THE FIFTY YEARS' DIGEST (1901-1950)
(Civil, Criminal & Revenue)

THE FIFTY YEARS' DIGEST
1901-1950
(Civil, Criminal & Revenue)

BY
D. V. CHITALEY & N. RAMARATNAM

PART VIII

EASEMENTS ACT S. 15 TO HINDU LAW-DEBTS.

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ABBREVIATIONS.

REPORTS.

A.I.R. 1914 All., Bom., etc. .. All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
A.M.L.J. .. Ajmer-Merwara Law Journal
Agra H.C.R. .. Agra High Court Reports.
All. or I.L.R. All. .. Indian Law Reports, Allahabad Series.
All. L. Jour. .. Allahabad Law Journal.
All.W.N. .. Allahabad Weekly Notes.
All. W.R. .. Allahabad Weekly Reporter.
I.L.R. Assam. .. Indian Law Reports, Assam Series.
B.R. .. Bihar Reports.
Beng. L.R. .. Bengal Law Reports.
B.L.J.R. or Bihar L.J.R. .. Bihar Law Journal Reports.
Bom. or I.L.R. Bom. .. Indian Law Reports, Bombay Series.
Bom.H.C.R. .. Bombay High Court Reports.
Bom.L.R. .. Bombay Law Reporter.
Bom.P.J. .. Bombay Printed Judgments.
Bur.L.Jour. .. Burma Law Journal.
Bur. L. R. .. Burma Law Reports.
Bur. L. Tim. .. Burma Law Times.
Cal. or I.L.R. Cal. .. Indian Law Reports, Calcutta Series.
Cal. L. Jour. .. Calcutta Law Journal.
Cal. L. R. .. Calcutta Law Reports.
Cal. W. N. .. Calcutta Weekly Notes.
Cal. W.N. (D.R.) .. Calcutta Weekly Notes (Dacca Reports).
C.P.L.R. .. Central Provinces Law Reports.
Cr. App. Rep. .. Cohen's Criminal Appeal Reports.
Cr. or Cri. L. Jour.... Criminal Law Journal.
I.L.R. Cut. .. Indian Law Reports, Cuttack Series.
Cut.L.T. .. Cuttack Law Times.
E.P. .. East Punjab.
I.L.R. E.P. or East Pun. .. Indian Law Reports, East Punjab Series.
F.C.R. .. Federal Court Reports.
F.L.J. .. Federal Law Journal.
I.L.R. Hyd. .. Indian Law Reports, Hyderabad Series.
Ind. App. .. Law Reports, Indian Appeals.
Ind. Cas. .. Indian Cases.
I.L.R. or Rul. .. Indian Rulings or Ruling.
I.T.R. .. Income Tax Reports.
J & K .. Jammu & Kashmir.
J. & K.L.R. .. Jammu & Kashmir Law Reports.
J.L.R. or Jaipur L.R. .. Jaipur Law Reports.
I.L.R. Kar. .. Indian Law Reports, Karachi Series.
K.B. .. (Law Reports) King's Bench Division.
(L.J.) K.B. .. Law Journal Reports, King's Bench.
K.L.T. or Ker. L.T. .. Kerala Law Times.
I.L.R. Lah. .. Indian Law Reports, Lahore Series.
Lah. L. Jour. .. Lahore Law Journal.
Lah. L.T. .. Lahore Law Times.
L.R.A. .. Law Reporter, Allahabad.
Low. Bur. Rul. .. Lower Burma Rulings.
Luck. or I.L.R. Luck. .. Indian Law Reports, Lucknow Series.
Madh. B. or M.B. .. Madhya Bharat.
I.L.R. Madh. B. .. Indian Law Reports, Madhya Bharat Series.
Madh. B.L.J. .. Madhya Bharat Law Journal.
Madh. B.L.R. .. Madhya Bharat Law Reporter.
Mad. or I.L.R. Mad. .. Indian Law Reports, Madras Series.
Mad. H.C.R. .. Madras High Court Reports.
Mad. L. Jour. .. Madras Law Journal.
Mad. L. Tim. .. Madras Law Times.
Mad. L. W. .. Madras Law Weekly.
Mad. W. N. .. Madras Weekly Notes.
M. L. R. or Marwar L. R. .. Marwar Law Reporter.
Moo. Ind. App. .. Moore's Indian Appeals.
Moo. P. C. C. .. Moore's Privy Council Cases.
Mys. .. Mysore.
I. L. R. Mys. .. Indian Law Reports, Mysore Series.
Mys. H. C. R. .. Mysore High Court Reports.
Mys. L. J. .. Mysore Law Journal.
I. L. R. Nag. .. Indian Law Reports, Nagpur Series.
Nag. L. Jour. .. Nagpur Law Journal
Nag. L. R. .. Nagpur Law Reports.
N. W. P. H. C. R. .. North-West Provinces High Court Reports.
Oudh Cas. .. Oudh Cases.
Oudh L. Jour. .. Oudh Law Journal.
Oudh L. R. .. Oudh Law Reports.
Oudh S. C. .. Oudh Select Cases.

Oudh W.N. .. Oudh Weekly Notes.
Pak. Cas. .. Pakistan Cases.
Pak. L. R., Lahore .. Pakistan Law Reports, Lahore.
Pat. or I. L. R. Pat. .. Indian Law Reports, Patna Series.
Pat. L. Jour. .. Patna Law Journal.
Pat. L. Tim. .. Patna Law Times.
Pat. L. W. .. Patna Law Weekly.
Pat. W.N. .. Patna Weekly Notes.
I.L.R. Patiala .. Indian Law Reports, Patiala Series.
Pepsu L. R. .. Pepsu Law Reports.
I. L. R. Punj. .. Indian Law Reports, Punjab Series.
Pun. L. R. .. Punjab Law Reporter.
Pun. Re. .. Punjab Records.
Pun. W.R. .. Punjab Weekly Reporter.
I. L. R. Raj. .. Indian Law Reports, Rajasthan Series.
R.L.W. or Raj. L. W. .. The Rajasthan Law Weekly.
Rang. or I.L.R. Rang. .. Indian Law Reports, Rangoon series.
Rang. L. R. .. Rangoon Law Reports.
Rat. Qr Rat. Un. Cr. C. .. Ratanlal's Unreported Criminal Cases.
R.D. .. Revenue Decisions.
Sau. .. Saurashtra.
Sau. L. R. .. Saurashtra Law Reporter.
Sind L. R. .. Sind Law Reporter.
S. C. J. .. Supreme Court Journal.
S. C. R. .. Supreme Court Reports.
Suth. W. R. .. Sutherland's Weekly Reporter.
I.L.R. Trav. Co. or T. C. .. Indian Law Reports, Travancore-Cochin Series.
T. C. L. R. or Trav. Co. L. R. .. Travancore-Cochin, Law Reports.
T. L. J. or Trav. L. J. .. Travancore Law Journal.
U. P. L. R. .. United Provinces Law Reports.
Upp. Bur. Rul. .. Upper Burma Rulings.
Vind. Pra. or V. P. .. Vindhya Pradesh.
Weir .. Weir's Criminal Rulings.

Other Abbreviations.

A.C. .. Appellate Jurisdiction, Civil.
A. Cr. .. Appellate Jurisdiction, Criminal.
App. .. Appendix or Appeal.
Appr. .. Approved.
Art. .. Article.
B. R. .. Board of Revenue.
C. A. .. Court of Appeal.
Civ. .. Civil.
Cl. .. Clause.
Cons. .. Considered.
Cr. .. Criminal.
Diss. .. Dissented.
Dist. .. Distinguished.
D. B. .. Division Bench.
Expl. .. Explained.
F. A. .. First Appeal.
F. B. .. Full Bench.
F. C. .. Federal Court.
Foll. .. Followed.
Illus. .. Illustrations.
Jour. .. Journal.
L. P. .. Letters Patent.
N. .. Note.
No. .. Number.
O. .. Order.
O. C. .. Original Jurisdiction, Civil.
O. Cr. .. Original Jurisdiction. Criminal.
Over. .. Overruled.
P. .. Page.
Pr. .. Para.
Pt. .. Point.
P. C. .. Privy Council.
Pre. .. Preamble.
R. .. Rule.
Ref. .. Referred or Reference.
Rel. on .. Relied on.
Rev. .. Revenue.
S. .. Section.
S. A. .. Second Appeal.
S. B. .. Special Bench.
S. C. .. Supreme Court.
S. N. .. Short Notes of cases.
V. .. Volume Number.

THE FIFTY YEARS' DIGEST

1901—1950

(Civil, Criminal & Revenue)

VOLUME VIII

EASEMENTS ACT (5 OF 1882)

EASEMENTS ACT (5 OF 1882)

——S. 15. (See also Limitation Act S. 26)

Synopsis.

1. Acquisition by prescription
2. Burden of proof
3. Customary right
4. Defences
5. 'Discotinuance"—Meaning
6. Enjoyment
7. Enjoyment for less than statutory period
8. Interruption
9. Light and air
10. Lost grant
11. Nature of right
12. Ownership and easement
13. Positive easement
14. Profits a prendre
15. Proof
16. Right against Government
17. Right of fishery
18. Right of way
19. Right to Support
20. Right to water
21. Scope
22. Tenent—If can acquire by prescription
23. User (See also Easements Act—S. 15—(7) Enjoyment
24. What rights can be acquired
25. When acquirable
26. Who can acquire
27. Miscellaneous.

1. Acquisition by prescription.

——S. 15—Acquisition by prescription—Essentials.

When an easement is claimed, the plaintiff has to establish user for the statutory period. He has to establish that the user was as of right, but the law presumes that it was as of right, that is to say, that it had a lawful origin, if the plaintiff proves open and notorious user. That presumption, however, is rebuttable and the defendant may show, if he can, that the facts are such that the user was not as of right; e. g., he can show that the user was under licence not amounting to a grant, or he can show fraud in the sense it is used in relation to the subject, or he can show force, or he can show secreey. These latter would go to destroy the effectiveness of the user; the former would go to show that it was not as of right. The words 'as of right' signify no more than that the enjoyment must be by a person in the assertion of a right.

It is difficult to see how, before the statutory period has expired, any person using a way over another's land or exercising an easement over another's land without any grant could be free from the danger of being treated as a trespasser. The attitude of the law is to raise after certain period an irrebuttable presumption that the person exercising the easement for that period has been granted a right. But until that period has come to an end, there is no such presumption, and in the great majority of cases, it would be open to the owner of the servient tenement, in the absence of the statutory presumption to show that there was no such grant and to show in effect that the acts of the person claiming a dominance amounted to a trespass. 171 Ind. Cas. 121=20 N.L.J. 12=I.L.R. (1938) Nag. 21.

——S. 15—Acquisition by prescription.

——Right of user by prescription cannot be acquired where the grant is in the nature of a licence and not of an easement right. A.I.R. 1934 Pesh. 96= 152 Ind. Cas. 141.

——S. 15—Acquisition by prescription—Right to discharge water into another's land, whether can be acquired where water has to pass through intervening public path.

Where a person has, for more than 20 years, been discharging water from his land on to the defendant's land by lawful means, he will acquire a legal right to discharge such water on to the defendant's land even though the two lands are not contiguous but separated by a public path, and even though an easement in the strict sense of the term, might not have been acquired against the Secretary of State in respect of the public path by user for more than 60 years. A.I.R. 1934 Mad. 543=40 L.W. 281=1934 M.W.N. 597=67 M.L.J. 382=152 Ind. Cas, 659.

——Ss. 15 and 28—Acquisition by prescription—Extent of the right—Determining factor.

In the case of a right of easement acquired by prescription, the evidence regarding the probable intention of the parties and the purpose for which the right was acquired would be afforded by the accustomed user. The extent of the right must be measured by the extent of the enjoyment proved in any particular case. The use must be the reasonable use for the purposes of the land in the condition in which it was while the user took place and any expansion of the user or the purposes for which the easement may have been used is not permissible. 227 Ind. Cas. 44=1946 A.W.R. (H. C.) 579=1946 A L.J. 365=A.I.R. 1947 All. 86=1946 A.L.W. 602=1946 O.W.N. (H.C.) 1.

——S. 15—Acquisition by prescription—Easement is acquired in land and not against persons.

The Easements Act does not contemplate any acquisition of an easement against an occupier and not against an owner. An easement is acquired in the land and against one or more of the persons interested in the land. As S. 15 states that the right acquired by prescription shall be absolute, it is not possible to hold that such a right should exist only against the occupier and not against the owner. If the right is absolute, it must be a right in the land itself and an absolute right against all persons connected with the land whether as owners or as occupiers. A.I.R. 1937 All. 428=1937 A.L J. 249=1937 A.W R. 215=1.L.R. (1937) All. 511=169 Ind. Cas. 666.

—S. 15—Acquisition by prescription—One party executing deed allowing the other to build house in any way he liked—Right of easement, it can be claimed by successors of party who executed deed.

Where, in a partition between A and B, B by a document allowed A to build his house in any way and years later, B's successors claimed a right of easement against A and were met by the argument that the document barred the claim:

Held, that the document merely empowered A to build his house in any manner he thought fit it did not amount to a relinquishment of the right of easement which would accrue to B or his successors in title after the prescribed period of twenty years had expired. The parties were not dealing with hypothetical rights which were to materialize in future, if at all. If certain rights of future easement were intended to be restricted or cancelled by the parties, nothing would have been easier than to make it clear by a specific reference to them. A.I.R. 1936 Lah. 109=162 Ind. Cas. 733.

——S. 15 — Acquisition by prescription — Methods of.

The known methods of acquiring as easement by prescription under the Indian law are: prescription under Easements Act where it is applicable, prescription under Ss. 26 and 27 of the Limitation Act and claim founded on last grant. Prescription at Common Law as understood in England cannot be availed of in India. A.I.R. 1936 Mad 682=1936 M.W.N. 426=44 L.W. 139=71 M.L.J. 187=59 Mad. 979=164 Ind. Cas. 764.

——S. 15—Acquisition by prescription.

S. 15 is of wider application and is not confined to rights of way or of support specially mentioned therein. The expression 'any other easement' includes a variety of rights similar to those illustrated in the section. Pasturage, fishery, ferry and similar rights of easements have been frequently upheld as those acquired by prescription and it is possible to acquire a right of prescriptive easement for storing, for threshing floor and for using particular land as courtyard. 14 Bom. 213; 5 Cal. 945, Ref. 123 Ind. Cas. 757 A.I.R. 1930 All. 410.

——S. 15—Acquisition by prescription.

A title to easement is not complete merely upon the effluxion of the period mentioned in the statute, viz., 20 years and however long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until it is so brought in question in some suit, and until it is so brought in question, the right is inchoate only and in order to establish it when brought in question, the enjoyment relied on must be an enjoyment for 20 years upto within two years of the institution of the suit. 119 Ind. Cas. 293=33 C.W.N. 517=56 Cal. 927=A.I.R. 1929 Cal. 542.

——S. 15—Acquisition by prescription.

Under S. 15 paragraph 5 plaintiff has to show a period of 20 years continuing upto some point within 2 years before the institution of the suit. The 5th paragraph of S. 15 of the Easements Act seems to render it impossible to acquire statutory prescriptive title to an easement, unless and until the claim thereto has been contested in a suit, 10 A.L.J. 227; (1904) L.R.A. C. 179; (1908) L. R. 1 Ch. 167, Foll. 72 Ind. Cas. 909=A.I.R. 1923 Oudh 29.

——Ss. 15, 47—Acquisition by prescription.

The plaintiff sued for an injunction to restrain the defendant from allowing the rain water of their house to flow on plaintiff's land. The court dismissed the suit on the ground that the defendant's easement being discontinued only 4 years before the suit was not extinguished under S. 47 of the Easements Act until the lapse of 20 years from its total disuse. Held:—(1) That there was no acquisition of easement under S. 15 of the Easements Act on the ground that the period of 20 years must be taken to be a period ending within 2 years next before the institution of the suit wherein the claim to which period relates is contested. (2) That S. 47 of the Easements Act comes into operation only where an easement has been acquired under S. 15 of the Act. 9 Bom. L. R. 1101.

——S. 15—Acquisition by prescription.

Right in respect of the usufructuary mortgage property can be binding on mortgagee as well as mortgagor, but the act done must not be with mortgagee's express or implied consent. 98 Ind. Cas. 619=24 M.L.W. 691=A.I.R. 1927 Mad. 73.

——S. 15—Acquisition by prescription.

Easements by prescription are acquired only by sufferance of the dominant owner. 91 Ind. Cas. 348=A.I.R. 1026 Cal. 647.

——S. 15—Acquisition by prescription.

In the absence of a finding that the tank is either private property or the property of the Government, a right of easement by prescription cannot be established. 92 Ind. Cas. 465=A.I.R. 1926 Mad: 625.

to cessation within two years within S. 15. A.I.R. 1922 Bom. 3; 12 A. L. J. 415; 33 Ind. Cas. 503 and 29 M. L. J. 685, Foll. 98 Ind. Cas. 886=A.I.R. 1927 Mad. 238.

——S. 15—Interruption.

Explanation 2 clearly relates not to the period after which the easement has ceased to be enjoyed but to any interval of non-user within the 20 years of enjoyment. 98 Ind. Cas. 886=A. I. R. 1927 Mad. 238.

——S. 15—Interruption.

Easement acquired before burning of a house —Re-building—Right to the same access of light and air is not lost—House burnt during the process of acquiring easement—Immediate rebuilding—Enjoyment will not be deemed to be interrupted—Delay in re-building may be evidence against the intention to resume user. 67 Ind. Cas. 250=46 Bom. 448=24 Bom. L. R. 83=A. I. R. 1922 Bom. 3.

——S. 15—Interruption—Suit and finding that windows were not ancient lights — If interruption.

On 12th December 1935, the plaintiff brought a suit for a declaration that 26 windows of his building were ancient lights and for an injunction to restrain the defendants from obstructing the same or in any way interfering with the access of light and air through the said windows. The 26 windows were divided into two categories. In regard to 17 windows, it was held that they were ancient lights, but that the plaintiff had no actionable claim against the defendant for the closing of these windows; with regard to the remaining 9 windows it was held that they were not ancient lights and that the plaintiff had not acquired any easement in respect thereof. The entire suit of the plaintiff was thus dismissed. The remaining 9 windows which were in the residential and business part of the premises in suit were not closed by the defendants till judgment was pronounced in the suit on 23rd September 1938. An appeal by the plaintiff was dismissed with costs on 17th January 1941. On 19th April 1939, the plaintiff again instituted a suit against the same defendant for declaration that he had acquired a prescriptive right to the access of light and air through the 9 windows which had been held in the previous suit not to be ancient lights, the building in which they were, having been erected by the plaintiff in 1917. The plaintiff contended that the filing of the previous suit, its pendency and the decision thereon did not amount to an interruption of the plaintiff's peaceable enjoyment and that on the expiry of 20 years from 1917, the plaintiff's right of easement of air and light from the 9 windows had become absolute:

Held, that the plaintiff's previous suit of 1935 came within the purview of the words "two years next before the institution of the suit wherein the claim to which such period relates is contested" in S. 15. Easements Act. The suit of 1935 having been filed, been contested by the defendants and having been decided against the plaintiff, his inchoate right came to an end and no period subsequent to the filing of suit of 1935, could be added to the period which had elapsed before the filing of that suit to make up a period of twenty years of peaceable enjoyment without interruption. Further the suit was barred by res judicata. A.I.R. 1943 Sind 17=I.L.R. (1942) Kar. 306=207 Ind. Cas. 83.

——S. 15—Interruption in enjoyment.

Where the owner of a mahua tree complained of the construction of a wall by the defendant which prevented him from collecting the fruit of the tree, the branches of which overhang the wall but it was found on the evidence that the wall was constructed three years before the suit was brought,

Held, that assuming that the plaintiff had a right of easement he could not enforce it because of S. 15 of the Easements Act. 114 Ind. Cas. 512.

——S. 15—Interruption.

Suit by a servient owner before the expiry of twenty years requisite for the exercise of a prescriptive right by the dominant owner prevents the period of 20 years running in favour of the dominant owner. (1841) 8 Cl. & F. 231, Dist. 113 Ind. Cas. 525=30 Bom. L. R. 873=A.I.R. 1928 Bom. 312.

9. Light and air.

——S. 15—Light and air—Acquisition of easement of—Nature and extent of.

Both under the Lim. Act and the Easements Act, the easement of light and air is acquired by a building and not by any particular room in a building. If such an easement has been acquired and if it has been infringed, in judging whether the diminution has been such as to amount to a nuisance, regard must be had, not merely to the effect upon the particular room where the aperture or apertures are situated, but to the entire building. Even a vacant tenement which is unoccupied for 20 years or over can during such period acquire easement rights over the servient tenement. A.I.R. 1945 Cal. 438=221 Ind. Cas. 495.

——S. 15—Light and air—Permissive enjoyment of access and use of for over 20 years—Prescriptive right, if acquired.

Where the owner of a vacant site who has full power to build a house on it does not build a house there for 20 years, the enjoyment of the access and use of light or air by the opening to the adjacent house is only permissive and no easement is acquired. A.I.R. 1936 Lah. 905=38 P.L.R. 1146=167 Ind. Cas. 454.

——Ss. 15 and 16—Light and air.

In order to constitute an actionable obstruction of ancient lights, it it not sufficient that the light is less than before, but there must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and in the case of business premises, to prevent the plaintiff from carrying on his business as beneficially as before.

The expression "carrying on the business beneficially" in this connection is not to be read as depending on the question whether or not the person carrying on the business is likely to lose a customer. The test is whether he would carry on the business less beneficially to himself, either in discharging his duty to his customers on the one hand or in preserving his health and facility of transacting business on the other. A.I.R. 1933 Rang. 351=150 Ind. Cas. 252 (2).

——S. 15—Light and air—Holes in joint walls—Enjoyment of easement for over twenty years—Joint owner building up against the holes.

Where for over twenty years, a person has been, through certain holes in his wall, enjoying light from

the adjoining land of his co-owner, the latter, as a joint owner of the wall, is not entitled to close the wall, and if he builds up against the holes thereby stopping the access of light and air, his action is illegal and unauthorised. A.I.R. 1933 Lah. 28=33 P.L.R. 930=142 Ind. Cas. 764.

——S. 15—Light and air.

Injunction for the protection of the easement of light and air can only be granted when their closure amounts to an actionable nuisance. It is not enough that the light has boen reduced. There must be a substantial privation of light enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the occupier from carrying on business as beneficially as before.

The existence of other sources of light should be taken into consideration. 114 Ind. Cas. 698=A.I.R. 1928 Lah. 980.

——S. 15—Light and air.

The owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or the business of the tenement according to the ordinary notions of mankind. The closing of the only ventilator of a room amounts to a nuisance whether the room is occupied by servants or others. 108 Ind. Cas. 53= A.I.R. 1928 Lah. 735.

——S. 15—Light and air.

The mere existence of light from other sources to which the person has not acquired any prescriptive right is no answer to a suit for infringement of prescriptive right to light and air. 105 Ind. Cas. 39=A.I.R. 1928 Pat. 106.

——S. 15—Light and air.

The owner of a dominant tenement does not obtain by his easement a right to all the light he has enjoyed during the period of prescription. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings. Further there is no infringement of the easement acquired by ancient lights unless the act which is done amounts to a nuisance.

The mere fact that the making of a room would block the plaintiff's window would not by itself entitle him to obtain a decree for perpetual injunction, in the absence of a definite and clear finding that the constructions contemplated by the defendants would amount to a nuisance. 99 Ind. Cas. 5=A.I.R. 1927 All. 191.

——S. 15—Light and air.

Joint property—Right does not arise. 97 Ind. Cas. 691=28 Bom. L.R. 1000=A.I.R. 1926 Bom. 545.

——S. 15—Light and air.

New and bigger windows constructed in place of old ones constitute new easement. 96 Ind. Cas. 546=9 N. L. J. 136=A.I.R. 1926 Nag. 474.

——S. 15—Light and air.

No injunction should be granted to prevent obstruction to an easement unless the alleged obstruction causes such a diminution of light as to constitute a nuisance. There must be substantial privation of right enough to render the occupation uncomfortable according to the ordinary notions of mankind. 96 Ind. Cas. 546=9 N. L. J. 136=A.I.R. 1926 Nag. 474.

——S. 15—Light and air.

There is no easement for the free access of wind. 72 Ind. Cas. 576=36 C. L. J. 406=A.I.R. 1923 Cal. 256.

——S. 15—Light and air.

Long user may not always raise a presumption of grant. 71 Ind. Cas. 831=6 N. L. J. 59=A.I.R. 1923 Nag. 192.

——S. 15—Light and air.

Access and use of light and air through certain opening — Enjoyment need not be as of right to create an easement by prescription. 61 Ind. Cas. 569=A.I.R. 1921 Nag. 127.

——S. 15—Light and air—Extent of right.

By the enjoyment of light for a period of twenty years there is no indefeasible right to the enjoyment of like amount of light in the future. Unless an alleged obstruction causes such a dimunition of light as to constitute a nuisance there is no cause of action to the dominant owner. 11 Bur. L.T. 109=49 Ind. Cas. 458.

——S. 15 — Light and air—Obstruction — When actionable.

To constitute an actionable obstruction there must be substantial privation of light enough to render the occupation uncomfortable according to the ordinary notions of mankind. (1911) 1 M.W.N. 251=9 M.L.T. 383=21 M. L. J. 313=9 Ind. Cas. 417.

——S. 15—Light and air—Obstruction—Remedy—Cities and villages—No difference—Defences that are not open.

If a man's ancient lights be interrupted it is no answer to say that he can provide other sources of lights for himself by making changes in his own tenement; nor that deft. is willing to provide fresh light for him in another way. Where a party causes injury to another he cannot object to appropriate relief being granted to his opponent on the ground that he would suffer serious injury by being compelled to undo mischief. There is no difference in the application of the law as regards interference with ancient lights to builders in cities and elsewhere. 36 Mad. 11=21 M.L. J. 742=10 M.L.T. 121=(1911) 2 M.W.N. 89=11 Ind. Cas. 642.

10. Lost grant.

——S. 15—Lost grant—Presumption of—Requirements—Grant of ghat to public—Exclusive right in individual.

In order to acquire a right by prescription or under a lost grant, it is necessary to show (1) that the origin of the right was legal, (2) that the right had been enjoyed openly, peaceably and uninterruptedly, and (3) that the right was valid and enforceable against all. In order to have a lawful origin under a grant, it is essential that there should be a capable grantor and a capable grantee. In the case of property which has been dedicated, no person can make a grant affecting or interfering with the rights of the public. The dedication of a bathing **ghat** to the public cannot be limited by invasion of any of the members of the public, nor can they, by such invasion, however prolonged, gain for themselves a title to the land or to the exclusive user of the **ghat** which was the subject of the invasion. A.I.R. 1936 All. 301=1936 A L. J. 223=1936 A.W.R. 266=58 All. 818=162 Ind. Cas. 512 (F.B.)

——S. 15—Lost grant — Right to drain water brought for agricultural purposes on to lower land.

If for a sufficiently long time, water brought on to the upper land by artificial means for agricultural purposes is allowed to pass without interruption by the proprietor of the lower land into it, one can easily infer a custom and that the customary conditions of the locality require such user. The doctrine of lost grant

can be invoked in aid of the inference of such a custom. A.I.R. 1936 Mad. 682=1936 M.W.N. 426=59 Mad. 979=44 L. W. 139=71 M. L. J. 187=164 Ind. Cas. 764.

——S. 15—Lost grant—If can be applied to ryotwari **holdings.**

The estate of a **ryotwari** proprietor is an estate in the soil and possession is with him though the property may be said to be in the Government. The estate of a **ryotwari** proprietor is also heritable and alienable. He has sufficient estate to support a grant of an easement. He would be a capable grantor as understood in English law, for the application of the doctrine of lost grant. A.I.R. 1936 Mad. 682=1936 M.W.N. 426=71 M. L. J. 187=44 L.W. 139=59 Mad. 979=164 Ind. Cas. 764.

——S. 15—Lost grant—Presumption from immemorial user.

It is open to the Court to infer a grant from immemorial user alone, when such user is open, as of right, and without interruption. A.I.R. 1935 Cal. 253=60 C. L. J. 321=155 Ind. Cas. 719.

——S. 15—Lost grant—Presumption of.

The presumption of lost grant cannot be made in respect of such possession as cannot be characterised as immemorial, that is, exceeding twenty years. Consequently a right of easement cannot be acquired by uninterrupted user extending to not more than eighteen years by virtue of a presumption of lost grant. A.I.R. 1935 Nag. 205=18 N.L. J. 261=31 N.L.R. 393=158 Ind. Cas. 344.

——S. 15—Lost grant—Acquisition by—Points to be considered.

S. 15 is not prohibitory of other modes of acquiring easement.

The expression "time immemorial" in English law has a connotation that obviously cannot be applicable to Indian societies and circumstances and being a term having a special significance must, if at all, be used in its proper signficance.

In India, where a right of easement is claimed on the basis of 'immemorial user', the matter to be attended to is whether there is evidence before the Court from which it may be presumed that there existed at some distant period of time, a grant which is now lost or incapable of being proved and the Court may come to a conclusion on this point on a presumption drawn from long and undisturbed enjoyment. A.I.R. 1932 Bom. 130=34 Bom. L. R. 92=56 Bom. 82=137 Ind. Cas. 881.

——S. 15—Lost grant:—Evidence insufficient to prove long enjoyment under the Act cannot be sufficient to raise presumption of lost grant. 96 Ind. Cas. 317=1926 M.W.N. 404=A.I.R. 1926 Mad. 788.

11. Nature of right.

——Ss. 15 and 16—Nature of right—Easement—Limited prescription.

A prescriptive right to light and air cannot be acquired as an easement for limited period, **e.g.**, when the servient heritage is in the occupancy of a tenant. (Per **Phillips, J.**) To impose an easement is to create an easement by voluntary act of the owner of a lease or any other person authorised to transfer an interest in the servient heritage. The word does not necessarily mean imposition by some act such as grant, but includes imposition by omission to prevent acquisition by prescription. 42 Mad. 567=37 M.L. J. 28=(1919) M.W.N. 305=26 M.L.T. 48=10 L.W. 87=50 Ind. Cas. 291.

——S. 15—Nature of right—English Prescription Act—Distinction.

Per Phillips, J.—The law relating to the acquisition of right of easements under the Easements Act appears to be the same as under the English Prescription Act. 20 M.L.T. 544=(1916) 2 M.W.N. 192=4 L. W. 128=35 Ind. Cas. 749.

——S. 15—Nature of right—Possessory right—Easement.

Easements are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession and gives no possessory right before the expiry of twenty years. 38 Mad. 280=29 Ind. Cas. 255.

12. Ownership and easement.

——S. 15—Ownership and easement—Trespasser—Tacking.

The principle that one trespasser cannot tack on to his own possession the possession of another trespasser, cannot apply to the acquisition of a right of easement which must be distinguished from ownership. These rights cannot co-exist as they are mutually exclusive. The adverse possession spoken of in connection with acquisition of ownership means total exclusion of the rightful owner whereas the enjoyment and user necessary for the acquisition of easement is consistent with the possession as well as the enjoyment by the rightful owner. The right of easement is annexed to the tenement and cannot be acquired in gross as a personal right. A. I. R. 1937 Nag. 38=168 Ind. Cas. 921.

——S. 15—Ownership and easement.

The case of an easement to take water stands on a different footing from a claim to have the property declared trust property under the provisions of S. 92, Civil P.C. A.I.R. 1935 Sind 133=156 Ind. Cas. 892.

13. Positive easement.

——S. 15—Positive easement—Claim must be set up throughout requisite period.

In order to acquire a right of positive easement, a person must do certain physical acts over a requisite period and throughout that period, he must be setting up a claim to do those acts as of right upon the property of another. A.I.R. 1943 All. 362=1943 A.W.R. 233=1943 A.L. J. 595=I.L.R. (1943) All. 792=209 Ind. Cas. 578.

[Reversing A.I.R. 1942 All. 405.]

14. Profits 'a prendre'.

——S. 15—Profit a prendre—**Presumption—Defendant neither tenant nor licensee—Defendant cutting trees—Proprietor's right to price of timber cut.**

There cannot be any presumption in the case of an easement that what was the state of facts twenty or thirty years ago has continued since. The law provides that an easement is established only when it is shown that there has been a continuous enjoyment.

The plaintiff was admittedly the proprietor of the land upon which certain bamboo clumps stood. The defendant admittedly was not the tenant nor was there any relationship between him and the plaintiff. The plaintiff came to the Court with a story that there was an agreement under which the defendant would pay the price of the timber cut, and the defendant denied that he cut any trees during the years in question. The suit was dismissed on the ground that the defendant was in adverse possession for over twenty years:

Held, (1) that such an agreement, if any, naturally would take the nature of a licence ;

(2) that there could not be any custom strictly so called to appropriate the trees unless the defendant were a tenant. If there had been anything established in the nature of a custom to appropriate the timber, the defendant not being a tenant, it would not be custom but would be in the nature of what is known in England as a profit **a prendre**;

(3) that there was an easement, and hence a right to trees was not established by the defendant and the fact that the plaintiff made some sort of admission by saying that he was entitled to take the leaves and branches but not the timber did not assist the defendant. A. I. R. 1935 Pat. 188=16 P. L. T. 192= 1 B.R. 533=155 Ind. Cas. 966.

——S. 15—Profit a prendre—**Evidence for proof—Nature of.**

A right in gross or profits **a prendre**, as it is technically called, may be established by the same sort of evidence as is used to establish either profits **a prendre** appurtenant or an easement in the ordinary sense of the word. A.I.R. 1934 Cal. 461=61 C. 45= 151 Ind. Cas. 813.

15. Proof.

——S. 15—Proof—Assertion of right—Right if defeated by showing that party was not consciously claiming such right during whole or part of prescriptive period.

Where a party shows that for the statutory period, he has openly exercised certain rights which are in themselves sufficient to establish an easement, **prima facie** he is entitled to the easement, and it is not necessary to show that during the whole of the prescriptive period, he was consciously asserting a right to an easement. A right to an easement by prescription cannot, therefore, be defeated merely by showing that during the whole or part of the period of prescription, the plaintiff was not consciously claiming an easement. A.I.R. 1939 Bom. 149=I.L.R. (1939) Bom. 140=41 Bom. L.R. 168=183 Ind. Cas. 139.

——S. 15—Proof—Right to irrigate through neighbour's land—Requisite proof.

In a suit for a declaration that the plaintiff is entitled to irrigate his punjah land through a channel in the adjoining nanjah lands of the defendant, it is not necessary for him to establish a right to water against Government. It is enough if in fact he was irrigating the land for even 20 years before the alleged obstruction through a channel in the land of the defendant. 1937 M.W.N. 920.

——S. 15—Proof—Long user—Sufficiency of, to find if it has lasted long enough to confer right by prescription.

Where there is evidence showing long and continuous user, it is sufficient for the Court to find whether it has not lasted long enough to confer a right, without particular reference to any specific number of years. A.I.R. 1935 Cal. 357=39 C.W.N. 387=60 C.L.J. 566= 159 Ind. Cas. 383.

——S. 15—Proof—User not attributable to permission or sufferance—Whether evidence of enjoyment as of right.

An open user continued without interruption for a period of over 20 years and not shown to be attributable to permission or sufferance on the owner's part is **prima facie** evidence of enjoyment as of right within the meaning of S. 26, Limitation Act. A.I.R. 1935 Lah. 937=157 Ind. Cas. 871.

16. Right against government.

——S. 15—Right against government.

A person who had begun a period of prescription against the Government might continue the period as against the Government's transferee as such. But a person claiming an easement against a transferee from the Government has an option. He can either base his claim upon user for a period of 60 years against the Government and the transferee, as such, of the Government or, if he so prefers, he can ignore the period of prescription against the Government and base his claim entirely upon user for a period of 20 years while the property has been in the possession of the transferee. A.I.R. 1943 All. 362=1943 A.W.R. (H.C.) 233=1943 A.L.J. 595=I.L.R. (1943) All. 792=209 Ind. Cas. 578.

——S. 15—Right against Government—'Temple puramboke' land—Right of trustees to prevent strangers acquiring right of way—Government land—Acquisition of easement against person in possession—60 years' user, whether necessary.

In respect of 'temple puramboke' lands of which the ownership is vested in the Government, the temple is not a mere licensee and the trustees of the temple are entitled to prevent a stranger from acquiring a right of way over such lands by prescription, by obstructing him.

The provision contained in S. 15 which insists on a period of 60 years' user for acquisition of right by prescription in respect of Government lands, is not restricted to cases where the right is claimed against the Government. No right can be acquired by prescription in respect of Government lands even as against persons with a limited interest in or in possession of Government land unless 60 years' user is proved. A.I.R. 1934 Mad. 575=40 L.W. 514=67 M.L.J. 262=1934 M.W.N. 1042=152 Ind. Cas. 216.

——S. 15—Right against Government.

——To apply 60 years rule Government ownership must exist on the date when easement is claimed. 116 Ind. Cas. 806=A.I.R. 1929 All. 382.

——S. 15—Right against Government.

It is against the land, and there by its owner, that a right of easement can be claimed. Sixty years user must be proved to acquire a right of way against Government whether the Government land is in occupation of Government or their lessee. 106 Ind Cas. 305=4 O. W. N. 1035=A.I.R. 1928 Oudh 17.

——S. 15—Right against Government.

——Where a ryotwari holder was found to use water from a Government channel for 50 years but the settlement records showed that his lands were dry lands,

Held, no presumption of an implied grant arise nor could a right by prescription be acquired. 105 Ind. Cas. 84=39 M.L.T. 112=A.I.R. 1928 Mad. 96.

——S. 15—Right against Government.

——The common law of England on the subject of acquisition of prescriptive rights does not apply in India, and, assuming that it does, there would be no prescription against the Crown. 86 Ind. Cas. 757=21 S.L.R. 195=A.I.R. 1927 Sind. 270.

——S. 15—Right against Government.

——Sixty years user is necessary in case of Govt. land even where private person is in occupation as easement is a right which attaches to one property [illegible] another. 78 Ind. Cas. 844=A.I.R. 1924 All. 724.

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——S. 15—Right against Government.

The words 'belongs to the Govt.' in S. 15 refer not to the time of the suit but to the duration of enjoyment. When after 40 years' enjoyment against the Govt., the latter transfers the land to a private person, the easement in order to become absolute must be enjoyed as against the transferee for a further period of 20 years. The period of 20 years must be computed from the time when the transfer was made to a private person. 41 Mad. 622=34 M.L.J. 396=45 Ind. Cas. 98.

——S. 15—Right against Government.

If the plff. proves 30 years' possession, the Govt. must prove that he had no possession within 60 years. 12 M.L.T. 159=16 Ind. Cas. 626.

——S. 15—Right against Government.

A plff. claiming a right of easement against Govt. must prove sixty years peaceful and uninterrupted user and the rule of law that the burden of proof is shifted on to Govt. if the plff. proves possession for a sufficient number of years is not applicable if the plff. fails to prove the completion of even the prescriptive period necessary against a private individual. Case law discussed. 19 M. 165; 33 M. 1, 33 M. 173; 33 M. 362 Dist. 39 Mad. 304=26 Ind. Cas. 723.

——S. 15—Right against Government.

Mere pasturing of cattle by a ryot on Govt. waste land, does not amount to enjoyment as of right so as to create prescriptive title. Hence the right of pasturing cannot be claimed against the transferees from Govt. 34 Mad. 58=(1910) M.W.N. 75=7 M.L.T. 380=20 M.L.J. 362=5 Ind. Cas. 853.

——S. 15—Right against Government.

If a person proves his possession for twenty years prior to the notification that certain land is Government reserved forest, he need not prove adverse possession for sixty years. The crown must prove that the Government has subsisting title. 33 Mad. 1=7 M.L.T. 128=20 M.L.J. 66=5 Ind. Cas. 882.

17. Right of fishery.

——S. 15—Right of fishery — Mere right to fish not excluding rightful owner — Profit a prendre.

A mere right to fish not excluding the rightful owner is a profit a prendre and falls within the definition of easement given in S. 2(5) of the Lim. Act and may be acquired by 20 years' uninterrupted enjoyment under s. 26. A.I.R. 1934 Pat. 420=148 Ind. Cas. 431.

——S. 15—Right of fishery.

Under S. 15 of the Easements Act, a right of fishing cannot be acquired by prescription but from uninterrupted user such a grant may be presumed. The easements Act does not exclude or interfere with the other titles or modes of acquiring easement. 14 N.L.R. 35=43 Ind. Cas. 962.

——S 15—Right of fishery.

Limitation Act, Art. 144—Exclusive right of fishery is interest in immovable property and not merely "profit a prendre"—Adverse possession for 12 years against lawful owner creates such interest. 1930 M.W.N. 328=31 M.L.W. 508=A.I.R. 1930 Mad. 679.

——S. 15—Right of fishery.

—Several fishery—No claim to soil itself—Applicability of Easements Act is doubtful. 23 Bom. L.R. 939=A.I.R. 1921 Bom. 93.

——S. 15—Right of Fishery—Private rights—How acquired—Prescription.

Private rights of fishing in public waters may be acquired either by a grant from the crown or by the prescription from which a grant may be presumed. Quaere.—Whether exclusive rights can be acquired in a tidal or navigable river by proof of mere enjoyment in the manner provided by S. 26 of the Lim. Act. A person to acquire the right of fishery, by prescription must show that he had an uninterrupted enjoyment of it openly, publicly and peacefully for over the statutory period; but where such an enjoyment was in exercise of a common right which he shared with others, he should show that his user was in assertion of a higher right than the general right, in himself and for his exclusive benefit. 39 Cal. 53=15 C.W.N. 972=14 Ind. Cas. 180.

18. Right of Way.

——S. 15—Right of way—User as of right—Necessity.

A right of way can be acquired either by grant or by prescription. In the absence of any grant having been made where the right is alleged to have been acquired by prescription it must be proved to have been enjoyed "as of right" for the period prescribed by S. 15 of the Easements Act. A.I.R. 1950 All. 316.

——S. 15—Right of way—No licence or agreement—Plaintiff using way over defendant's land openly, peaceably and as of right for over statutory period—Animus of enjoying easement.

In the absence of any allegation as to any licence or agreement, if the plaintiff is found to have been using a way over the plaintiff's land, openly and peaceably and as of right for over the statutory period, he must be held to have acquired an easement in respect of that right. In the absence of any allegation of ownership during that period, his user must be regarded to have been with the animus of enjoying the easement as such in the defendant's land. A.I.R. 1942 Mad. 392=1942 M.W.N. 209=55 M.L.W. 142=(1942) I. M.L.J. 373=206 Ind. Cas. 528.

——S. 15—Right of way—Long user of—Relationship not showing user due to licence or leave—Presumption—Person acquiring right of way for himself, servants and carts—Right, whether includes passage for sweepers.

Where a person had been exercising a right of way for himself, his servants and his carts from remote past as appurtenant to his shop and there was nothing to show that the relationship between the parties was such as to indicate that the user was attributable to leave or licence, it must be presumed that the user was as of right.

But a servitude acquired for one purpose cannot lawfully be used for another. Thus where a person acquires a right of way for himself, his servants and carts by prescription, this right cannot be presumed to include the passage for sweepers. The argument that the right of way acquired by the person, in these circumstances should be deemed

to have been acquired for all purposes connected with the beneficial enjoyment of his house cannot prevail unless it is proved that it is used for a variety of purposes in general. The fact that the houses occupied by parties had, at one time, belonged to a common owner, does not also give rise to this presumption unless the way was necessary for enjoying the tenement which was purchased by the person claiming easement. Moreover, right of way is not a continuous and apparent easement. The case, therefore, cannot fall within the terms of S. 13 (f). Nor can it be presumed that it is a way for all purposes for the reason that it was common way. It is only when the land that is used for passage is found to belong to both the neighbours that the way might be presumed to be used for all purposes. A. J. R. 1939 Nag. 197=1939 N.L.J. 297=I.L.R. (1939) Nag. 580=186 Ind. Cas. 155.

——S. 15—Right of way.

Easements in S. 15 must have been enjoyed by owner or occupier of dominant heritage—Fact that persons visiting dominant heritage have been following certain route cannot confer right of way on owner. A.I.R. 1939 All. 90=1938 A.L.J. 1142=1938 A.W.R. 795=179 Ind. Cas. 633.

——S. 15—Right of way—Claim of, over land of private owner—Evidence necessary to establish claim—Mere fact of long user, if sufficient—One of the termini in private land—Value as evidence—Dedication in past—Inference of fact.

When a public right of way is claimed over lands belonging to a private owner, it is wrong to deal with the evidence in compartments. It is not legitimate to presume from long user an intention to dedicate and then examine the evidence adduced on behalf of the private owner and to see if the said presumption has been rebutted by him, the evidence must be examined as a whole and the inference either in favour of or against the dedication must be drawn. Dedication should not be inferred from the mere fact of long user. Some additional evidence will be necessary to support the claim of the public and the fact that cul de sac has been maintained and repaired at public expense would be a very cogent piece of evidence. The fact that a passage leading from a public place does not stop at the land of the private owner but proceeds further to a great distance would be an important factor in support of the claim of the public, especially when it is not shown that the pathway has terminated in private grounds. To hold that a long khal, which begins from a public channel and extends for miles can be regarded as a matter of law to be a private boatway or a boatway restricted only to the use of a class of persons and over which the public would have, in no circumstances, a right of passage, simply because it is not proved that the other terminus is at a public place would, in Bengal, lead to serious consequences. The fact that one of the termini is on private land is a circumstance, and it may be an important circumstance, to be taken into consideration by the Court of fact and when it has taken that into consideration and on the evidence has come to the conclusion that there has been in the past a dedication, the inference drawn by it is an inference of fact. A.I.R. 1935 Cal. 413=60 C.L.J. 556=39 C.W.N. 303=157 Ind. Cas. 224.

——S. 15—Right of way—Mere discontinuance of user is not an interruption or abeyance of enjoyment even though such cessation occurs while right is being acquired.

In order that a prescriptive right may be successfully claimed, the pathway must be enjoyed peaceably and openly as an easement without interruption for more than 20 years. The term 'interruption' refers to an adverse obstruction and not a mere discontinuance of user. A person may be said to be in enjoyment of a right of way during a period of time, though he does not use the way every moment. Cessation of user is not an invariable indication of the abeyance of enjoyment of a right, that is, it is not inconsistent with the continuance of the enjoyment of the right.

Cessation of user for a time while the right is being acquired does not stand on a different basis from cessation when the right has already been acquired by 20 years' enjoyment. A.I.R. 1935 Cal. 282=60 C.L.J. 412=155 Ind. Cas. 833.

——S. 15—Right of way.

One of the necessary conditions of a right of easement is that it must be certain. Before decreeing a right of pathway, the Court will have to find out what particular pathway has been used. When the two termini are known, the right to the way does not fail merely for want of a defined track between them, and if the owner of the servient tenement does not point out the line of such way, the dominant owner must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track, he must set out a reasonable way, and then the person is not entitled to go out of the way merely because the way is rough, and there are ruts in it and so forth. A.I.R. 1934 Pat. 420=148 Ind. Cas. 431.

——S. 15—Right of way.

A plff. is entitled to have his right of way declared if he establishes the terminiz to and from which the way runs. And the right would be enjoyed in the way servient owners point out as the tract. If no tract is pointed out the plff. can enjoy the nearest route. 22 C.W.N. 922=46 Ind. Cas. 374.

——S. 15—Right of way—Payment made for use of land—Right by prescription, if arises.

Where a person makes a payment for the use of land, such user is by license and is not a user by right, and it is only a user by right which can give rise to a right of presciption within the meaning of S. 15. The use of a piece of land by certain cartmen crossing it on payment to certain others does not give rise to any prescriptive right because, by making such payment, the cartmen acknowledge the title of the persons to whom they pay. A.I.R. 1933 All. 623=17 R. D. 209=1933 A.L.J. 516=147 Ind. Cas. 272.

——S. 15—Right of way.

——User to be 'open' must raise presumption of servient owner's knowledge and acquiescence. 116 Ind. Cas. 231=31 Bom. L.R. 120=A.I.R. 1929 Bom. 144.

——S. 15—Right of way.

——In questions regarding a right of way the Court should consider the character of the ground, the space for which the right is claimed, the relations between the parties and the circumstances under which the user took place to decide whether

land. **Held**, this could not prevent the plaintiffs from cutting a pyne on their own land which did not interfere with the channel feeding the defendant's land, (1910) 13 C.L.J. 579.

——S. 15—Right to water—Surplus rain water.

In order to give the owner of a land a prescriptive right for passing the surplus rain water of his land over another person's land, it must be proved that the water passed through a defined channel and not in various directions through the servient tenement. 8 C. W. N. 244.

21. Scope.

——S. 15—Scope—Dedication of land for user as public pathway—Acts or omissions are to be considered by the Judge and not period of 20 years or less.

When a Court of law is called upon to say whether or not there has been a dedication of land or of the user of land for the purpose of use as a pathway by the public, it has to consider what has been done or has been omitted to be done by the owner of the land, and to decide whether a presumption can and ought to be drawn, from the various acts of commission or omission, that the land or the user of the land has been dedicated to the public. Whether the acts or omissions relied on extend over a period of more than 20 years or less than 20 years, is, in such a case, not very material. No one other than the proprietor of land can dedicate it or the user of it to the general public. A.I.R. 1944 Pat. 278=10 Cut. L. T. 13=11 B. R. 107=216 Ind. Cas. 174.

——S. 15—Scope—Permissive user of others' courtyard for 9 years—Easement, whether could be acquired.

A person whose wall of the house abutted on neighbour's courtyard claimed as easement by prescription to go over his courtyard, which was being used with his permission since only 9 or 10 years:

Held, that the user being permissive and not as of right, no easement could be acquired by prescription.

Held, also, that he could neither acquire easement of necessity, as the two tenements were not owned by him. A.I.R. 1937 Lah. 320=39 P.L.R. 66=171 Ind. Cas. 40.

22. Tenant—If can acquire by prescription.

——S. 15—Tenant—If can acquire by prescription.

No easement by prescription can be acquired by a tenant against his landlord. I.L.R. (1947) Nag. 254=229 Ind. Cas. 544=1947 N. L. J. 18=A. I. R. 1947 Nag. 175.

——S. 15—Tenant—If can acquire by prescription—Lessee of land, owner of building built upon land—Lessee acquires rights of easement with respect to use of light or air or support for his building as owner thereof.

A lessee of land cannot acquire a right of way or any other easement over land owned by his lessor as having been peaceably and openly enjoyed by a person claiming title thereto and as of right, within the meaning of the words in cl. (3) of S. 15, for, in such a case, the tenants occuption is in the sight of the law that of his landlord. But where a lessee of land owns a building built upon land leased to him, he may, so far as the use of light or air or support for his building is concerned, acquire rights of easement in respect of such light, air or support under cls. (1) and (2) of S. 15 and these rights cannot be objected to as being incapable of being acquired by him on behalf of his landlord as well as against his landlord, for these rights are acquired by him for himself and for none other than himself, as the owner of the building. A.I.R. 1941 Sind. 211=I.L.R. (1941) Kar. 381=198 Ind. Cas. 418.

——S. 15—Tenant—If can acquire by prescription — One mokarariдar, if can acquire easement against another, under same landlord.

A **mokarariдar** is always a tenant and never an owner of the land. He always derives his rights from the lessor and as the latter cannot have the right of enjoyment of an easement as of right against himself, so neither can his tenant against him. Consequently, one **mokarariдar** cannot acquire easement against another **mokarariдar** under the same landlord by prescription. A.I.R. 1937 Cal. 572=I.L.R. (1937) 1 Cal. 569=172 Ind. Cas. 320.

——S. 15—Tenant—If can acquire by prescription.

The tenants used water from the landlord's tank to raise a second crop for over a period of 20 years openly and without obtaining permission from the landlord and without any obstruction. During this period, the landlord did not claim or recover any compensation for the use of the water by such tenants. Landlord subsequently brought a suit to recover compensation which was resisted by the tenants on the ground that they had acquired a right by prescription to use water without liability to pay for it. No attempt on the part of the landlord was made to show that the tenants used water with his permission or to negative tenants' claim as of right:

Held, that the tenants started with a presumption in their favour that they were using the water as of right and no attempt was made to show that they were doing so with the permission of the landlord or any facts to negative the claim as of right; the tenants had, therefore, acquired a prescriptive right to use water without paying for it. The fact that in some years, there may not have been enough water to irrigate as large an area as in other years, did not affect the acquisition of such right by prescription. The land lord could not, therefore, recover compensation from tenants. A.I.R. 1937 Mad. 953=1937 M.W.N. 895=46 L.W. 643=175 Ind. Cas. 568.

——S. 15—Tenant—If can acquire by prescription—Tenant holding temporary lease, if can acquire right of way by user over land in possession of other tenant under same landlord.

There is no reason why the expression "as of right" which appears both in S. 26, Limitation Act, and S. 15, Easements Act, with regard to the right of way, should not receive the same interpretation.

Two persons held adjoining plots of land under a temporary lease issued by the Government which was terminable at three months' notice and was transferable only with Government's sanction:

Held, that one of them could not acquire a right of way of user over the land which was in possession of the owner as he could not be said to have enjoyed the alleged easement as of right. A.I.R. 1936 Sind 61=39 S.L.R. 32=163 Ind. Cas. 137.

——S. 15—Tenant—If can acquire by prescription—Prescription as between tenants of same landlord, if possible.

Where there is evidence of long enjoyment in a particular way, it is the habit and duty of the Court so far as it lawfully can, to clothe the fact with right.

There cannot be a prescription by one tenant against another tenant of the same landlord. A.I.R. 1934 Pat. 11=148 Ind. Cas. 215.

——S. 15—Tenant—If can acquire by prescription—Joint tenants — If can acqire easements by prescription against each other.

A prescriptive right cannot be acquired by one tenant against another tenant of the same landlord. **Quaere.**—Whether one permanent tenure holder can acquire an easement against another permanent tenure-

holder under the same landlord. 19 C.W.N. 1211=31 Ind. Cas. 549.

——S. 15—Tenant—If can acquire by prescription.

A tenant in a zamindari cannot acquire the right to irrigate his land **held** by him as a tenant, with water from the tank belonging to the Zamindar. 11 M.L.W. 600=56 Ind. Cas. 598.

——S. 15—Tenant—If can acquire by prescription.

A right of way cannot be acquired by a tenant over the lands of the landlord within his tenancy except by grant. The mere grant of leave and license of a right of way by the landlord to his tenant, will not invest the latter with a right of way enforceable in suit. 20 C.W.N. 1158=34 Ind. Cas. 450.

——S. 15—Tenant—If can acquire by prescription.

Except where the Easements Act is applicable, a tenant can acquire by prescription an easement over the land of his landlord even though the tenant had a right of permanent occupancy on his lands. 9 C.W.N. 856. See also 29 C. 363.

23. User—See also—Easements Act S. 15—(7) Enjoyment.

——S. 15—User—Vacant tenament, if can acquire easement of light and air.

The user of a building has no materiality whatsoever in cases of the easement of light and air. Even a tenement which is vacant and unoccupied for the statutory period of 20 years or over can, during the same period of non occupation, acquire easement rights over the servient tenement. A.I.R. 1945 Cal. 438=221 Ind. Cas. 495.

——S. 15—User.

While the mere putting forward of a wider claim in legal proceeding is not conclusive against a right of easement, yet the question **quo animo egerit**, to what purported character are the acts of user to be ascribed is one which the Court must answer. The question in each case is one of fact as to whether the acts of user are referable to a purported character of owner or to the claim to an easement. Even in the case of an enjoyment from time immemorial it would be equally necessary for the plaintiff to prove a user as of right as an easement as distinguishable from a right of ownership. A.I.R. 1930 Pat. 7=11 P.L.T. 637=124 Ind. Cas. 385.

——S. 15—User—Legality.

No use of property which would be legal if due to a proper motive, would become illegal if prompted by an improper or even a malicious motive. The extent of a right acquired by prescription is measured by the extent of the use and enjoyment thereof during the prescriptive period. 42 Cal. 164=20 C. L. J. 97=18 C.W.N. 1296=26 Ind. Cas. 213.

24. What rights can be acquired.

——S. 15—What rights can be acquired—Throwing filthy water on neighbour's land—Easement, if can be acquired.

The right of throwing filthy water on a neighbour's land is an easement which can be acquired either by grant or under S. 15, Easements Act, by prescription: the words "any other easement" in that section are comprehensive enough to include such a right. Where such a right has not been acquired, the act of polluting amounts to a nuisance which is actionable. A.I.R. 1937 Mad. 823=1937 M.W.N. 690=(1937) 2 M. L. J. 350=46 M.L.W. 466=173 Ind. Cas. 705.

——S. 15—What rights can be acquired—Right to use land as burial ground—Whether can be acquired by prescription.

A prescriptive right to use land as burial ground by user of the same as such for even 100 years, openly, continuously, without interruption as of right, as an easement by prescription, cannot be acquired or created, and by no stretch of language can the right to bury the dead on a plot of land be called on easement, implying that such user was for the beneficial enjoyment of land. The right to cremate dead bodies may very well be treated as a right of similar nature as the right to bury the dead, and such a right cannot be acquired as an easement by prescription. Land for use as a cremation ground can be acquired by dedication or by prescription, as a mode of acquisition or extinction of substantive or primary rights by a certain lapse of time. A.I.R. 1935 Cal. 357=39 C.W.N. 387=60 C. L. J. 566=159 Ind. Cas. 383.

——S. 15—What rights can be acquired—Right to bury or cremate dead bodies in land of others.

The right to bury or burn dead bodies on land belonging to another person is not an easement recognised by law and cannot be acquired by prescription. A.I.R. 1932 Lah. 256=33 P.L.R. 157=138 Ind. Cas. 325.

——S. 15—What rights can be acquired.

Right to stock manure can be acquired by prescription. 98 Ind. Cas. 460=A.I.R. 1927 All. 115.

——S. 15—What rights can be acquired.

A prescriptive right to throw back water and keep it standing on the land of another exists only in the case of water flowing in a definite stream and cannot apply to surface-water not flowing in such a stream though it might ultimately, if not arrested, flow in a tank. 97 Ind. Cas. 832=1926 M.W.N. 652=25 M.L.W. 359=A.I.R. 1927 Mad. 144.

——S. 15—What rights can be acquired—Right to discharge water on land of deft. through channel across public road.

A prescriptive right of easement to discharge surplus water on the deft.'s land through a channel across the public road cannot be acquired. 19 C. L. J. 42=18 C.W.N. 378=21 Ind. Cas. 857.

——S. 15—What rights can be acquired—Riparian rights.

A riparian right is a natural right and is not acquired by immemorial user. It exists by law; it may be lost by the adverse enjoyment of another; but it has not got to be enjoyed to be kept up. Whatever the enjoyment at the date of the grant may be, the measure of the right that passes is determined only by configuration and the width of the river or stream. 105 Ind. Cas. 864=50 Mad. 961=26 M.L.W. 513=1927 M.W.N. 854=A.I.R. 1927 Mad. 988=53 M. L. J. 868.

——S. 15—What rights can be acquired.

The private nuisance caused by the over-hanging boughs belonging to the trees of one neighbour to the owner of the land over which the boughs were overhanging does not create a "right" within the definition of "easement" in the Indian Easements Act, nor does the convenience to the owner of the tree, always changing in extent and position of space, become at any time so determinate that it could by any length of time be held to be enjoyed as "of right". There can be no such easement as can be acquired by prescription. 89 Ind. Cas. 191=27 Bom. L.R. 663=A.I.R. 1925 Bom. 446.

——S. 15—What rights can be acquired—Trees—Branches—Prescriptive right in respect of.

A prescriptive right of easement in respect of the branches of a tree is inadmissible. 7 M.L.T. 247=(1910) M.W.N. 265=6 Ind. Cas. 600.

——S. 15—What rights can be acquired—Right to a ferry.

The right to establish and maintain a ferry over the property of another is a right of easement for which twenty years use is necessary under S. 28 of the Lim. Act. 5 Pat. L. J. 500=1 Pat. L. T. 395=57 Ind. Cas. 516.

——S. 15—What rights can be acquired—Right to ferry.

Right to ferry though not an easement is in the nature of an easement and may be acquired by user. 9 Ind. Cas. 846. (Cal.)

——Ss. 15 and 12—What rights can be acquired—Water of Govt. channel—Ryotwari proprietor—Possessory right — Incorporeal right.

No easement or presumptive right can be acquired by a ryotwari landholder in water in a Govt. channel irrigating the lands. No person can claim possessory rights in a channel and ask for injunction against a threatened interference with such rights. There can be no possessory rights in connection with incorporeal rights. In a suit for declaration of the plff.'s rights to irrigate his lands with the water of a Govt. channel as against a rival proprietor, the Govt. is a necessary party. 34 M. L. T. 425=(1918) M. W. N. 276=23 M.L.T. 337=45 Ind. Cas. 30.

——S. 15—What rights can be acquired—Right to dam up a stream.

A prescriptive right to dam up a stream is acquired by the continued exercise of the right for twentyfive or thirty years. 15 M. L. T. 247=1 L. W. 307=26 M. L. J. 385=(1914) M.W.N. 521=24 Ind. Cas. 547.

——S. 15 — What rights can be acquired — Minerals—Grant—Right to minerals.

Per (Spencer, J.) In the case of **shrotriam** grant the right of Govt. over the minerals is not lost by limitation. 15 M. L T. 277=23 Ind. Cas. 144.

——S. 15—What rights can be acquired— Right to plant and maintain trees.

A right to plant and maintain trees on the land of another cannot be acquired as an easement by prescription. Change in quantum of inconvenience, imposed by growing trees on other's land, places arboriculture outside the scope of prescriptive rights. 5 N.L R. 52=2 Ind. Cas. 230.

25. When acquirable.

——S. 15—When acquirable:—Where an easement cannot be prevented, it cannot be acquired. 30 C. 1077.

26. Who can acquire.

——S. 15—Who can acquire.

Easement can be acquired only by a definite person or persons natural or juristic—A fluctuating and uncertain body of persons cannot acquire one. 92 Ind. Cas. 465=A.I.R. 1926 Mad. 625.

——S. 15—Who can acquire.

Ownership of property by a fluctuation body of persons is recognized in Hindu Law and though there is no case there are observations tending to show that such a body of persons is capable of owing property.

The fact found in the present case that the Akhra and its property were enjoyed by the Dhobi community of Narainda from time immemorial pointed to a leagl origin and any objection that a right cannot be acquired by a fluctuating body of persons by prescription was inapplicable to the case. 24 C. W. N. 206: 54 Ind. Cas. 742.

——S. 15 — Who can acquire—Caste — If can acquire right of way.

A caste is a corporation with civil rights and can acquire by user, title to a right of way, even if the user be only of a few members of the caste provided it is exercised on behalf of and for the caste. 27 M. L. J. 110=24 Ind. Cas. 467.

——S. 15—Who can acquire—Joint user.

The joint user of the water from a tank for the joint cultivation of a plot does not affect the nature of the right of easement which is a right over the servient heritage acquired by virtue of the joint ownership of the plot. The right prescribed for, is not a right to irrigate jointly but a right as part owners of a dominant heritage. 8 C.W.N. 359, Dist. 20 M.L.T. 544=(1916) 2 M.W.N. 192=4 L.W. 128=35 Ind. Cas. 749.

——S 15—Who can acquire—Successive holders—Prescription.

The essential requisite of prescription is that it should be acquired against specific individuals; prescription against one person cannot be tacked to that acquired against others. Where there are successive **stanom** holders, each is independent of the other and they do not claim through each other and a suit by a particular claimant for possession of the **stanom** is not barred by limitation if brought within the limitation period the period being reckoned from the date on which his rights arose. 28 M. L. J. 669=24 Ind. Cas. 519.

——S. 15—Who can acquire—Right of way—Amendment of plaint.

A resident of a village can sue on his own behalf to establish a right of way over another's land and can be allowed to amend the plaint to limit his claim to that easement. 7 M.L.T. 222=6 Ind. Cas. 285.

——S. 15—Who can acquire—Superior proprietor.

Superior proprietor can acquire easement on land held by under proprietor under S. 15, Easements Act. 12 O. C. 106=2 Ind. Cas. 281.

27. Miscellaneous.

——S. 15—Miscellaneous.

S. 7, Illus. (e) applies to cases where the land is in natural condition and does not apply to land burdened with a building and there is artificial pressure by the building itself. In such cases S. 7 does not apply and the question of easement can be decided by applying S. 15. 118 Ind. Cas. 715=1930 A. L. J. 340=A.I.R. 1929 All. 885.

——S. 15—Miscellaneous.

A bye-law, passed by the Board and sanctioned by the Government, signifying the intention to let out the spaces at the sides of roads to hawkers, does not create Board's ownership to those sides but merely extends its power of user, the ownership being already created by S. 116, Municipalities Act of 1916, or a similar provision in the previous Act. 116 Ind. Cas. 806=A.I.R. 1929 All. 382.

——S. 15—Miscellaneous.

Though Easements Act is not in force in Berar, Limitation Act, S. 26, is. 96 Ind. Cas. 546=9 N. L. J. 136=A.I.R. 1926 Nag. 474.

——S. 15—Miscellaneous — Failure of right of easement—Non-exercise of right—Period.

Even though a person might have been flowing the water of the roof through the **abchak** land of another for a period of twenty years or even more, nevertheless, if he ceases to exercise that right "within two years, next before the institution of the suit wherein the claim to such period relates is contested" that right would fail. 1947 A.W.R. (H. C.) 78=1947 A. L. J. 64=1947 A.L.W. 107=A.I.R. 1947 A. 374.

——S. 15—Miscellaneous.

Where a plaintiff in claiming relief upon the ground that his prescriptive right to the passage of light and air to a certain window has been interfered

with, it is enough to show that the right has in fact been interfered with. The plaintiff is not obliged to go further and show that he has suffered actual damage thereby. (1907) A. W. N. 175=29 A. 571=4 A. L. J. 477.

——**S. 15—Miscellaneous—Finding that plaintiff** had exercised right of way on plot for over statutory period before assertion of his ownership of that plot is of fact and binding in second appeal.

A finding that the plaintiff had been exercising his right of way on the plot in dispute for over the statutory period (about 24 years) before the letters and petitions containing the plaintiff's assertion of ownership were written and made is a finding of fact and must be accepted in second appeal. A.I.R. 1942 Mad. 392=1942 M. W. N. 209=55 L. W. 142=(1942) 1 M. L. J. 373=206 Ind. Cas. 528.

——**S. 15—Miscellaneous—Right of way—Immemorial user—Further opportunity to meet the case, if can be given.**

Where, in a suit for an easement, the plaintiff has alleged circumstances to show the user of the pathway by himself and his ancestors for forty or fifty years, the defendant should not be given a further opportunity of meeting the case of immemorial user even though immemorial user was not specifically pleaded in the plaint. A.I.R. 1933 Cal. 215=56 C. L. J. 274=142 Ind. Cas. 458.

——**S. 17—Applicability.**

S. 17 is intended to apply not to rights of irrigation in natural streams but to rights in the nature of profits **a prendre** which do not include a right to water. 94 Ind. Cas. 929=7 P. L. T. 547=A.I.R. 1926 Pat. 187.

——**S. 17—"Paya," meaning explained.**

A paya is a channel, but not necessarily one which would contain water in the dry season. A.I.R. 1945 Mad. 396=(1945) 2 M. L. J. 27=I. L. R. (1945) Mad. 420=221 Ind. Cas. 324.

——**S. 17—Silt accumulation.**

It is doubtful whether a prescriptive right can be acquired at all in respect of a shifting or changing mass like silt accumulation. A.I.R. 1938 Mad. 180=46 M.L.W. 862=1936 M.W.N. 948 (2)=174 Ind. Cas. 229.

——**S 17 (a)—'Tend to total destruction' explained.**

The expression 'tend to the total destruction' in S. 17 (a) (3), does not mean total destruction but such an interference as would render the dominant owner's rights largely inoperative. A.I.R. 1931 Sind 1=25 S. L. R. 257=130 Ind. Cas. 546.

——**S. 17—Riparian owner—Rights to surface and under-ground waters — "Known" and 'defined', meanings of.**

A riparian owner has natural right to use the surface water flowing in the river or natural water course that flows along by the side of his land. He has no right even to the user of the water if it flows under-ground in an undefined channel. But if the under-ground water flows in a defined and known channel, he has a right to use and may, in the exercise of that right, even dig a pit in the bed of the water course.

The word 'known' in the expression "known channel," means the knowledge by reasonable inference, from existing and observed facts in the natural and pre-existing condition of the surface of the ground and is not equivalent to "visible," nor is it restricted to knowledge derived from exposure of the channel by excavation. 'Defined,' means a contracted and bounded channel although the course of the stream may be undefined by human knowledge. 1944 N.L.J. 374.

——**S. 17 (c)—"Surface water"—Characteristics.**

The chief characteristic of surface water is its inability to maintain its identity and existence as a water body. Water flowing into a field from a defined channel and making its exit by another defined channel by passing along the field though not over a confined track but along its whole area, is not surface water. While in the field it is bounded by the bandhis and must be regarded as flowing in a defined channel. A right of easement can, therefore, be acquired in respect of such water. I.L.R. (1949) Nag. 325=1949 N.L.J. 312.

——**S. 17 (c)—Word 'and' means 'or'—Temporary collection caused by dam and draining off immediately by another channel.**

S. 17 (c) is an example (another is to be found in S. 15 of the same Act) of the use of "and" when "or" is intended. What is required according to this section is that the surface water shall not be simply water flowing on the surface; it must be gathered up in some way either in a defined channel or by being collected in some other way.

Where, in a case, the rain water collects, passes along a depression which forms a natural channel over a person's land and at a point on such person's land, his neighbour has dammed that channel, that dam blocks the natural channel, causes the flow to stop, the water to rise, and from the collection of water thus caused another higher natural channel takes the collected water away to the neighbour's tank when the water rises a little, such a temporary collection caused by a dam and draining off immediately by another channel cannot be regarded as a collection of water for the purpose of S. 17 (c) of the Easements Act. A.I.R. 1937 Nag. 310=I.L.R. (1937) Nag. 13=174 Ind. Cas. 267.

——**S. 17 (c)—Right to take water through another's land.**

The right to take water from a river running through an undefined channel over the neighbouring lands is not one coming under S. 17 (c) of the Easement Act, but is a right which though perhaps could not be acquired by prescription as an easement, could be inferred from long user. A presumption of lost grant can be made if the usage is long and uninterrupted if it could form the subject of grant. 42 Bom. 288=20 Bom. L. R. 398=45 Ind. Cas. 448.

——**S. 17—Surface water.**

——Act does not apply to Burma—Right of receiving surface water can be acquired by custom in absence of statutory prohibition. 114 Ind. Cas. 519=6 Rang. 615=A.I.R. 1929 Rang. 31.

——S. 17 (c)—**Surface water.**

——Every landowner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and to put it to such use as he may desire. He may also allow it to flow away in the usual course of nature upon the lower lands of his neighbour and cannot be bound to prevent it from so doing, and it is for the other party to establish that they have acquired a right to compel the owner not to do so either by contract or by prescription. 107 Ind. Cas. 542=A.I.R. 1928 Pat. 279.

——**S. 17 (c)—Surplus water—Defined channel—Acquisition—Grant—Presumption—English and Indian Law.**

A person acquires a right of easement of water of artificial channels or derived from artificial tank or pools. The water of a tank fed by rain water as well as surface water from neighbouring lands

flowed in a defined channel from the deft.'s land through the land of the plaintiff who was not the owner of the tank. The deft. had been using and enjoying the said water for a sufficient length of time and as a matter of right. Held, that he must be deemed to have acquired a right of easement with respect to the same, notwithstanding the fact that the water was what might be called surplus water. In the circumstance of the case, a grant of the said right might be presumed. 33 M.L.J. 674= (1917) M.W.N. 863=44 Ind. Cas. 625.

——S. 17—Right to raise crest level of calingula of tank—Owner of land submerged can protect his land:—(1) A right to maintain the bund of a tank at a certain level can be acquired after twenty years' use, though the effect of it is to submerge the lands of others. (2) Semble:—The owner of the submerged lands can take measures to save his lands from being submerged. 24 M. 202.

——S. 18. Synopsis.

1. Access to tomb
2. Acquisition
3. Against land lord
4. Burying and Cremating
5. Caste—If can acquire right
6. Custom
7. Customary right
8. Cutting wood
9. Exercise of right
10. Holding festivals
11. Licence
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13. Over hanging branches of trees
14. Pasturage rights
15. Privacy
16. Reasonableness when necessary
17. Right of way
18. Right to dam channel
19. Right to prayers
20. Right to worship
21. Tank
22. Tarwad
23. Use of khal
24. Use of land.

1. Access to tomb.

——S. 18—Access to tombs—Conditions—Limits.

A person can acquire a right of access to a spot in which some persons are buried and to worship the tomb provided he proves that the enjoyment of the right was not by leave granted or by stealth or by force, but that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned.

But the right of access to a tomb does not include the right to erect substantial structures over and round the tomb which amounts to an infringement of the owner's rights to the land. 112 Ind. Cas. 431=6 Rang. 456=A.I.R. 1928 Rang. 268.

2. Acquisition.

——S. 18—Acquisition.

——There cannot be a customary easement in favour of an individual and so easement acquired under and by virtue of local customs can only be in favour of class and community. 119 Ind. Cas. 695=A.I.R. 1930 Nag. 40.

——S. 18—Acquisition.

——A Village community in India can acquire a customary right. 101 Ind. Cas. 58=A.I.R. 1927 Mad. 645=52 M.L.J. 641.

——S. 18—Acquisition.

——In order to find a customary right enjoyment for a period at least as long as would a prescriptive or easementary right require is necessary. 97 Ind. Cas. 832=1926 M.W.N. 652=25 M.L.W. 359= A.I.R. 1927 Mad. 144.

——S. 18—Acquisition.

——A custom cannot be established by a practice of less than 20 years. 98 Ind.Cas. 800=24 M.L.W. 677=A.I.R. 1927 Mad. 76.

3. Against land-lord.

——Ss. 18 and 15—Against land lord—Tenant, if can acquire prescriptive or customary easement to irrigate land in his possession from well in another land of landlord.

A tenant can acquire a customary right or irrigating the land comprised in his tenancy from a well situate in another land belonging to the landlord, but not a prescriptive easement over the said well.

The question of the nature of his tenure in respect of his land cannot affect the decision of the question whether he has acquired an indefeasible right to irrigate that land, so long as he holds possession thereof, from that well. If his tenure is not of a permanent nature he can naturally enjoy the right to irrigate the land in his cultivating occupancy only so long as he is allowed or is able to continue in possession of that land. The right acquired by him being not of a personal nature but only a right existing for the more beneficial enjoyment of the land held by him will only last so long as his occupation of that land lasts. However while he is still in cultivating occupancy of that land the landlord cannot legitimately interfere with his right to irrigate that land from the well. A.I.R. 1949 E. P. 409.

——S. 18—Against landlord.

——A tenant may acquire a customary right of using the water of a well against his own zamindar. 12 A.L.J. 963; A.I.R. 1924 All. 159, Foll.; 17 A.L.J. 672; 11 A.L.J. 990 and 14 All. 185, Dist. 113 Ind. Cas. 729=9 L.R.A. Civ. 224=A.I.R. 1928 All. 591.

——S. 18—Against land lord.

——The first illustration to S. 18 expressly recognises that a tenant may have a customary right of easement against his land lord. A customary easement is not limited to easements of a kind which could not be recognised at all apart from special customs such as the right of pasturage and the right of privacy referred to in the illustrations. Any kind of easement recognised by custom of the provinces would surely fall within the meaning of the term. 74 Ind. Cas. 703=A.I.R. 1924 All. 159.

——S. 18—Against land lord—Right to cut sugar-cane and boil juice.

The right to cut sugarcane, to extract, boil and concentrate the juice on a piece of land in the abadi is in the nature of a customary easement referred to in S. 18 and can be acquired by a tenant against the landlord. 12 A.L.J. 963=26 Ind. Cas.122.

4. Burying and Cremating.

——S. 18—Burying and cremating—Suit land used by Muhammadans for burial for 45 years—Inference as to grant of such right in past.

The English common law rule of immemorial user is not required to establish a custom in India. [Requisites of custom explained.]

Where the suit land has been used as a burial ground by a Muhammadan community for 45 years

as that, the Court is bound to infer that at some time in the past there was granted to this Muhammadan community the right to bury their dead in the suit land. A.I.R. 1939 Nag. 193=1939 N.L.J. 246=I.L.R. (1941) Nag. 460=183 Ind. Cas. 341.

——S. 18—Burying and cremating — Right—Question of evidence—Mere permission of Municipality—Effect.

The question whether the members of a particular community have a right to bury their dead at a certain place, which does not belong to the community and is not a general burial ground is a question of actual evidence: an **ex parte** order of the Municipal Committee giving permission to the community to bury their dead there connot confer any such right on them. 132 Ind. Cas. 567.

——S. 18—Burying and cremating—Whether an easement—Origin of right peaceful—Dedication or lost grant, if can be presumed—Right, if a licence.

S. 18, recognizes an easement which is established by local custom, but the right must be an easement. The mere fact that it is a customary right would not make it cease to be an easement. If the right to bury is not an easement, then it can be a licence coupled with a grant. The right to bury the dead cannot be a mere licence, for, from its very nature, the permission is irrevocable. An owner of land cannot permit a corpse to be buried and then later on ask that the grave should be excavated and the corpse removed. If the permission from the very beginning is irrevocable, it cannot be a mere licence. It must necessarily be a licence coupled with a transfer, that is to say, a grant. If the right implies that the space should not be used by the original owner for any purposes whatsoever, then the spot must be taken to be gifted or granted or, at any rate, dedicated or consecrated for burial purposes. The ownership of the zamindar would, in such a case, cease qua that spot.

The question whether a plot of land is a graveyard or not is primarily a question of fact. In the case of a plot covered by recent graves, the burden is undoubtedly on the person who alleges that it is a graveyard, to establish how the grant was made. But in cases where a graveyard has existed from time immemorial or for a very long time, there can be a presumption of a lost grant. It is open to a Court to infer from circumstances that a plot of land covered by graves which has been used as a graveyard, is in fact a graveyard and has been set apart as such by the original owners and made a consecrated ground even though a registered document is not now forth-coming. A.I.R. 1934 All. 868 =1934 A.L.J. 809=3 A.W.R. 811=57 All. 166=149 Ind. Cas. 797.

——S. 18—Burying and cremating.

——In the absence of any evidence that the land was ever dedicated to the community, the mere fact that permission was given for one or two persons to be buried in a particular spot does not ipso facto invest the spot with a public character and give outsiders any rights over it. 112 Ind. Cas. 431 =6 Rang. 456=A.I.R. 1928 Rang. 268.

——S. 18—Burying and cremating—Right—Recognition by Courts.

Right to bury dead in a place privately owned is recognised by Courts and has been regarded by the Courts as a right partaking of the character of an easement and capable of acquisition by virtue of a custom. 76 Ind. Cas. 588=2 Bur. L.J. 186=1 Rang. 702=A.I.R. 1924 Rang. 61.

——S. 18—Burying and cremating—Customary right—Form of pleading.

Customary right of user of land as burial or cremation ground must be specifically pleaded. A plaintiff setting up prescriptive right cannot be allowed to succeed on basis of customary right for the two are fundamentally distinct, for custom differs from prescription in the fact that prescription is the making of a right while custom is the making of a law. 66 Ind. Cas. 640=34 C.L.J. 319=A.I.R. 1921 Cal. 569.

——S. 18—Burying and cremating—Customary right—In the nature of an easement.

A customary right of burial can exist, apart from provisions of Indian Easements Act; hence where it is found that a certain family used a grave as a burial ground customarily it was held not an easement but a customary right in the nature of an easement. 13 A.L.J. 1094=31 Ind. Cas. 805.

5. Caste—If can acquire right.

——S. 18—Caste—If can acquire right.

Ownership of property by a fluctuation body of persons is recognized in Hindu Law and though there is no case there are observations tending to show that such a body of persons is capable of owning property.

The fact found in the present case that the Akhra and its property were enjoyed by the Dhobi community of Narainda from time immemorial pointed to a legal origin and any objection that a right cannot be acquired by a fluctuating body of persons by prescription was inapplicable to the case. 24 C.W.N. 206=54 Ind. Cas. 742.

6. Custom.

——S. 18—Custom—Essentials of.

The essential attributes of a custom are, that it must be immemorial, it must be reasonable, it must be continued without interruption since its immemorial origin, and it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the person whom it is alleged to affect. 66 Ind. Cas. 640=34 C.L.J. 319=A.I.R. 1921 Cal. 569.

——S. 18—Custom—Recognition—Conditions.

A Court should not decide that a local custom, such as cutting wood from a jungle exists, unless the court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned. 123 Ind. Cas. 377=A.I.R. 1930 All. 338.

——S. 18—Custom and prescription—Distinction.

Where the plaintiffs claimed to have acquired an easement by prescription the Court should not convert the claim into one of customary easement. What may suffice to establish a customary easement may be wholly insufficient to establish an easement by prescription and vice versa. The two rights are different although the result may be the same. 69 Ind. Cas. 528=A.I.R. 1924 Lah. 275.

—S. 18—Custom and prescription—Distinction.

Rights which are in the nature of customary rights which exist for the common benefit of certain communities or inhabitants of particular localities, and to establish which the law does not lay down any fixed period must be distinguished from prescriptive easements which can be acquired by 20 years user by specific individuals who alone can exercise them as against servient owners for the beneficial enjoyment of their own dominant heritages. 105 Ind. Cas. 113=A.I.R. 1928 Nag, 39.

7. Customary right.

——S. 18—Customary right — Origin and growth of:—A customary right owes its origin generally to common consent, and when fully developed, may be treated as incorporated into a contract by implication. 11 C.L.J. 209=14 C.W.N. 487=37 Cal. 322=5 Ind. Cas. 243.

8. Cutting wood.

——S. 18—Cutting wood—Nature of right.

Villagers taking wood from landlord's jungle without his knowledge cannot acquire right to cut and appropriate wood—If such acts are with permission or acquiescence that amounts to license and cannot likewise confer a right as against him. 123 Ind. Cas. 377=A.I.R. 1930 All. 338.

9. Exercise of right.

——S. 18—Exercise of right—Mode.

Customary easement may be exercised intermittently. 66 Ind. Cas. 833=16 S.L.R. 17=A.I.R. 1921 Sind 155.

10. Holding festivals.

——S. 18—Holding festivals—Villagers accustomed to making offerings for long time at particular "Isthan" situated in a house to rid their cattle of diseases.

Where residents of village have been accustomed for a long period of time to make offerings when their cattle are afflicted by disease and those offerings are made at a particular Isthan in a particular room, it amounts to a customary easement within the meaning of S. 18, giving the villagers right to continue to make the offering. A.I.R. 1939 All. 387=1939 A.L.J. 391=1939 A.W.R. 327=185 Ind. Cas. 334.

——S. 18—Holding festivals—Right of going to certain plot, burning Holi there.

A customary right of going to certain plot of land at a certain time of the year and collecting fuel there and burning Holi and performing certain religious ceremonies is not an unreasonable right and such right of easement can be acquired and is recognized by the Court. A.I.R. (Vol. 26) 1939 All. 165=1938 A.L.J. 1243=1939 A.W.R. 4=180 Ind, Cas. 233.

——S. 18—Holding a festival on land—Custom—Right of way—Carrying idols.

A right to hold a festival in a particular place once or twice a year may be a customary right but not a right of easement but there may be a right of way over a particular plot for the purpose of carrying idols once or twice a year. 36 Cal. 615=13 C.W.N. 1002=1 Ind.Cas. 108.

11. Licence.

——S. 18—Licence—Owner of well permitting neighbours to draw water for a long number of years—If dedication of well to public.

Where a person has been permitting his neighbours to draw water from his private well for a long number of years, such conduct would, at best, constitute a bare licence—a facility provided for the convenience of his neighbours by the person but without any legal liability to continue it. A user of this kind, however, does not lead necessarily to the conclusion that the well was dedicated to the public. A.I.R. 1939 Lah. 191 = 41 P.L.R. 536=184 Ind. Cas. 76.

12. Lost grant.

——S. 18—Lost grant—Principle of—Circumstances that no lawful grant be made—Presumption of legal origin, if arises.

No presumption of legal origin is possible when the circumstances are such that no lawful grant could be made. All grants must be subject to the right of the public and even the Crown cannot make a grant entitling a person to commit a public nuisance. If, therefore, the exercise of the rights which a party claims amounts to an infraction of the rights of the public, no presumption of their legal origin can properly be made. A.I.R. 1938 Cal. 366 =42 C.W.N. 445=177 Ind. Cas. 53.

13. Overhanging branches of trees.

——S. 18—Overhanging branches of trees—Custom as to—Cannot be recognised.

A custom in a village not to complain against the overhanging of cocoanut trees over neighbour's lands would not be reasonable and cannot be pleaded. It is indefinite and vague nor can there be customary easement under S. 18 of projecting the branches of trees growing on one's land over the land of another. 89 Ind. Cas. 191 =27 Bom. L. R. 663=A.I.R. 1925 Bom. 446.

——S. 18—Overhanging trees.

A custom to allow the neighbour's trees to overhang one's house and premises, is neither definite nor reasonable. Whether the right to retain trees overhanging another's land is customary easement. 43 Bom. 164=20 Bom. L. R, 826=47 Ind. 629.

——S. 18—Overhanging trees.

There can be no customary easement under S. 18 of projecting the branches of trees growing on one's land over the land of another. No prescriptive right to keep the overhanging branches of one's neighbour's land can be acquired by any number of years. A.I.R. 1935 All. 750(2)=1935 A.L.J. 963=1935 A.W.R. 849=156 Ind. Cas. 42(1).

14. Pasturage rights.

——S. 18—Pasturage right—Nature of—Such right, if originates from custom.

The rights of pasturage, claimed by a whole body of villagers, are not easements in the proper sense of the word. They are not privileges attached to individuals in respect of their lands. These are rights claimed for a fluctuating class of persons in respect of a locality. They come under the description of the second class of rights, intermediate between public and private rights, and they attach to certain classes of persons or portions of the public and have their origin ordinarily in custom. A.I.R. 1937 Cal. 245=41 C.W.N. 503=I.L.R. (1937) 2 Cal. 86=66 C.L.J. 284=171 Ind. Cas. 785.

——S. 18—Pasturage right.

A customary right of pasture on landlord's land can be established by proper evidence if it is made out that from time immemorial the tenants have enjoyed it as of right, and if from the

circumstances it could be gathered that the right was enjoyed by them customarily or might be due to a lost grant.

Where the rent was increased within living memory, within a few years and on every occasion on which the landlord granted permission to the tenants to graze the cattle the tenants had to apply for it and obtain such permission.

Held, that customary right cannot be held to exist. 106 Ind. Cas. 195=A.I.R. 1928 Mad. 799.

——S. 18—Pasturage right.

A right to graze cattle in a jungle area of the village can be the subject of a customary right. 20 Ind. Cas. 467. (Oudh).

——S. 18—Pasturage right, nature of—Acquisition of right—Extent of user:—The right of pasture cannot be said to exclude the owner's right to the possession and enjoyment of the property over which such a right may exist. Quaere:—Whether in the case of Government waste, where the owner has no use for the property and is not present on the spot to resist any acts of trifling enjoyment on the part of another, the mere pasturing of cattle by the adjoining ryot would amount to an enjoyment of a right so as to create a presumptive title. 20 M.L.J. 362=34 Mad. 58=(1910) M.W.N. 75=7 M.L.T. 380=5 Ind. Cas. 853.

——S. 18—Pasturage over landlord's land claimed by tenant—Immemorial user—Presumption of legal origin:—It was proved in a suit brought by raiyats against their putnidar landlord that the former had been enjoying a right of pasturage over certain indigo and waste lands of the latter from time immemorial. Held, that this entitled the raiyats to a decree declaring their right to graze cattle on the said lands, so as not to prevent the putnidar or his successors from cultivating or excuting improvements on them so long as sufficient pasturage was left to the raiyats and other persons entitled to the right. This right of pasturage was not a right in gross. Application of doctrines of English law deprecated. 8 C.W.N. 425=31 C. 503=14 M.L.J. 152=31 I.A. 75 (P.C.).

15. Privacy.

——S. 18—Privacy.

The custom of privacy exists in the United Provinces. The basis of such a right is the parda system in vogue and the custom is confined to the protection of pardanashin women and those parts of a house which are ordinarily occupied by females. This right does not extend to apartments occupied by males. New constructions should not be made to overlook apartments which are generally occupied and used by women and have been so occupied and used for a period sufficiently long to establish a right of privacy. It may be that the custom once established does not extend only to women who are in the habit of observing parda because women of all races are entitled to a certain degree of privacy depending on the custom of their class and even those who expose their faces in public, would expect to have their privacy respected in their more private apartments; but it would be stating the custom too widely to lay down that any portion of any house used or occupied by men should be protected. A.I.R. 1945 All. 335=1945 A.L.J. 213=I.L.R. (1945) All. 607=222 Ind. Cas. 41.

[Overrules A.I.R. 1923 All. 404=73 Ind. Cas. 1040.]

——S. 18—Privacy—Right, if confined to any class, creed or race.

The right of privacy, based on social custom and parda system, is quite different from the right of privacy based on natural modesty and human morality, and the latter is not confined to any class, creed, colour, or race, and it is the birth-right of a human being and is sacred and should be observed, though the right should not be exercised in an oppressive way. A.I.R. 1935 All. 1002=1935 A.W.R 1109=1935 A.L.J. 1131=58 All. 370=159 Ind. Cas 683.

——S. 18—Privacy.

If a right of privacy is established, the intervention of a space between two houses cannot affect the right of privacy. If in fact that right has been invaded by the new constructions complained, the injured party has a good cause of action to maintain the suit. The Purdah system is generally observed by both Hindus and Mohomedans in the United Provinces except by the lowest classes. 13 A.L.J. 361=23 Ind. Cas. 674.

——S. 18—Privacy—Whether a question of fact.

Whether such a custom as a right of privacy exists and the nature and limits of such a custom, if it does exist, are questions of fact and the findings of the lower Appellate Court, if based on admissible and relevant evidence are conclusive. A.I.R 1935 All 751=1935 A.L.J. 432=1935 A.W.R. 322=155 Ind. Cas. 1056.

——S. 18—Privacy—Right to—Recognition—Conditions.

Where a custom of privacy existed in the locality in which the plaintiff lived and she sued the defendant that her right of privacy was infringed by certain construction made by defendant and where her house was already overlooked from another house and she did not show any reason why she did not object to being overlooked from that particular house and where she endured without protest the invasion of her privacy by the defendant for two years, she is not a person who is entitled to right of privacy although her suit is brought within limitation. 119 Ind. Cas. 834=A.I.R. 1929 All. 809.

——S. 18—Privacy—Enforcement of right to—Facts to be proved.

Plaintiff alleging infringment of right of privacy must prove customory right of privacy in neighbourhood and that he is individually entitled to take advantage of such custom. 119 Ind. Cas. 833=1929 A.L.J. 1028=51 All. 986=A.I.R. 1929 All. 676.

——S. 18—Privacy.

——The existence of a public lane in-between would not destroy the right of privacy in case where the right of privacy is proved to have been enjoyed. 114 Ind. Cas. 732=50 All. 706=26 A.L.J. 537=A.I.R. 1928 All. 717.

——See also: 110 Ind. Cas. 693=5 O.W.N. 538; 13 A.L.J. 361=28 Ind. Cas. 674.

——S. 18—Privacy — Existence of lane in between.

Whether the houses in question are on the same side of a street or on the opposite side, a right of privacy exists and this right needs more protection when the person who invades it, is opposite to the person whose right of privacy is invaded and there is invasion of the right of privacy if a person constructs a room in the upper story of his house overlooking another person's house. 24 Ind. Cas. 683 (All.).

——S. 18—Privacy.

The houses of P and D faced each other and were divided by a narrow lane. D used the roof of his house in hot weather for sleeping purposes and a person could always overlook the house of P and could get a view of certain portions of the house. D constructed a room with doorways on the roof. P complained that by construction of the room and doorways, his right of privacy was violated:

Held, that P could not be granted any relief as there was no fresh invasion of his right of privacy but merely a more restricted view had been brought about by alteration in the house of D and by the restricted view, a suspicion had been created in the mind of P that some one might, unobserved, look into that part of his house which was always open to the same view. A.I.R. 1945 Oudh 308=1945 O.W.N. (C. C.) 313=1945 A.W.R. (C. C.) 216=20 Luck. 575=222 Ind. Cas. 347.

——S. 18—Privacy—Extent of right.

The right of privacy is well-established in India, but there must be substantial and material infringement of the right of privacy before the Courts will interfere and the right cannot be carried to an oppressive length. A.I.R. 1945 Oudh 15=1944 O.W.N. 397=1944 A.W.R. 267=20 Luck. 82.

——S. 18—Privacy.

Right acknowledged in award cannot be infringed by the opening of a window not used for the legitimate purpose of obtaining light and air. 6 O.W.N. 854=A.I.R. 1929 Oudh 437.

——S. 18—Privacy—U. P.—Judicial notice.

A costomary right of privacy exists in the United Provinces and is so well established that the Court is entitled to take judicial notice of the custom. A customary right of privacy attaches to the property in respect of which it is claimed and is not a personal right. Substantial interference with a right of privacy would afford a person whose right has been invaded a good cause of action. 110 Ind Cas. 693=5 O.W.N. 538.

——S. 18—Privacy—Infringement—Onus.

Whenever a new wall is built overlooking the courtyard of another person, and such wall contains windows (not in existence in the wall before reconstruction), the initial burden of proof is on the person constructing the wall to show that the windows are not of such a character as to invade the privacy of the person into whose courtyard they look. This presumption that windows must cause an invasion of privacy can be rebutted by showing that no one can look out of the windows. 93 Ind. Cas. 332=13 O L.J. 512=A.I.R. 1926 Oudh 352.

——S. 18—Privacy—Extent of right.

A plff. cannot ask the deft. to close his windows on the ground of the invasion of his right of privacy when it is proved that the said windows do not look out upon the plff.'s house but upon certain plots of land acquired by him less than twenty years ago. 15 Ind. Cas. 270 (Oudh).

——S. 18—Privacy.

A suit to have the windows of a neighbouring house closed in exercise of the right of privacy cannot be maintained when even before the date of the suit, no privacy could be exercised as all the adjacent houses could have a view of the court yard of plaintiff. 3 Ind. Cas. 88 (All.).

——S. 18—Privacy.

——Illustration (b) to S. 18 affords statutory recognition of the validity of a custom of privacy in India which can be founded on custom and previous enjoyment of privacy in accordance with that custom. 66 Ind. Cas. 833=16 S.L.R. 17=A.I.R. 1921 Sind. 155.

——S. 18—Privacy—Roof of a house.

The fact that the local custom mentioned in Illustration (b) to S. 18 refers to portions of a house "which are ordinarily excluded from observation," does not preclude a local custom of privacy extending to the roof of the house. 66 Ind. Cas. 833=16 S.L.R. 17=A.I.R. 1921 Sind 155.

——S. 18—Privacy—Custom in Gujarat.

In the province of Gujarat there is a customary usage which makes an invasion of the privacy an actionable wrong, and a man may not open new doors or windows in his house or make any new apertures or enlarge old ones in a way which will enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation. 22 Bom. L.R. 226=55 Ind. Cas. 949=44 Bom. 496.

——S. 18—Privacy—Custom.

A plff. is entitled to an injunction restraining the deft. his neighbour from opening such windows and ventilators as would infringe the plff.'s right of privacy which he is entitled to, by custom. 74 P.L.R. 1915=251 P.W.R. 1915=29 Ind. Cas. 154.

——S. 18—Privacy—Right to open apertures—Invasion of neighbour's privacy—Remedy of—Relief under Specific Relief Act (1 of 1877). S. 52.

A opened apertures and a door looking on the site of B B objected to it and wanted to obstruct them by building a wall on his own land. The Municipal Committee refused permission to B to build the wall. B, therefore, applied for injunction for closing the apertures and the door. The lower Appellate Court granted the injunction on the ground that the Municipal Committee had refused permission to build the wall:

Held, that every owner has got the right to open apertures in his own wall and unless, by doing so, he invades the privacy or any other pre-existing and well-established right vested in his neighbour, the latter cannot force him to close the apertures. The neighbour's remedy is to build on his own land or otherwise obstruct the apertures. But the reason that the Municipal Committee had refused permission to the plaintiffs to construct the wall in front of apertures was not a legal ground for granting the injunction in the form in which it had been done, and that pecuniary compensation and not the grant of injunction was the proper relief to redress the threatened injury in the case. A.I.R. 1933 Lah. 847=148 Ind. Cas. 224.

16. Reasonableness when necessary.

——S. 18—Reasonableness when a necessary factor.—Reasonableness is not a necessary factor for easements other than customary. 30 C. 1077.

17. Right of way.

——S. 18—Right of way — Classes of rights of way.

In India, as in England, there are three distinct classes of rights of way. First, there are private rights of way vested in particular individuals or in individual owners of particular tenements; these are easements proper, and commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons or certain portions of the public, such as the freemen of a city, the tenants of a manor, or the inhabitants of a parish or a village; such rights may be regarded as quasi-easements, and commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which

exist for the public at large, and the source of these, when not created by legislative enactment, is dedication. A.I.R. 1942 Cal. 505=46 C.W.N. 743=76 C. L. J. 479=I.L.R. (1942) 2 Cal. 427=202 Ind. Cas. 470.

——S. 18—Right of way—Classes of right of way.

There are three kinds of rights of ways: first, there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of the city, the tenants of a manor, or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of all the King's subjects, and the source of these is ordinarily dedication. It is the third class of rights of ways for which the dedication in favour of the whole public is necessary. If a right of way claimed falls under the second class, dedication to the whole of the public is not necessary. If such a right of way has been exercised by a person or persons for a sufficiently long time openly, uninterruptedly and peaceably, it can safely be presumed that it had a legal origin, and the people of the locality had a right to use this passage. A.I.R. 1939 All. 586=1939 A.L.J. 821=I.L.R. (1939) All. 754=1939 A.W.R. 515=184 Ind. Cas. 620.

——S. 18—Right of way—Public highway and village path—Distinction.

There is a distinction between a public highway and a village path. A village path comes under the description of the second class of rights intermediate between public and private rights. These rights belong to certain class of persons or certain portions of the public such as the freemen of a city, the tenants of a manor, or the inhabitants of a parish or village, and have their origin ordinarily in custom. A public highway on the other hand, exists for the benefit of all the King's subjects, and its source ordinarily is dedication.

In deciding whether a particular pathway is a public highway or a village pathway, it is not enough to say that there could be a public highway having no public place as any of its terminus. The entire evidence on the record relating to the position of the pathway the purposes for which it is used and the people who use it, together with the entries in the Cadastral Survey records should be considered by the Court and a proper conclusion arrived at, as to whether the pathway in question is a village pathway or public highway. If it is found to be a village pathway, the rights to which are vested in the villagers only, no question of injury to public rights would arise, A.I.R. 1938 Cal. 366=42 C.W.N. 445=177 Ind. Cas. 53.

——S. 18—Right of way—Nature of right—Dedication or lost grant, inference of.

The right of way claimed by the public over certain lands described as a village pathway is a customary right and is also traceable to dedication which can be inferred from user for a long time. No particular period of time is necessary for such inference and the Court must decide in each case whether the user proved is such as to enable it to raise the presumption of dedication or of lost grant. A.I.R. 1945 Pat. 118=25 P.L.T. 192=10 Cut. L.T. 78=12 B.R. 45=220 Ind. Cas. 511.

——S. 18—Right of way—Village pathway—Proof of custom.

The persons claiming customary easement must prove that the custom was ancient, continuous, peaceable, reasonable, certain and compulsory. Indiscriminate miscellaneous user of village waste land cannot establish the fact that such user had become a customary law of the place in respect of the persons and things which it concerned. Taking rubbish by some inhabitants of a village over a piece of land in their carts cannot make the path a village pathway. A.I.R. 1943 Oudh 83=18 Luck. 632=1942 O.W.N. 725=204 Ind. Cas. 237.

——S. 18—Right of way—Dedication—Presumption from long user of highway.

Though proof of open, uninterrupted and continuous user may give rise to a presumption of dedication, the presumption is still one of fact, and not one of law. It must not be supposed, therefore, that if there is no evidence in rebuttal, the Court shall be bound to give effect to the presumption and hold dedication proved as a matter of course. A.I.R. 1942 Cal. 505=46 C.W.N. 743=76 C. L. J. 479=I. L. R. (1942) 2 Cal. 427=202 Ind. Cas. 470.

——S. 18—Right of way—Dedication—Presumption from long user.

To prove that the roofs of a building form a public thoroughfare, it is necessary to have evidence as to their dedication for public use express or implied. Mere evidence of witnesses on the record to the effect that the roofs in question have been used by pedestrians for access to the neighbouring public streets for a long time, does not necessarily raise a presumption as to dedication in every case. There must be an intention to dedicate, of which the user by the public is mere evidence and no more.

A single act of interruption, is of much more weight on the question of intention to dedicate than many acts of enjoyment. A. I. R. 1938 Lah. 97=177 Ind. Cas. 966.

——S. 18—Right of way—User of highway—Custom—Antiquity—Proof.

In India, in the matter of proof of antiquity, the strict rules of English Law governing the establishment of custom cannot be applied. In order to be valid, the custom must be ancient; but it is not of the essence of the rule that its antiquity must in every case be carried, back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district.

If proof be given of facts from which it can be inferred that user corresponding to the alleged custom in fact existed at some time past, the existence of the custom from the remoter era will be inferred.

After the existence of the custom for some years has been proved by direct evidence, it can only, as a rule, be shown to be immemorial by hearsay evidence and it is for this reason that hearsay evidence is allowable for the purpose as an exception to the general rule.

There is no reason why 50 or 60 years' user might not in the circumstances of the case, be regarded as sufficient to indicate the existence of the right from a much remoter period. A.I.R. 1942 Cal. 505=76 C.L.J. 479=I.L.R. (1942) 2 Cal. 427=46 C.W.N. 743=202 Ind. Cas. 470.

——S. 18—Right of way—Highway—Question whether there has been dedication is one of fact

—Dedication in case of public right of way—Nature of.

In the case of a public right of way, the question whether there has been dedication or not is one of fact, and has to be decided by the ultimate Court of fact with reference to the circumstances of the case. A finding on such an issue is conclusive in second appeal.

In the case of a public right of way, dedication, as the term implies, is a gift or grant by the owner of the land to the public of the right of way over it: it presupposes, therefore, an intention to dedicate—an animus dedicandi, it also requires acceptance by the public. Where the intention is expressed in words or writing, the matter admits of direct proof and presents little difficulty, but more often than not, that is not the case, and it must then become a matter of inference. (Inference, how to be drawn, explained.)

As regards the length of public user the period is material only as one element from which the intention to dedicate may be inferred; there is neither a fixed minimum period which must be proved in order to justify an inference of dedication, nor a fixed maximum period which must compel such an inference. It is dedication and not user that constitutes a highway, user is merely the evidence that proves the dedication. This, no doubt, presupposes the existence of an owner capable in law, of dedicating but it does not follow that such a person must be proved to be living within the period over which actual user is established. To hold otherwise would be to confuse user, which is only evidence of dedication, with the dedication itself. If the user is sufficient to raise a presumption of dedication, the dedication may well have taken place long before the first proved act of user. So long, therefore, as dedication may be inferred form user, it is by no means necessary that the evidence of user must go back to the date of dedication. Dedication can be presumed from long user.

A finding that user was permissive negatives customary right of way and is in itself enough to dispose of case as to customary right of way. A.I.R. 1942 Cal. 505=46 C. W. N. 743=76 C. L. J. 479= I.L.R. (1942) 2 Cal. 427=202 Ind. Cas. 470.

——S. 18—Right of way—Easement enjoyed for a long time must be referred to legal origin.

A right of easement which has been enjoyed for a very long time must be referred to a legal origin and hence the owner of the servient tenement must be presumed to have granted the right to the dominant tenement. A.I.R. 1941 Pat. 260=7 B.R. 897=22 P.L.T. 699=195 Ind. Cas. 313.

——S. 18—Right of way—Easements proper and customary rights—Distinction.

A customary right such as the right to village pathway is not an easement properly so called. An easement proper belongs to a determinate person or persons in respect of his or their land. A congeries of persons, such as the inhabitants of a locality, unless incorporated as a determinate juridical person, cannot claim an easement. A customary right belongs to no individual in particular. It may be enjoyed by anyone who inhabits a particular locality for the time being, or who belongs to the particular class entitled to the benefit of the custom. Easements are, so to speak, private rights belonging to particular persons, while customary rights are public rights annexed to the place in general. A.I.R. 1938 Cal. 202=66 C.L.J. 270=175 Ind. Cas. 252.

——S. 18—Right of way—Public pathway—Existence of dominant tenement, if necessary to establish right — User of way for fixed period, if should be proved.

A right of easement is claimable on the land of another by the owner of land. It is not a personal right but it attaches to land and is exercisable over another's land. A public pathway, however, may be on another's land but the exercise of a right of passage over it does not necessarily require that the person claiming it must prove that he is the owner of some land. In other words, the existence of a dominant tenement is not necessary. User for any number of years is not necessary to establish a right to pass over the public pathway. User on the other hand, is merely an evidence of original dedication in such cases. A.I.R. 1936 Lah. 797=38 P.L.R. 500=165 Ind. Cas. 329.

——S. 18—Right of way—Infringement of public path—Special damage, whether necessary.

If a person alleges that there is a public path which has been infringed by the defendant, before the plaintiff can maintain an action for the avoidance of the infringement, special damage must be proved.

Where it is established that it is more or less a village path way wherein the residents on either side of the pathway and round about may be considered to have a right acquired by long user of passing to and fro and this right is referable to a grant or agreement on the part of the zamindar, it is not necessary to prove any special damage and the residents of the neighbourhood can maintain an action for the avoidance of the obstruction without proving any special damage. Even if a proof of special damage were necessary, a very small amount of inconvenience would entitle the plaintiff to the relief claimed. A.I.R. 1933 All. 919=149 Ind. Cas. 874 (2).

——S. 18—Right of way—Right over a person's private property — Proof by cogent evidence—Necessity of.

In the case of either the right of the members of the public at large or a limited class, such as the inhabitants of a particular village, the customary period of user of the public right of the village path, must be proved by cogent evidence where the interests claimed conflict with those of a private owner. They must be proved by such degree of evidence as is representative of either the public at large or of the particular village or the smaller community alleged to have the right of user. To call three partisan witnesses who can in no sense be said to be representative of either the larger community of the general public or the smaller community of a particular village is no evidence whatever upon which a finding of public right or village custom can be founded. A.I.R. 1934 Pat. 30=148 Ind. Cas. 498 (1).

18. Right to dam channel.

——S. 18—Right to obstruct and divert channel —Right to dam channel:—See 29 C: 100.

——S. 18—Right to obstruct and divert channel —Extent of.

A person who is entitled to put up a dam of turf and loose stones, is not necessarily entitled to substitute a tighter and stronger dam. The question in each case is the exact nature of the right which is shown by the evidence to have been acquired. 9 M.L.T. 375=9 Ind. Cas. 636.

19. Right to prayers.

——S. 18—Right to prayers—Mahomedan Law.

By custom, a Mahomedan cannot acquire any right to say prayers on the land of another, except with the other's permission, express, or implied. 9 Ind. Cas. 45 (All.).

20. Right to worship.

——S. 18—Right to worship—Mode of acquisition.

The right of going round a tree or worshipping a tree which is supposed to be the abode of a deity cannot be acquired by the inhabitants of a village merely by some people going round the tree or worshipping it. 98 Ind. Cas. 619=24 M.L.W. 691=A.I.R. 1927 Mad. 73.

——S. 18—Right to worship.

A customary right of going over a particular plot of land belonging to another for the purpose of worshipping a pipal tree and the idol of Sri Ganeshji embedded in the tree, and a tulsi chabutra, all situate on that plot of land is valid. 19 Bom 420 Dist. 61 Ind. Cas. 132=2 P.L.T. 160=6 P.L.J. 11=A.I.R. 1921 Pat. 90.

21. Tank.

——S. 18—Tank—Customary right—Essentials.

A customary right to be established must be reasonable and it must be definite or certain. A customary right to bathe in a tank can be acquired by the residents of a village, but in order to establish such a right the evidence must be clear; the enjoyment must be as of right for a long number of years and in considering the evidence regard must be had to the habits and customs of the people. 98 Ind. Cas. 619=24 M.L.W. 691=A.I.R. 1927 Mad. 73.

——S. 18—Tank — Customary right of user—Right of access—Limitation of.—A customary right to use a tank does not necessarily involve a general right of access; it may be limited to a right of access from one or more of the four sides of the tank. 20 M.L.J. 699=8 M.L.T. 399=2 Ind. Cas. 427.

22. Tarwad.

——S. 18—Tarwad—Acquisition against.

The fact that a junior member of a Malabar tarwad is either a consenting party to or was cognizant of the use of the family property in a particular way by strangers would not necessarily bind the family or the karnavan and strangers cannot acquire customary right of user against the family. 98 Ind. Cas. 619=24 M.L.W. 691=A.I.R. 1927 Mad. 73.

23. Use of 'khal'.

——S. 18—Use of a khal for fifteen years.

Where a water course (**khal**) was allowed to be used for fifteen years, **held** that the long practice and the conduct of the owner of the khal coupled with the other evidence on the record made out a sort of custom which had perfected the right, and on principles of equity, the Court would not interfere with its enjoyment. 101 P.L.R. 1909=153 P.W.R. 1909=4 Ind. Cas. 1015.

24. Use of land.

——S. 18—Use of land—Right as to—Essentials.

Evidence showing that the suit land was used for the village cattle to gather in the early morning for over sixty years and also that people used to assemble on it during festivals in the adjoining temple, is not sufficient to deprive the revenue authorities of their right to deal with property under Dharkast Rules. In order to establish right to the property, there must be, besides such user, evidence that the land in question was dedicated or set apart as a cattle stand or for any purpose connected with the temple. 115 Ind. Cas. 241=29 M.L.W. 229=56 M. L. J. 38.

——S. 18—Use of land—Limits.

A custom by which the villagers without interruption by the **malik** have been using the land for performing Ram-lilas, for putting up marriage processions, for keeping **Khalihans** and for tying cattle during the rainy season from time immemorial, is not invalid. A declaration of such right can be given. 72 Ind. Cas. 218=4 P.L.T. 223=A.I.R. 1923 Pat. 346.

——S. 18—Use of land—Customary right to hold kirtans.

No right to hold Kirtan upon another's land can be acquired as an easement.—**Semble.**—Such a right may be acquired by custom. 36 C. 615=13 C.W.N. 1002=1 Ind. Cas. 108.

——S. 19—Easement of water-power, if recognised in India.

The easement of water-power is one which is well-known to the law in India, and is referred to in the Easements Act in various illustrations. A.I.R. 1936 All. 522=1936 A. L. J. 625=1936 A.W.R. 533=163 Ind. Cas. 872.

——S. 19—Applicability.

The **chabutra** appurtenant to the house cannot be taken to have been sold along with the house when there are no means of ingress and regress from the house to the platform. 41 P.L.R. 579.

——S. 19—Applicability.

S. 19 lays down only that when the dominant heritage is transferred the easement passes to the transferee. But where no easement at all existed while the two tenements belonged to the same person, S. 19 does not apply. 6 L. L. J. 176=A.I.R. 1924 Lah. 488.

——S. 19—Severance of tenements—What passes.

On a severance of tenements easements used as of necessity or in their nature continuous pass by implication but easements used from time to time do not pass unless expressly so stated. A.I.R. 1930 Pat. 7=11 P.L.T. 637=124 Ind. Cas 385.

——S. 19—Succession—Effect on the easement.

A garden, over which an easement to enjoy it as a park, is created in favour of a community but the ownership and management of which is reserved to the owner descends in succession in the ordinary way, subject to the charge upon it. 59 Ind. Cas. 673=14 S.L.R. 132.

——S. 20—Interference with right of way—Principles applicable.

The considerations which may apply when the interference complained of has reference to the access of light and air or to support from adjoining land may not apply when the interference has reference to the use of a way over another's land. A.I.R. 1941 Mad. 176=53 M.L.W. 8=1941 M.W.N. 20=1941—1 M. L. J. 145=I.L.R. (1941) Mad. 367=1941 A.W.R. 1 Sup. =194 Ind. Cas. 180 (F.B.)

——S. 20—Light and air—Wall existing between two houses from beginning—Ancient apertures in it before other house is built, if can be closed—Agreement to treat lower part of wall as joint—If would extinguish easement of light and air through windows in upper wall.

The party, who wants the whole wall to be treated as a joint wall, must establish that there was a party wall in the beginning and that it had been subsequently raised by the other co-owner or that there was an agreement to treat the whole wall as joint. If the wall exists from the beginning and there are ancient aper-

tures in it before the other house is built, they cannot be blocked up unless there is an agreement to close them when the other house is raised, and the agreement to treat the lower part of the wall as joint would not have the effect of extinguishing the already acquired easement of light and air through the windows in the upper wall. A.I.R 1940 Bom. 153=42 Bom. L.R. 186=I.L.R. (1940) Bom. 140=187 Ind. Cas. 717.

——S. 20—Right of use of tank—Customary right of user—Right of access, limitation of.

A customary right to use a tank does not necessarily involve a general right of access; it may be limited to a right of access from one or more of the four sides of the tank. 20 M. L. J. 699=6 M.L.T. 399=2 Ind. Cas. 427.

——Ss. 20 and 22—Right of way—Contract.

An owner of a large piece of land divided it into several plots for building purposes and sold them to different persons reserving one part for himself and in each sale-deed, there was a covenant by which every purchaser bound himself to keep open a passage 15 feet wide for the common use of the other plot-holders. The defendants erected posts in the passage and reduced its width to 7 ft. In a suit by one of the other plot-holders, the lower Court applied S. 22 of the Act, considered 10 ft. width sufficient and granted a decree accordingly.

Held, an easement of way over another's land by virtue of an agreement is governed by S. 20 and not S. 22; the rights in this case were governed by the contract between the vendor and the purchaser which should be given full effect to. (English cases dealing with restrictive covenants held inapplicable to the present case where the right of way was defined both as to dimensions and direction.) 55 Bom. 138=A.I.R. 1931 Bom. 87=128 Ind. Cas. 886=32 Bom. L.R. 1425.

——S. 21—Compromise conferring right on defendant to construct bundh **on plaintiff's land**—Defendant can claim nothing more than easement to maintain **bundh**—He cannot claim adverse possession—Repairs to **bundh**, right to.

The defendant who has obtained a right to construct a **bundh** on the plaintiff's land under a compromise, cannot set up adverse possession with regard to the land. He can claim nothing more than a right of easement to maintain a **bundh** on the land. The right to repair the **bundh** being incidental to the existence of the **bundh**, must be presumed in favour of defendant. A.I.R. 1941 Pat. 260=7 B. R. 637=22 P.L.T. 699=195 Ind. Cas. 313.

——S. 21—Light and air—Nature of rights.

A right to free passages of light and air is merely a right to prevent the servient owner from causing discomfort to the dominant owner by obstruction and so the latter cannot create new rights by using his heritage for extraordinary purposes. 3 S.L.R. 36=1 Ind. Cas. 961.

——S. 21—Right of way—Purpose and not person is the test.

An easement of a right of way for the use of the sweeper can be acquired and the fact that the sweeper is a servant of the Municipality would not prevent the plaintiffs acquiring such a right. 95 Ind. Cas. 170=28 Bom. L.R. 601=A.I.R. 1926 Bom. 282.

——S.22—Applicability—Right of way—Alteration.

When a line of way is once definitely set out, neither the dominant nor the servient owner can compel the other to give or accept a different and substituted way; the provisions of S 22 of the Easements Act can only apply, when the exact way to be taken over the premises of the servient owner has not been ascertained. 67 Ind. Cas. 413=24 Bom. L. R. 437=46 Bom. 910=A.I.R. 1922 Bom. 407.

——S. 22—Applicability—Right of way—Essentials.

A right of way or other easement must be defined and not be so large as to destroy all the ordinary uses of the servient property and make it impossible that it should ever be used for any useful purpose.

A straggling right to the promiscuous use of the whole property for the purpose of driving cattle over it cannot be acquired as an easement. 60 Ind. Cas. 990=43 All. 345=19 A. L. J. 126=A.I.R. 1921 All. 206.

——S. 22—Applicability—Right of way—Exercise of right.

The owner of a private right of way is entitled to enter the way at one and the same place only and not at any other. 42 Cal. 164=20 C. L. J. 97=18 C. W. N. 1296=26 Ind. Cas. 213.

——Ss. 22 and 23—Easement for a particular purpose—Conversion.

Easement confined to a particular purpose ought not to be extended to any other. A backdoor of a house which was occasionally used by the sweepers or the ladies of the house cannot be converted into a main door to be used by males. 19 Ind. Cas. 984 (All.)

——Ss. 22 and 23—Easement—Right of access.

The existence of a customary right to use a tank for washing, bathing and taking water therefrom, does not necessarily involve a general right of access to the tank. The right may be limited to access by particular side. 6 M.L.T. 399=20 M. L. J. 699=2 Ind. Cas. 427.

——S. 22—Exercise of easement.

Easements is respect of old and new windows and spouts—Spouts do not cast additional burden on plaintiff's land—New windows may affect privacy but plaintiff cannot resist as no burden on plaintiff's land is increased. 20 Nag. L. J. 99.

——S. 22—Extent and mode of enjoyment of easement—How to be fixed.

The extent of easements such as light and air and the mode of their enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired. A.I.R. 1936 All. 517=1936 A. L. J. 712=1936 A. W. R. 525=163 Ind. Cas. 843.

——S. 22—Prescriptive right for passing surplus rain water—Defined channel:—In order to give the owner of a land a prescriptive right for passing the surplus rain water of his land over another person's land, it must be proved that the water passed through a defined channel and not in various directions through the servient tenement. 8 C. W. N. 244.

——S. 22—Right to roof—Limits.

Where defendants had acquired the right to use the roof A and B as an open space in front of the room C as an easement it cannot justify their building over that portion. 69 Ind. Cas. 406=A.I.R. 1924 Lah. 387.

——S. 22—Right to water—Increase of area—Relief.

A person entitled to water his lands from another's well does not forfeit his entire right by increasing the area to which the water would flow, and is entitled to a decree declaring his right to water the lands to which the water was already flowing. 88 Ind. Cas. 970=A.I.R. 1926 Cal. 462.

——S. 22—Right to water—Modes of drawing water at different times—Land in occupation of tenant:—The user for 20 years of the water of a tank drawn for irrigating an adjacent land gives the owner of the land a right of easement although the

modes of drawing the water were different within that period and the land be in the occupation of his tenant. 8 C. W, N. 158.

——S. 22—Scope—Directions of Court.

An order that plaintiffs can cut opening in tank bund and take necessary water and close bund afterwards is explicit and that the objection that it virtually dispossessed the defendants from the entire tank is not sound. 87 Ind. Cas. 19=41 C. L. J. 379=A. I. R. 1925 Cal. 788.

——S. 23—Blocking of water channel—Power of Court to make new outlet.

Where the defendant blocked a water channel of the plaintiff by building a wall, the Court directed the opening of another channel through the defendant's land without demolishing the wall. 13 A. L. J. 637=29 Ind. Cas. 1002.

——S. 23—Conditions of enjoyment.

A dominant owner may from time to time alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage. When a person acquires a right of easement for the outlet of water it may be of a limitted kind. He should not be allowed to increase the extent or alter the mode of enjoyment so as to cast an additional burden on the servient heritage. 97 Ind. Cas. 169=24 A. L. J. 810.

——S. 23, Illus. (b)—Eaves—Projection of, over land of another for twelve years—Nature of right acquired.

The projection of the eaves over the land of another resulting in the discharge of rain water is only an easement. Such projection does not entitle the person who so projects his eaves to acquire a right to maintain them by adverse possession. A.I.R. 1932 Bom. 224=34 Bom. L. R. 395=138 Ind. Cas. 458.

——S. 23—Increase of the burden.

Defendant who had a right to discharge water from his thatched roof to the plff.'s roof pulled down his house and built a three storied house with spouts, to discharge water on the plff.'s land. **Held**, that the burden on the plff.'s land was increased within the section. 13 A.L.J. 791=30 Ind. Cas. 941.

——S. 23—Increase of the burden—Rain water falling from eaves of thatched roof made to fall through spouts after conversion of the roof into terrace. See Easements Act (V of 1882), S. 15, Expl. 1 and S. 23. 1949 A.W.R. 460.

——S. 23—Increase of burden.

Where the plaintiff and the defendant are the owners of adjoining premises and defendant has connected his drain with that of the plaintiff with the latter's consent many years ago, the right is limited by a particular purpose and also the condition of defendant's premises at that time. If at the time when the plaintiff consented to the connection being made, the only question that arose was of waste water and rain water only but subsequently the defendant erected privies on the premises and claimed the rights to discharge the night soil from these into the plaintiff's drain without his permission, the defendant must show some foundation for the right upon the basis of some contract or irrevocable licence or upon the basis of prescription. A.I.R. 1932 Cal. 249=35 C.W.N. 963=59 Cal.260=138 Ind. Cas. 193.

——S. 23—Increase of burden.

No man can impose a new or increased restriction or burden on his neighbour by his own act and for this reason an owner of an easement cannot, by altering his dominant tenement, increase his right. The extension of the projection of a cornice beyond its original breadth and the consequent increase in the flow of rain water on the land of the servient owner are both an addition to the burden of the servient owner. 24 C.W.N. 896=32 C.L.J. 27=58 Ind. Cas. 854.

——S. 23—Increase of burden—Increase of flood through drain.

A person is not entitled to enlarge his right of easement by increasing the volume of water flowing through a drain through which he was entitled to discharge only the rain water and the ordinary waste water. 102 P.L.R. 1917=88 P.W.R. 1917=42 Ind. Cas. 284.

——S. 23—Increase of burden.

The owner of the dominant tenement may raise the height of the eaves so long as he does not throw an increased burden on the servient tenement, but the projection of the new roof should not exceed that of the old though at an increased height. If the dominant owner exceeds the right, injunction and not damages is the proper remedy. 28 Ind. Cas. 169. (Sind.)

——S. 23—Light and air — Windows— New windows at a higher level—Right to light through—Test:—Where a person opens new windows in place of old ones, but has them larger in size or at a higher level, the easement for his new windows becomes a new easement, which he can acquire only by enjoying it for the required length of time. Per **Fulton, J.**:—In a case of this sort, where the position of the window has been changed the question is whether it is the same ray which enters by the new windows as previously entered through the old window. If the position of the new window is such that the ray of light passing through it would have equally passed through the old window, then the easement which entitles the owner of the dominant estate to a free passage for that ray remains unaffected. If, on the other hand, the position of the new window is such that the rays passing through it would not have passed through the old window, then it is clear that no easement exists to secure free passage of such rays. If the position of the new window is such, in reference to the old window, that it is doubtful whether the rays passing through the two windows would have been the same, the claimant to the easement who has to establish his right must fail. The new window may be of the same size as the old window. It may admit to the room a similar quantity of light as before. The passage of that may be as little injurious to the owner of the servient tenement as the passage of the light which fell on the old window. But if the rays of light falling on the new window are different that is, if the rays, though projected, would not have entered by the old window, then it is not an old but a new easement which is being set up. 4 Bom. L.R. 34=26 B. 374.

——S. 23—Nuisance — Presumed grant of running water—Discharge of foul effluent into drain.

The discharge of foul effluent into a drain through which there might be a presumed grant of running water is not permissible in law as it imposes an over-burden on the servient tenement. A grant of flow of water does not authorise the discharge of a sewage effluent. A.I.R. 1934 Oudh

237 = 11 O.W.N. 657=10 Luck. 79= 149 Ind. Cas. 45.

——S. 23—Obstruction of easement — Right to abate.

The rights of private parties to abate the nuisance relating to the obstruction of an easement are never allowed unless the obstruction has actually become a nuisance. A.I.R. 1938 Cal. 669=I.L.R. (1938) I Cal. 680=40 Cr.L.J. 10=177 Ind. Cas. 1000.

S. 23—Rain water — Right to regulate — Burden not increased.

If the owner of the higher tenement has the right to pass on to the lower tenement all the rain-water that falls, on his land, the mere fact, that in the course of improving his tenement he carried out works of drainage or other works, the result of which is that instead of the water being allowed to flow imperceptibly to the lower tenement gets collected and is passed by an artificial channel, is the result of a natural user by the owner of the superior tenement of his own land and the works of improving and the draining by him on his land could not be regarded as any acts done on his part which would have the effect of either changing the right or increasing the burden of the obligation corresponding to the right. Conceivably, therefore, if it should be found in any case that by reason of such collecting of the water and passing it on through an artificial cutting in the bund the obligation on the servient tenement is increased in an appreciable degree or if it should be found that the damage done to the servient tenement by such artificial drainage is appreciably in excess of the damage done when the water was passed merely naturally, it would follow that the owner of the lower tenement is entitled to object to the draining of the rain-water in that manner. It is on the assumption that the obligation of the owner of the servient tenement is not changed either in quality or increased in degree that any changes by the owner of the higher tenement of his own property are allowed and regarded as not justifying any adjustment on the part of the owner of the servient tenement. 108 Ind. Cas. 205=39 M.L.T. 373= A.I.R. 1928 Mad. 52.

——S. 23—Reconstruction of house — Roshandans—Blocking of.

Reconstruction of a house by the dominant owner involving a change in the situation of the roshandans does not mean a fresh easement requiring a fresh period of twenty years for its acquisition. Hence the dominant owner is entitled to a mandatory injunction for demolishing the wall constructed by the servient owner so as not to obstruct the roshandans. 98 P.W.R. 1918=45 Ind. Cas. 985.

——Ss. 23, 28, 43—Right of way for residential purpose — Conversion of building into warehouse—Easement, whether extinguished —Increase of burden — Question of fact.

The defendants who owned a building which was used for residential purposes had a right of way to that building over a passage through the plaintiff's house. The defendants converted the building into a warehouse and the plaintiffs sued for a declaration that the defendants had no right of way over that passage and for an injunction:

Held, (i) that the case was governed by S. 23 and not by S. 43;

(ii) that the right of easement was not extinguished ipso facto by the conversion of the building into a warehouse, but the question which had to be decided was whether the new user imposed an additional burden on the plaintiffs' tenement;

(iii) that this question was essentially one of fact;

(iv) that, on the facts of the case, the lower Court was entitled to come to the conclusion that the new user imposed an additional burden on the servient tenement of the plaintiffs. A.I.R. 1931 Mad. 128=1931 M.W.N. 631=61 M.L.J. 58=34 M.L.W. 369=130 Ind. Cas. 661.

——Ss. 23, 45— Right of way for sweepers — Change of location of privy, whether extinguishes easement—Decree relating to old privy, whether executable.

The plaintiff obtained a decree against the defendant that his sweeper shall have the liberty to go through a lane belonging to the defendant in order to clear the latrine situated in the plaintiff's premises. On the motion of the defendant, the Municipality ordered the plaintiff to remove the privy further away and accordingly, the old privy was pulled down and a new one built. When the sweeper employed by the plaintiff was going to clean this privy, the defendant obstructed. The passage used by the sweeper was precisely the same as before and there was no necessity to pass over a greater portion of the defendant's land so as to increase the burden:

Held, (1) that the dominant heritage was the plaintiff's house and land to which the privy was attached and not the privy itself and the removal of the old privy and its rebuilding on a different spot did not extinguish the easement under S. 45, Easements Act;

(2) that the case fell within S. 23 as there was no increase of burden;

(3) that the decree did not become incapable of execution by the pulling down of the old privy. A.I.R. 1931 Bom. 490=33 Bom. L.R. 1114= 135 Ind. Cas. 425.

——S. 23—Right of way—Different purposes.

Under S. 23 a right of way enjoyed for agricultural purposes may be used for other purposes provided no additional burden is thereby imposed on the servient heritage. 98 Ind. Cas. 239=50 Bom. 635=28 Bom. L.R. 1158=A.I.R. 1926 Bom. 537.

——S. 23—Right of way—Occasional deviations —Restricted right.

Where the plaintiff's right of way is proved over a defined track, occasional deviation therefrom does not affect his right. The prohibition of the user of the track, during a particular season does not negative the claim of a general right of way, but is presumptive proof of a restricted right. 18 Ind. Cas. 85. (Mad.)

——S. 24—Accessory right—Right to discharge rain water.

The accessory rights mentioned in S. 24 of the Act are not intended to deprive the servient owner of his rights of property unless such a result is absolutely essential. Where a plaintiff having a right to discharge rain water from eaves on defts.' land sued for an injunction restraining him from making any use of his land which would prevent plaintiff from going upon it for all the purposes of repairing the wall of his house supporting the eaves,

etc. Held, that the plaintiff could well repair the wall and the eaves from the inside and could not be granted an injunction. 42 Bom. 529=20 Bom. L.R. 403=45 Ind. Cas. 422.

——S. 24—Adjoining house-owners—Right to go to neighbour's land to repair wall—Eaves.

Where the repair of the wall is reasonably necessary for its enjoyment the right to go to the neighbour's side of the premises to repair the wall is a necessary easement. The right does not allow going over the deft.'s roof. A person can also enter his neighbour's house or land to protect his eaves which project over the neighbour's house. 16. Ind. Cas. 893 (Mad.)

——S. 24, III, III, (d)—Easement—Public way—Dedication.

Public rights of way are not easement but arise from a dedication to the public evidenced by a deed or implied from custom and user. There can be no right of easement in favour of an indeterminate body of persons. Where the owner of lands renders a way impassable, persons having a right to use the way may deviate from it and pass over adjoining land of the owner provided the deviation is reasonable. 14 N.L.R. 78=44 Ind. Cas. 868.

——S. 24—Rights of dominant and liabilities of servient owner.

The dominant owner has a right to do everything requisite to secure to himself the fullest advantage of his servitude but thereby he should not impose any additional burden on the servient tenement. 18 P.W.R. 1917=39 Ind. Cas. 592.

——S. 24—Rights of the owner of dominant tenement.

The owner of a dominant tenement is entitled to do requisite acts to secure the fullest enjoyment of his servitude without imposing any additional burden on the servient tenement. 39 Ind. Cas. 590 (All.)

——S. 24—Right of holder of dominant tenement to do such acts in servient tenement as are necessary for full enjoyment of easement.

Even if inamdar's right to take water for irrigating the inam lands could be put no higher than an easement, he would be entitled under S. 24 to do in the servient tenement (that is, the bed of the channel) all acts necessary to secure the full enjoyment of the easement subject to the limitations indicated in that section. Such acts on the part of the inamdar cannot be said to amount to a trespass so as to entitle the Government to have an injunction restraining the inamdar from interfering with the bed of channel in any manner. A.I.R. 1937 Mad. 523=1937 M.W.N. 145=1937 2 M.L.J. 178=46 M.L.W. 748=169 Ind. Cas. 597.

——S. 24—Entire inam village irrigated by ancient channel taking off from a Government stream—Channel exhausting itself in village—Priniciple of the Urlam case is applicable and the inamdar is entitled to make what use he can of the water that comes into his village through the channel. 1936 M.W.N. 975.

——S. 24—Where the original way is blocked only in its northern portion, there is no justification for any deviation in the southern portion at a distance of over 100 feet from the orginal way. Such a diversion can hardly be considered to be "resonable." The mere fact that a road is not sufficiently wide for carts to pass over cannot entitle a person who has to pass along it to claim an easement of necessity. A.I.R. 1934 Lah. 199=149 Ind. Cas. 949 (2).

——S. 27—Right of way—Nature and Limits.

An easement like a right of way over a tenement is a right running with the land and is not a personal right. Whether it is the owner or a trespasser who is in possession, the person who claims the right of way cannot claim more than that his right of easement should not be curtailed in any way. 108 Ind. Cas. 610=A.I.R. 1928 Lah. 709.

——S. 27—Right to drop water—Alteration of course.

Where a person has acquired by grant from a Municipality a right to drop water on a public road the Municipality will be at liberty to permit another person to build a house, so that the water from plaintiff's house, instead of falling directly on the road will fall on the roof of that house and then fall into the street. 85 Ind. Cas. 608=6 L.R.A. Civ. 122=A.I.R. 1925 All. 348.

——S. 27—Right to water — Servient owner's interference—Limits.

Plaintiffs had a right to have their land irrigated by the water which passed through their land from the sluices which passed through defendant's land. The flow of the water to their land was obstructed by the channel which the defendant dug at right angles to the existing channel. The defendant was willing to construct a trough or aqueduct, which would carry the water to the plaintiffs' fields over the nala in dispute, but it was found that such construction did not give sufficient water to plaintiffs:

Held, that defendants could not be allowed to build.

The owner of the servient tenement must not so deal with the servient tenement as to render the easement incapable, or more difficult, of enjoyment by the owner of the dominant tenement. 87 Ind.Cas. 899=A.I.R. 1925 Nag. 389.

——Ss. 28, 29, 33—Damages—Principles of recovering.

In an easement case, damages may only be recovered if there has been substanial interference as described in expln. 2 to S. 33, and an injection can only be granted when compensation might be allowed under S. 33 (2), that is, both in the case of an action for damages or for an injunction simpliciter, it is necessary for the plaintiff to show conclusively that there has been substantial interference with physical comfort, etc.

Where a person altered the gabled roof of his house to a pucca flat roof and while formerly there was an established easement right to sprinkle water on the whole length of the eaves, after the alteration, the water of the whole roof was discharged through one hole on to the defendant's land:

Held, that the alteration completely destroyed the original easement and that it could not be said that there was any prescriptive right for the new condition of affairs and the burden had not been increased substantially. A.I.R. 1933 All. 492=1933 A.L.J. 1006=55 All. 711=145 Ind. Cas. 530.

——S. 28—Extent of easement.

Extent of an easement other than an easement of necessity as also the mode of its enjoyment must be fixed with reference to the purpose for which the right was acquired. 78 Ind. Cas. 563=22 A.L.J. 314=5 L.R.A. Civ. 221=A.I.R. 1924 All. 394.

——S. 28—Extent of easement:—The mere non-user of a mode cannot deprive a person of his right to enjoy the easement in that particular mode unless there was any intentional abandonment of

that particular mode, giving rise to an aggreement, express or implied, between the parties, by which the person can be said to have relinquished it. The evidence as to relinquishment must be clear and uniquivocal. 6 Bom. L.R. 287.

——S. 28—S. 28 (c)—Light and air—Interference—When actionable.

The natural right of a plaintiff is restricted to light and air coming vertically over his land. As regards lateral light and air and that falling at an angle to the vertical, that can be acquired by prescription. Even when such a right has been acquired by prescription or aggreement, the plaintiff cannot maintain a right of action unless he can show, not only that the right has been infringed but that there has been a substantial nuisance to his comfortable and beneficial occupation of the premises. A mere abstract obstruction in itself is not enough, that is to say, both things have to be proved before an action can lie; first an acquisition of the right by prescription, agreement, grant or otherwise; secondly, obstruction to the right such as amounts to nuisance. Neither will do standing by itself unless the nuisance be an actionable nuisance otherwise. So far as cases relating to smells, noise, smoke and nuisances of that kind are concerned, the nuisances which emanate from another's property do not stay on their property. They cross the boundaries of that property and pass over to plaintiff's land. In a sense, they trespass on that land and the cause of action lies because of that trespass. If the smells, or the smoke etc., could be confined to defendant's land and not travel over plaintiff's land, then no action for a nuisance would lie. A.I.R. 1945 Nag. 231=1945 N.L.J. 295=I.L.R. (1945) Nag. 948.

——Ss. 28, 33—Light and air—Interfernce with—When actionable.

An injunction cannot be granted in the case of an actual interference unless there is an actionable interference with the easement within the meaning of S. 33. The Court must always decide whether an alleged obstruction has actually caused substantial damage to the plaintiff. A.I.R. 1936 All. 517=1936 A.W.R. 525=1936 A.L.J. 712=163 Ind. Cas. 843.

See also: 117 Ind. Cas. 618=A.I.R. 1929 All. 430 following A.I.R. 1924 All. 394; 33 Mad. 327.

——S. 28—Light and air—Demolition of old building and construction of new—Effect.

When a building has been pulled down, in which there was a right of light and air as regards certain windows, and a new building is constructed on the same site, if the windows placed in the new building can be substantially identified with the windows that existed in the former building, the right to light and air will remain and the easement will not be lost. A.I.R. 1631 Nag. 80=131 Ind. Cas. 429.

——S. 28 (c)—Light and air—Actionable interference—Nuisance.

The owner or occupier of a dominant tenement in respect of which an easement of light has been acquired by prescription is entitled, not to the full amount of light enjoyed during the prescriptive period, but only to so much of it as will suffice for the ordinary purpose of habitancy or business according to the ordinary notions of mankind. There is no infringement of the right unless the obstruction amounts to a nuisance. (1907) 42 Cal. 46=18 C.W.N. 933=27 M.L.J. 117=1 L.W. 561=16 M.L.T. 204=(1914) M.W.N. 631=12 A.L.J. 1166=16 Bom. L.R. 803=20 C.L.J. 353=41 I.A. 180=24 Ind. Cas. 300 (P.C.).

——S. 28—Light and air—New doors and windows constructed—Whether defendant can obstruct old source of light and air.

The right acquired by statutory prescription is a right to the continuance of the whole or substantially the whole quantity of light which had come to the window during a period of twenty years. The fact that plaintiff created means for light to pass into the room by constructing new doorways cannot justify the defendant in obstructing the already existing source for passage of light to which plaintiff had acquired a right by prescription. 33 Mad. 327=7 M.L.T. 345=20 M.L.J. 291=(1910) M.W.N. 246=4 Ind. Cas. 425.

——Ss. 28, 35—Light and air—Right to.

The combined effect of Ss. 28 and 35 of the Easements Act is that the mere circumstance that a plaintiff has a prescriptive right to the quantity of light which has entered certain openings of his house will not give him a cause of action against a servient heritage for disturbance caused to that right, but he must prove that such disturbance had either materially interfered with his physical comfort or prevented him from carrying on his accustomed business as beneficially as he had done before. Where a plaintiff having several sources of light, does anything permanent so as to materially interfere with any one of them and to considerably diminish the light coming therefrom, his act will be treated as equivalent to a surrender of his right, and the question of material diminution of comfort must be determined as if that light still substantially exists. To determine the question of physical comfort by the light of such diminution caused by the plaintiff's own act would be to impose a greater burden on the servient heritage than it is liable to according to law. In dealing with the right to air, English decisions are not of much avail because the conditions in this country are different from those of England so far as air is concerned. In England more light is needed than here, where as more air is needed here than in England. 7 Bom. L.R. 352.

——S. 28—Light and air—Obstruction—Alteration in the plan of the building—Injunction—45 degrees rule:—No alteration in the plan of the building, either by advancing or setting back the building, will destroy the right to light and air so long as the owner of the dominant tenement can show that he is using through the new apertures in the wall of the new building the same or a substantial part of the same light which passed through the old apertures into the old building. To constitute an actionable obstruction of ancient lights, it is not enough that the light is less than before. There must be a substantial privation of light enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) prevent the plaintiff from carrying on his business as beneficially as before. In India a man who enjoyed a right to air more or less pure and free ought to be reasonably protected against any interference. In bombay a court ought to interpret a man's right to air, having regard to the recent experiences of the city and the sanitary necessities in the country where ventilation is even more necessary than light. The 45 degrees rule is a safe one to adopt in a growing and popular city like Bombay,

and people living in such cities should not expect, as a matter of right, direct or horizontal light. This rule is not peremptory; but it is only a circumstance to be considered with other circumstances. 7 Bom. L.R. 73.

——S. 28—Light and air — Obstruction — 45 degrees rule:—In cases of obstruction of light and air, the rule of 45 degrees does not afford in all cases a correct measure of relief. The question to be determined in such cases is whether the obstruction causes such a privation of light or air to the house as renders the occupation of the same uncomfortable. 6 Bom. L.R. 633=29 B. 157.

——S 28—Light and air—One of owners of joint wall erecting wall on top of joint wall and keeping ventilators in it—Right of easement in respect of such openings, if can be acquired against other co-owner.

In the case of joint property, every co-sharer has a right to use it, consistently with the rights of the other co-sharers until partition.

Where one of the owners of a joint wall erects a wall on the top of the joint wall and keeps ventilators in such erected wall, he does so consistently with the rights of the co-owner and cannot, therefore, acquire a right of easement in respect of the ventilators against the co-owner. A.I.R. 1939 Lah. 28=41 P.L.R. 267=182 Ind. Cas. 498.

——S. 28—Pasturage right—Extent.

If the grazing area is larger than that required by the persons, a proprietor may use the excess for his own purposes. The persons having grazing rights cannot prevent him from developing any excess area and using it to its best purposes. 67 Ind. Cas. 306=2 L.L.J. 44=77 P.L.R. 1922.

——S. 28—Prospect—Obstruction of view to a shop—Removal of constructions:—The defendants built a shed and put sirki screens on their own land in front of the plaintiff's shop, the view to which was obstructed on account of these constructions. Held, that the plaintiff was not entitled to have the constructions removed on the ground that the view to the shop was interrupted from the neighbouring road. 29 A. 22=(1906) A.W.N. 257=3 A.L.J. 637.

——Ss. 28 and 29—Right of way—Burden on servient tenement—When increased.

A right of way, which exists as an easement of necessity, is limited by certain incidents, such as (1) purpose, (2) time, (3) width of way, (4) persons who can pass, (5) the place from and to which they can pass and (6) the direction of the way. When there is no change in any of these incidents, by any change in the dominant tenement, it cannot be said that the burden on the servient tenement has been increased. 25 Pat. 681=227 Ind. Cas. 396=A.I.R. 1947 Pat. 266.

——S. 28—Right of way—Mode of enjoyment.

A right of way imports the right of passing in a particular line and not the right of varying it at pleasure. Therefore, the right of way appurtenant to an enclosure can be used only for the purpose of passing to and from that enclosure, and persons interested therein cannot be allowed to impose any additional burden on the servient tenement by removing the boundary wall or opening new passages from the enclosure.

If a person has a power to make a way across another person's land he must exercise his power reasonably and with due regard to the convenience of servient owner so as to avoid inflicting on him needless and unreasonable injury.

A road is not always a highway. A.I.R. 1932 Oudh. 274=9 O.W.N. 159=7 Luck. 530=137 Ind. Cas. 170.

——S. 28—Right of way—Exercise of—Limits.

While servient owners are entitled to make any use they choose of the premises provided they do not in any way interfere with the enjoyment by the dominant owner of his right of way within reasonable limits, the dominant owner entitled to the right of way cannot make an excessive user of the right much less can he act arbitrarily and in a high-handed manner so as to render beneficial enjoyment by a servient owner of his own premises impossible or fraught with many difficulties. 90 Ind. Cas. 149=26 Cr. L.J. 1493=A.I.R. 1926 Nag. 221.

——S. 28—Right of way — Heavier burden—What constitutes.

Where an easement is claimed over another's property the servient tenement should not be saddled with a heavier burden than what the plaintiff has succeeded in proving. But when a particular mode of user is not heavier than the mode of user proved, the plaintiff may be allowed to use it in that particular way, e. g., the user of a way for horses may include the right to lead smaller animals as well but not larger animals or loads. The user of a path for the passage of men, carts and palanquins, may also entitle the dominant owner to take cattle, processions and corpses along the path as the latter user does not add to the burden on the servient tenement. 65 Ind. Cas. 579 (Cal.).

——S. 28—Right of way for carts, cattle, etc. whether includes right of way for sweepers.

Right of way for persons, cattle, carts, etc., over the open ground in front of plff.'s house though established is not sufficient for claiming right of way for sweepers to remove night soil from the privies. 22 Bom. L.R. 1131=59 Ind. Cas. 426.

——S. 29—Increase of easement.

It is always open in a decree granting an injunction against a certain person when execution is taken out of that decree on the ground that that person has infringed the terms of the decree, to take as his defence that the subject-matter which formed the grounds for the mandatory injunction no longer existed and therefore it was impossible for him to infringe the terms of any decree.

A window in respect of which a right of easement existed and a mandatory injunction was granted restraining from interfering with its enjoyment was 4 feet in length and 2 feet in breadth and situated at a height of 9 to 10 feet from the ground. The window was subsequently changed to $4\frac{1}{2}$ by $2\frac{1}{2}$ feet and raised to a height of 16 feet when the house was rebuilt:

Held, that the alteration in the location and dimensions of the window was such that the old easement pertaining to the old window could not continue for the benefit of the new window. A.I.R. 1937 Lah. 839=40 P.L.R. 46.

[Reversing A.I.R. 1937 Lah. 419=39 P.L.R. 712=173 Ind. Cas. 57.]

——S. 29—Overburdening—Test.

The discharge of foul effluent into a drain through which there may be a presumed grant of running water is not permissible in law as it imposes an overburden on the servient tenement. 33 C.W.N. 189=A.I.R. 1929 Cal. 350.

——**S. 29—Projection—Beam—Construction, overhanging the projection:**—Where a person acquires the right to project a beam upon another's lands, he has no right to prevent the other from having a construction in his own land which overhangs the beam. 6 Bom. L.R. 356=28 B. 428.

——**S. 29—Riparian owners—Right to particular conditions of water for particular mill.**

Rights to particular conditions of water for a particular mill are acquired by prescription and are not natural rights.

Where, therefore, the natural rights of the plaintiffs as riparian owners or tenants are to have the use of the water in the stream and they may use such water for the purpose of running a mill and while the action of the defendants has not prevented the plaintiffs from making use of the water for the purpose of a mill, all that the action of the defendants has done is to cause a slight diminution in the efficiency of the existing mill of the plaintiffs and the plaintiffs can obviously remedy this matter by raising their mill and if necessary their dam, by a corresponding height:

Held, that it would only be if the plaintiffs had acquired by prescription an easement to use that particular mill in that particular manner, that it could be said that a case would lie for damages. The plaintiffs had not acquired any easement in regard to that particular mill. They only got the right to have a mill on the river. The action of the defendants did not prevent the plaintiffs using their natural right and as the defendants were not shown to have acted in a manner which would give rise to a claim for damages, a suit for damages could not lie. A.I.R. 1936 All. 520=1936 A L.J. 534=58 All. 981=1936 A.W.R. 507=163 Ind. Cas. 877.

——**S. 30—Partition—Right to project branches expressly conferred but right to lop off branches not reserved—Effect.**

No right of easement can be acquired in respect of a tree which gradually projects over the neighbour's land insensibly and by slow degrees and the owner of the tree has no right to prevent a person lawfully in possession of land, into or over which, its roots or branches have grown, from cutting away so much of them as project into or over his land.

Held, on facts, that by the common intention of the parties at the time of the partition and the sales, the right to project the boughs of the tree in question was expressly conferred and transferred and the defendants not having expressly reserved for themselves the right to lop off the projecting branches in the sale deed in favour of the plaintiff, they were not entitled to cut off the branches. A.I.R. 1938 Mad. 511=47 M.L.W. 324 =1938 M.W.N. 282=(1938) 1 M.L.J. 510=182 Ind. Cas. 321.

——**S. 30—Partition—Right of way.**

If two houses were common and a certain right of way belonged to the parties, the passage being common then, under the Easements Act, it must be presumed, in the absence of any express agreement between the parties, that at partition, the passage was received for common enjoyment. 36 Bom. 379=14 Bom. L.R. 418=15 Ind. Cas. 818.

——**S. 30—Passing of easement—Division—Respective rights.**

When a dominant heritage is divided between two or more persons the easement becomes annexed to each of the shares provided that such annexation is consistent with the terms of the instrument under which the division was made. But there is no presumption that it wholly passed to one of such persons unless there is a specific agreement to that effect. 73 Ind. Cas. 66=18 M. L. W. 404=1923 M. W. N. 454=A. I. R. 1923 Mad. 674.

——**S. 30—Right of way—Conveyance of parcels by same grantor.**

Where the same grantor conveys in the course of one transaction portions of his property, to several grantees, each grantee is presumed in law to take his portion subject to such rights as a right of way as are created in favour of the other grantees. "Appurtenances" when used in a conveyance include a right of way. 38 Mad. 141=(1913) M.W.N. 317=13 M.L.T. 313=24 M.L.J. 552=19 Ind. Cas. 80.

——**S. 31—Obstruction—Legality and Limit.**

Excessive user may be rendered impracticable but whole user cannot be obstructed. 33 C.W.N. 189=A.I.R. 1929 Cal. 350.

——**S. 32—Dominant owner, if can be asked to take certain order and enjoy easement in a particular way—Principles applicable.**

If the owner of a dominant tenement has acquired an easement right, he cannot be compelled to take a certain order regarding his own property in order to enable another person to commit a nuisance. The principle to be applied is that the balance of light or air left must be sufficient for comfortable occupation having regard to the ordinary notions of mankind. Mankind must mean mankind of the locality or class to which the parties belong and an ordinary habitation must mean habitation for all the members of the family. A.I.R. 1945 Cal. 438=221½ Ind. Cas. 495.

——**S. 32—Easement by grant—Servient owner cannot substitute new pathway for old.**

In the case of an easement by grant, the servient owner is not entitled to substitute a new pathway for the old one. A.I.R. 1943 Mad. 741=56 M.L.W. 521=(1943) 2 M. L. J. 519=1943 M. W. N. 767=213 Ind. Cas. 304.

——**S. 32—Suit to establish right of easement is maintainable by occupier of dominant tenement.**

A suit to establish a right of easement can be maintained by the occupier of the dominant tenement, and hence, no question as to the nature of the plaintiff's title in the estate which he occupies really arises. A.I.R. 1941 Mad. 91=(1940) 2 M.L.J. 655=1940 M.W.N. 1062=52 L.W. 610=I.L.R. (1941) Mad. 157=195 Ind. Cas. 439.

——**S. 32—Construction of wall—When amounts to an infringement.**

Where an award states that the wall of the servient owner shall not be constructed in such a way as to interfere with the rights of the dominant owner in respect of his existing constructions, the servient owner cannot construct eaves, or use the dominant owner's chabutra or do other acts infringing upon the dominant owner's rights. 6 O. W. N. 854=A.I.R. 1929 Oudh 437.

——**S. 32—Light and air**—Ancient lights—Substantial interference—Remedy:—The right of the owner of the dominant tenement is a right to the reception of light and air in a lateral direction, but to constitute an actionable obstruction, the same must amount to a nuisance. The question that has to be decided is not how much light is left in spite of the obstruction, but whether there has been such a diminution of light as to constitute an actionable nuisance. When it was urged that, although the natural light coming into the dominant tenement had been diminished, the reflected light had increased with the result that the rooms were better lighted than before, but it was admitted that if the building was raised the light coming in the building would be seriously affected:—**Held**—That the right of the dominant owner (to light) should not be made dependent

on his refraining from exercising his undoubted right of raising the height of his building; there was thus a substantial interference with his rights. 12 C.W.N. 519=35 C. 661.

——**S. 32—Light and air — Obstruction — When actionable**:—To constitute an actionable obstruction of ancient light and unrestricted flow of air, it is not enough that the light is less than before and the plaintiff enjoys less flow of air. The test is whether the obstruction complained of is a nuisance. An injunction was granted where it was found that a wall built by the defendant on his own land would, having regard to its proximity to plaintiff's godown, cause such substantial privation of light and impede the flow of air to such an extent as would prevent the plaintiffs from carrying on therein their jute business as beneficially as before. 9 C.W.N. 543.

——**S. 32—Light and air—Obstruction—Alteration** in the plan of the building—Injunction—45 degrees rule:— No alteration in the plan of the building, either by advancing or setting back the building, will destroy the right to light and air so long as the owner of the dominant tenement can show that he is using through the new apertures in the wall of the new building the same or a substantial part of the same light which passed through the old apertures into the old building. To constitute an actionable obstruction of ancient lights, it is not enough that the light is less than before.There must be a substantial privation of light enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) prevent the plaintiff from carrying on his business as beneficially as before. In India a man who enjoyed a right to air more or less pure and free ought to be reasonably protected against any interference. In Bombay a court ought to interpret a man's right to air, having regard to the recent experiences of the city and the sanitary necessities in the country where ventilation is even more necessary than light. The 45 degrees rule is a safe one to adopt in a growing and popular city like Bombay, and people living in such cities should not expect, as a matter of right, direct or horizontal light. This rule is not peremptory: but it is only a circumstance to be considered with other circumstances. 7 Bom. L.R. 73.

——**S. 32—Light and air**—Obstruction—45 degrees rule:—In cases of obstruction of light and air, the rule of 45 degrees does not afford in all cases a correct measure of relief. The question to be determined in such cases is whether the obstruction causes such a privation of light or air to the house as renders the occupation of the same uncomfortable. 6 Bom. L.R. 633: 29 B. 157.

——**S. 32—Prospect—Obstruction of view to a** shop—Removal of constructions:—The defendants built a shed and put sirki screens on their own land in front of the plaintiff's shop, the view to which was obstructed on account of these constructions. **Held,** that the plaintiff was not entitled to have the constructions removed on the ground that the view to the shop was interrupted from the neighbouring road. 29 All. 22=1906 A.W.N. 257=3 A. L. J. 637.

——**S 32 — Right to water — Reservoir fed by** surface water—Right to cut **pyne** on one's own land.

Defendant had a prescriptive right to take water for irrigation of his **mouza** from an **ahar** on the plaintiff's land. **Held,** this could not prevent the plaintiffs from cutting a **pyne** on their own land which did not interfere with the channel feeding the defendant's land. 12 C.L.J. 579=14 C.W.N. 825=6 Ind. Cas. 277.

——**S. 32—Right to water—User of—Modes of** drawing water at different times—Land in occupation of tenant:—The user for 20 years of the water of a tank drawn for irrigating an adjacent land gives the owner of the land a right of easement although the modes of drawing the water were different within that period and the owner of the land has a right to sue even if the land be in the occupation of his tenant. 8 C.W.N. 158.

——**S. 33.**

Synopsis.

1. **Disturbance of easement.**
2. **Diversion of water.**
3. **Forum.**
4. **Injunction.**
5. **Landlord not in occupation.**
6. **Obstruction by servient owner.**
7. **Obstruction to light and air.**
8. **Obstruction to passage by construction.**
9. **Parties to suit.**
10. **Percolating water—Right to.**
11. **Right to sue.**
12. **Substantial damage.**
13. **Upper owner appropriating surface water.**

1. Disturbance of easement.

——**Ss. 33 and 35—Disturbance of easement—Remedy.**

Where an easement has been disturbed, plaintiff is entitled to an injunction rather than damages. He is not entitled to an injunction except in such cases where he would be entitled to recover damages under Chapter IX of the Act. S. 33 allows compensation to be recovered provided that the disturbance has actually caused a substantial damage to the plff. as explained in that section. **De minimus Non-Curat lex.**—The law does not concern itself with a disturbance which is trivial or immaterial. Where the plff. comes into Court at once, when the disturbance is threatened and the deft. completes his structures pending the suit, he does so at his own peril. 13 A.L. J. 385=28 Ind. Cas. 962,

2. Diversion of water.

——**S. 33—Diversion of water.**

Where the plff. has a right to pass his rain and sewage water across the deft.'s land to the public drain, the diversion of the old route taken by the water in former days and passing it by another route does not constitute an obstruction to the exercise of of plff.'s right. 13 A.L.J. 821=30 Ind. Cas. 508.

3. Forum.

——**S. 33—Forum—Right of easement operating** in British India in favour of land situate in foreign State—Suit to prevent injury to such right—Forum.

An action can be maintained to prevent an injury to a right of easement operating in one State in favour of land situate in another State by proceeding in the Court having jurisdiction over the land upon which the right of easement operates.

A suit brought against a defendant residing in British India to protect a right of easement which, though appurtenant to property in a foreign State has a local existence only in British India; seeking an injunction the operation of which is only over property in British India and which affects the person of the defendant who resides in British India, must be regarded essentially as one to establish a right to immovable property in British India and to protect that right by an injunction. A right of easement is itself immovable property. That right restricts the user of other immovable property and the mere fact that it operates in favour of land situate outside the

jurisdiction cannot prevent the Court having jurisdiction over the property in respect of which an injunction is sought from deciding whether or not that injunction is to be granted. Even if such a suit is to be regarded as one to establish a foreign title, the Courts in British India would have jurisdiction on the ground that it is a suit to establish the existence of an equity which the plaintiff has a right to demand as against the defendant. A Court in a foreign State cannot, however, entertain a suit for the issue of an injunction in respect of that right against a defendant risiding in British India. Not only would a decree for such an injunction be futile and unenforceable but it would, in fact be a decree for the protection of immovable property situate in another state. A.I.R. 1941 Mad. 91=(1940) 2 M.L.J. 655=52 L.W. 610=1940 M.W.N. 1062=I.L.R. (1941) Mad. 157=195 Ind. Cas. 439.

4. Injunction.

——S. 33—Injunction—Right to.

The grant of an injunction under the Easements Act is within the discretion of the Court. Hence in case where one party having absolutely no right to interfere with the land and dhar belonging to another party, interferes with the same, the Court should grant an injunction against the party interfering as pecuniary compensation cannot be regarded as adequate relief in the absence of a standard to assess the damage caused and a decree with a declaration without sanction to enforce it would be a mere paper decree. A.I.R. 1945 Nag. 106=1945 N.L.J. 80=I.L.R. (1945) Nag. 273.

——Ss. 33, 35, 42— Injunction — Easement by prescription of pankh—Servient owner cutting it—Suit for injunction.

Where the plaintiff enjoyed an easement in respect of his pankh (weather-board) projecting from the side wall of the plaintiff's house over defendants' land for more than 20 years, and the defendants cut the pankh and raised his house, and the plaintiff claimed injunction:

Held, that although the damage caused was substantial so as to give the plaintiff a right of suit under S. 33, Easements Act, the injury caused was not serious. The plaintiff was entitled to nominal damages and not injunction.

Held, further, that the measure of damages, strictly speaking, would be the difference between the value of the plaintiff's house with the easement and its value without it, but considering that the difference would not be considerable, the damages to be awarded would be, in a sense, nominal but not contemptuous.

Held, also, that the easement in respect of the pankh was not extinguished under S. 42. A.I.R. 1936 Bom. 219=38 Bom.L.R. 264=163 Ind. Cas 293.

——S. 33—Injunction—Conditions.

No injunction should be granted to prevent obstruction to an easement unless the alleged obstruction causes such a diminution of light as to constitute a nuisance. There must be substantial privation of light enough to render the occupation uncomfortable according to the ordinary notions of mankind. 96 Ind. Cas. 546=9 N.L.J. 136=A.I.R. 1926 Nag. 474.

——S. 33—Injunction—Nuisance to be proved.

The Court ought not to grant an injunction on the ground of nuisance unless the nuisance which is a question of fact is proved. 77 Ind. Cas 412=A.I.R. 1923 Bom. 281.

——S. 33—Injunction—Suit for mandatory injunction asking defendant to demolish his house so as not to block the windows of plaintiff's house—Damages, if can be claimed.

Held, that the plaintiff would not be entitled to damages unless he was able to show that he was prevented by the act of the defendant from getting the quantity of light or air which is required for the ordinary purposes of inhabitancy or business as the case may be. The Court in such cases, can take into consideration other sources of light. The fact that there has been some diminution of light is not sufficient to justify an award of damages or relief by injunction. A.I.R. 1934 Lah. 240=15 Lah. 320=35 P.L.R. 292=147 Ind. Cas. 640.

5. Landlord not in occupation.

——S. 33—Landlord not in occupation—Right to relief.

Where a landlord is not himself in occupation of any premises affected by interference with easements of light and air connected with those premises, he is not entitled to relief unless he proves that by reason of the interference with the easements of light and air enjoyed by those premises, he has been damnified. A.I.R. 1943 Sind 17=I.L.R. (1942) Kar. 306=207 Ind. Cas. 83.

6. Obstruction by servient owner.

——S. 33—Obstruction by servient owner—When actionable.

There is no actionable wrong unless there is a material interference with the physical comfort of the plaintiff or other substantial damage. 33 M. 327 and **Coll's case** (1904) A. C. 179, Foll. If, in spite of an obstruction being created by the servient owner, the same quantity of light still penetrates the ancient windows of a dominant **owner** the latter has no remedy in equity. 9 S.L.R. 101=33 Ind. Cas. 615.

7. Obstruction to light and air.

——S. 33—Obstruction to light and air—Proof of damage—Necessity.

Where relief is claimed against interference of the prescriptive right to the passage of light and air to certain windows, it would be enough for the plaintiff to show that his right has in fact been interfered with. He is not obliged to go further and show that he has suffered actual damage thereby. A.I.R. 1950 Ajmer 67.

——S. 33—Obstruction to light and air—Essentials to be proved by plaintiff—Suit to restrain.

In a suit for disturbance of an easement of light and air, dominant owner must show that substantial damage amounting to nuisance had been suffered by him. In order to establish substantial damage, the plaintiff must prove material diminution in the value of his heritage or material interference with his physical comfort which could be ascribed to the interruption of the free passage of light and air. The state of the property at the time of the alleged disturbance of the easement has to be looked to, not as it was before or as it might be at a future date.

Tenants who were in actual occupation of the premises regarded the windows of the dominant tenement as wholly useless. They preferred to have them bricked up rather than to take advantage of them as an amenity for the use of light and air. The light and air available to these premises, such as they were, was regarded as amply sufficient for their purpose. Subsequently, by the construction of a wall by the Municipality, these windows were blocked:

Held, that no substantial damage had been shown to result to the dominant owner as a result of the disturbance alleged, as required under S. 33 of the

Act. A.I.R. 1941 Sind 211=I.L.R. (1941) Kar. 381=198 Ind. Cas. 418.

——**S. 33—Obstruction to light and air — Suit to restrain**—Matters to be considered.

The mere fact that the plaintiff possesses a prescriptive easement of light and air is not by itself sufficient to justify the grant of an injunction but it is further necessary to show that the obstruction complained of amounts to an 'actionable nuisance.'

Where the deprivation of light and air is very substantial, the fact that the plaintiff can by making structural alterations in his building arrange to receive reflected light into his rooms is not to be taken into consideration in a matter of this kind. A.I.R. 1933 Lah. 29=33 P.L.R. 1015=13 Lah. 806=140 Ind. Cas. 238.

——**S. 33—Obstruction to light and air—Suit to restrain.**

In an action for infringement of the right of easement to light and air, the law takes no notice of an obstruction which has its origin in the caprice or sentiment of the aggrieved party. The law also does not concern itself with an obstruction which is trivial or immaterial. The act complained of must have caused substantial damage by any obstruction which materially affects the comfortable or beneficial use or enjoyment of the dominant tenement or lessens its selling or letting value. A.I.R. 1932 Cal. 113=53 C.L.J. 604=133 Ind. Cas. 214.

——**S. 33—Obstruction to light and air—Test of interference.**

The test of interference of the right to light and air is whether the obstruction amounts to a nuisance. 23 Ind. Cas. 959 (Cal.).

8. Obstruction to passage by construction.

——**S. 33—Obstruction to passage by constructions—Relief.**

Where a person obstructs a passage by building certain constructions on it and the person enjoying the easement of the passage has served a notice on the former but has not followed it up by a suit or a temporary injunction, the latter is not entitled to specific relief by demolition but to pecuniary damages only specially when there is a perfectly good passage on the other side which involves only short detour to him. A.I.R. 1939 Lah. 339=41 P.L.R. 224=186 Ind. Cas. 311.

9. Parties to suit.

——**S. 33—Parties to suit.**

There is no authority for the view that, where an easement is claimed, all persons interested in the servient tenement are always te be regarded as necessary parties. The general rule is that all owners of the servient tenement, as regards which there is a cause of action and over which the easement is claimed, should be made parties. Persons having an interest entitling them to present possession of the servient tenement should, therefore, be made parties. A.I.R. 1933 Cal. 882=60 Cal. 1072=149 Ind. Cas. 91.

——**S. 33—Parties to suit.**

A decree based on an easement cannot be passed when all the servient owners are not parties. 14 C.W.N. 15=5 Ind. Cas. 23.

10. Percolating water—Right to.

——**Ss. 33, 7—Percolating water—Right to.**

Per **Pandalai J.**—Though there is no ownership to percolating water till it reaches a defined channel not even of the owner of soil under which it percolates and though there is, therefore, no infringement of any right of property by appropriating such percolating water, yet it is possible for an owner to be guilty of a breach of contract if by appropriating underground percolating water from his land, he causes diminution of a supply which he is obliged by law to maintain. A.I.R. 1931 Mad. 284=33 M.I..W. 681=61 M.L. J. 563=54 Mad. 793=133 Ind. Cas. 507.

11. Right to sue.

——**S. 33—Right to sue—Actual damage if essential.**

Where an owner of a house has been enjoying free light and air through certain windows for over fifty years and another person has, by putting a wall in front of the windows, blocked them, the owner of the house has a cause of action against such other persons even if his action has not caused actual damage to the plaintiff. A.I.R. 1940 Mad. 952=(1940) 2 M.L.J. 381=52 M.L.W. 383=1940 M.W.N. 914=191 Ind. Cas. 832.

——**S. 33—Right to sue—Special damage.**

Where a way over which a private right, such as the right of persons in the neighbourhood to pass and repass is claimed, is obstructed, no special damage need be proved to enable the person obstructed to maintain a suit to remove the obstruction. 6 C.W.N. 197.

——**S. 33—Right to sue—Person interested in dominant tenement in reversion or remainder.**

Any person entitled to the possession of the dominant tenement may sue in respect of an interference with an easement appurtenant to that tenement. If the wrong done be such as to involve a permanent injury to the dominant tenement or the interference be such that unless some step be taken, that interference will operate as a denial of right, a person interested in the dominant tenement in reversion or remainder may sue in respect of the interference with the easement. In such cases, both the person in possession and the person in remainder or reversion may recover damages for their respective losses. But in the absence of these prejudicial elements, a person in reversion or remainder cannot sue. A.I.R. 1943 Sind 17=I.L.R. (1942) Kar. 306=207 Ind. Cas. 83.

——**Ss. 33, 32 and 35—Right to sue servient tenement for disturbance of its rights.**

The owner of a dominant tenement who had acquired a prescriptive right to the use of light and air through certain defined apertures can insist on the preservation to him of only such quantities of light and air as might be reasonably required for comfortable occupation. He is not entitled to the excess, even if he had enjoyed it in the past. If there is an infringement, he can sue the person guilty thereof only if the diminution amounted to an actionable nuisance. A.I.R. 1945 Cal. 438=221 Ind. Cas. 495.

——**S. 33—Right to sue.**

To give a right of suit there must be substantial infringement. 97 Ind. Cas. 500=A.I.R. 1926 All. 764.

12. Substantial damage.

——**S. 33—"Substantial Damage."**

What would be a substantial "damage" within the meaning of S. 33 in the case of an inhabitant of an open area, need not, necessarily, be a substantial damage to a person accustomed to living in a congested area. 97 Ind. Cas. 500=A.I.R. 1926 All. 764.

——**S. 33—"Substantial damage."**

Each case of disturbance of light and air must be decided on its own facts. Under Ss. 33 and 35 no damage is substantial unless it materially diminishes the value of the dominant heritage and interferes

materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he might have done prior to the disturbance. 78 Ind. Cas. 563=22 A. L. J. 314=5 L.R.A. Civ. 221=A.I.R. 1924 All. 394.

——S. 33—**Substantial damage—Physical comfort.**

In order that an injunction may issue to prevent a disturbance of easement there must be an apprehension of something more than mere obstruction. The expression 'physical comfort' does not admit of precise definition; but it is sufficiently exact when applied as a test to a given state of things to allow the ordinary reasonable man to arrive at a practical determination. A man's physical comfort in relation to the access of light and air to his house at any particular time depends upon the conditions then actually obtaining regardless of how these conditions came into being or when they may cease; it is a present fact uninfluenced by past history or future fate; hence, for the purpose of applying the test of the plaintiff's physical comfort, we must look to the state of their property as it is, not as it was or as it may be. 7 Bom. L R. 825=30 B. 319.

——S. 33 — **Substantial interference** — Reflected light—Mandatory injunction, refusal of—Delay—Damages:—The right of the owner of the dominant tenement is a right to the reception of light and air in a lateral direction, but to constitute an actionable obstruction, the same must amount to a nuisance. The question that has to be decided is not how much light it left in spite of the obstruction, but whether there has been such diminution of light as to constitute an actionable nuisance. When it was urged that, although the natural light coming into the dominant tenement had been diminished, the reflected light had increased with the result that the rooms were better lighted than before, but it was admitted that if the building was raised the light coming in the building would be seriously affected: **Held** — That the right of the dominant owner (to light) should not be made dependent on his refraining from exercising his undoubted right of raising the height of his building; there was thus a substantial interference with his rights. 12 C.W.N. 519=35 C. 661.

13. Upper owner appropriating surface water.

——S. 33—**Upper owner appropriating surface water—Remedy.**

Artificial stream of water caused by owner of land on higher level flowing from his land to that lying on lower level—Water so flowing not confined in channel belonging to owner of upper land:

Held, that the owner of lower land can appropriate such water to his own use—Upper owner cannot claim compensation for it. A.I.R. 1940 Mad. 86=50 M.L.W. 662=1939 M.W.N. 1018.

——S. 34—**Right to support**—Suit for damages on ground of withdrawal of—Essentials to be proved.

As regards the right to support is concerned, if a person proves that owing to an attempted withdrawal of support, there is danger or apprehension of injury, he may, under certain circumstances, be entitled to an injunction. But if damages are claimed, the right to support must be shown to have been infringed and this infringement takes place as soon as and not until damage is sustained in consequence of the withdrawal of the support. A relation as between cause and effect will have to be established before a decree for damages may be made. A.I.R. 1936 Cal. 37=61 C. L. J. 503=160 Ind. Cas. 904.

——S. 35 **Synopsis.**

1. Grazing rights.
2. Injunction.
3. Interpretation.
4. Light and air.
5. Party wall.
6. Right of privacy.
7. Right of way.
8. Right to discharge water.
9. Right to open windows.
10. Right to make openings in wall facing street.
11. Right to support.

1. Grazing rights.

——S. 35—**Grazing right—Limits and remedy.**

Where grazing rights are enjoyed by the plaintiffs in the **shamilat deh** wherein the defendants have proprietary rights and are entitled to cultivate the lands, the plaintiffs are entitled to have sufficient pasturage left for the use of their cattle and it should be stated in the decree that the defendant's right of cultivation will extend only to so much of the land as will leave plaintiffs a sufficient area for grazing purposes. The plaintiffs are also entitled to injunction restraining defendants from interfering with their rights. 92 Ind. Cas. 403=6 L. L. J. 336=A.I.R. 1925 Lah. 216.

2. Injunction.

——S. 35—**Injunction—Nature.**

An injunction is only an alternative within the discretion of the Court and is not an independent form of relief. 117 Ind. Cas. 618=A.I.R. 1929 All. 430.

——S. 35—**Injunction—Conditions.**

When injunction is asked for to restrain the threatened disturbance of an easement, the question for determination is whether the threatened disturbance of the easement would amount to a nuisance. A mere invasion of plaintiff's right of privacy is not sufficient to entitle him to an injunction.

There must be a threat of disturbance sufficient to cause substantial damage to the plaintiff. or in other words, it must amount to a nuisance, which in law implies substantial damage. The damage must not be merely sentimental or trifling: but in considering whether the property of the plaintiff is in fact injured or his comfort or convenience in fact materially interfered with, by an alleged nuisance, regard must be had to the character of the neighbourhood. 66 Ind. Cas. 833=16 S.L.R. 17=A.I.R. 1921 Sind. 155.

3. Interpretation.

——S. 35—**Interpretation.**

The word "when" in S. 35 (**a**) must be construed to mean "when and where" because it would be useless to prescribe that an injunction could be granted when damages can be claimed under S. 33, if damages under S. 33 could not be claimed. 117 Ind. Cas. 618=A.I.R. 1929 All. 430.

4. Light and air.

——S. 35—**Light and air**—Nature of right of dominant owner—Whether he can claim compensation by way of injunction or otherwise.

The owner of the dominant heritage has no absolute right to the access of light and air through windows and apertures. The owner of the dominant heritage is not entitled to compensation by way of injunction or otherwise for the disturbance of an easement unless he has sustained substantial damage; that substantial damage must be a diminution of the value of the dominant heritage or of the utility thereof, material interference with the physical comfort of persons using the dominant heritage, a material interference with the use of the dominant heritage in as beneficial a manner as it had been

used before such interference. An owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling house, if it is a dwelling house, or for the beneficial use and occupation of the house if it is a ware-house, a shop, or other place of business. To constitute an infringement of an easement of light and air, there must be a substantial privation of light and air, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before. A.I.R. 1939 Sind. 39=I.L.R. (1942) Kar. 255=179 Ind. Cas. 884.

——**S. 35—Light and air**—Plaintiff seeking injunction to restrain defendant—Court when can order enquiry as to damages although refusing injunction.

In a suit relating to an easement of light and air, restraining the defendant from interfering with the plaintiff's right, in a proper case, the Court can order an inquiry as to damages while refusing an injunction. But where no damage has been caused to the plaintiff, no such enquiry need be ordered. A.I.R. 1939 Sind. 39=I.L.R. (1942) Kar. 225=179 Ind. Cas. 884.

——**S. 35—Light and air**—Injunction—Disturbance of easement should materially affect enjoyment of building.

Even though a right of easement of light and air is established, a plaintiff is not entitled to an injunction unless the disturbance of his easement appreciably and materially affects his enjoyment of the building in respect of which the easement is claimed. A.I.R. 1938 Sind. 37=173 Ind. Cas. 380.

——**S. 35—Light and air**—Injunction to remove obstruction—Considerations.

Where injunction is sought for interference of light, light acquired by grant or prescription, is to be taken into account. Light which the plaintiff was only in the process of acquiring by prescription should not be taken into account. In considering the sufficiency of the light, the locality and the light coming from other quarters should be considered. A.I.R. 1936=Lah. 792=17 L. 599=38 P.L.R. 1003=165 Ind. Cas. 291.

[A.I.R. 1935 Lah. 865=159 Ind. Cas. 732, Reversed]

——S. 35—Light and air—Right to—Dominant owner, when entitled to mandatory injunction.

The owner of the dominant tenement is not entitled to a mandatory injunction directing the owner of the servient tenement to demolish his house sufficiently to unblock certain windows in order to give more light to the former, unless he can show that he has suffered substantial damage which is defined as any act likely to injure the plaintiff by materially diminishing the value of the dominant heritage or interfering materially with the physical comfort of the plaintiff or preventing him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

A mandatory injunction should not be granted if the invasion of the right is such that pecuniary compensation would afford adequate relief. A.I.R. 1936 Nag. 274=165 Ind. Cas. 94.

——S. 35—Light and air—Congested localities—Test of infringement—Granting of injunction—Discretion of Court.

In a congested locality in a town, people cannot expect as much light and air as they would do in more open localities and the test to be applied where an action for infringement of right to light and air by the erection of a wall is brought, is whether the quantity of light and air that would be left if the proposed wall is built would not be enough for the comfortable use and enjoyment of the plaintiff's house according to the ordinary requirements of people who live in the locality.

The word 'disturb' in S. 35 of the Easements Act, means illegal obstruction, i. e., an obstruction in respect of which a suit would lie, and before an injunction is granted, there must be proof of a civil wrong, in other words, the alleged infringement must amount to a nuisance. It is not enough that the quantity of light and air has been diminished.

Where the lower Court has refused to grant an injunction its order cannot be set aside merely because the alleged disturbance amounts to a nuisance, as the granting of injunction is a matter of discretion. A.I.R 1935 Mad. 870=159 Ind. Cas. 888.

——S. 35—Light and air—Injunction—Suit instituted before commencement of building by defendant—Application for temporary injunction—Under taking by defendant to demolish, if found to obstruct—Second appeal.

Held, that the defendant could not at the stage of second appeal, say that the injunction should not be granted and that the plaintiff should be merely compensated for the injury done to him by awarding him pecuniary damages as the defendant erected the building with his eyes open and hence must take the consequences. A.I.R. 1935 Lah. 937=157 Ind. Cas. 871.

——S. 35—Light and air—Diminution in respect of staircase and deorhi—Whether can amount to nuisance.

A staircase and a **deorhi** are both important portions of a building which is used as a human habitation and any appreciable diminution of light and air in either of them would affect the inhabitants injuriously and amount to a nuisance. The law laid down in 41 I. A. 180=2 M L. J. 117 (P. C.). applies to a staircase and a **deorhi** as well. A.I.R. 1935 Lah. 937=157 Ind. Cas. 871.

——S. 35—Light and air—Disturbance of right to—Remedies—Damages or injunction.

The question whether an injunction shall issue or whether the plaintiff must be content with an award of damages must depend on the circumstances of each particular case. If it is clear that damages will afford adequate relief to the injured party and the defendant has not been guilty of any high-handed action, or unneighbourly conduct, an award in damages is the appropriate remedy. This does not mean that a person should, for a monetary payment, be compelled to surrender his property or be deprived to a large extent of the beneficial use of it, but if the property is still substantially useful to him, a depreciation in value can be met by a decree for damages. Further, it is clear that a person entitled to an easement of light and air cannot be compelled to reconstruct his building to suit the convenience of a wrong-doer. There is no adequate substitute for a deficient supply of daylight.

It would be a negation of justice to require a person to demolish his property and re-construct it in order that he might escape from the consequence of a gross infringement of his rights.

Where it appears that there is a substantial interference with the light and that the defendants had acted in an unneighbourly spirit and unfairly, a mandatory injunction could be granted. A.I.R. 1933 Rang. 351=150 Ind. Cas. 252 (2).

——S. 35—Light and air—Relief — Substantial damage necessary.

An injunction to restrain the disturbance of an easement of light can only be granted where sub-

stantial damage is proved to have been caused. 117 Ind. Cas. 618=A.I.R. 1929 All. 430.

——S. 35—Light and air—Disturbance of right to—Remedy—Discretion of Court—Considerations.

To Courts governed by the Specific Relief Act, the question of injunction or no injunction presents itself in a different light to what it does to the English Courts and that to Courts subject to the Specific Relief Act the English decisions have no application. In India the Court has a discretion, it may—**not shall**—issue an injunction where the injury is such that pecuniary compensation would not afford adequate relief. The good sense of Judges might be relied upon for adequately protecting right to light on the one hand and freedom from unnecessary burdens on the other. There must be consideration for both sides in all these controversies. 87 Ind. Cas. 800=3 Rang. 230=A.I.R. 1925 Rang. 327.

——S. 35—Light and air—Right of the easement—Extent of.

It is only substantial privation of light enough to make the occupation of the house uncomfortable, according to the ordinary notions of mankind which gives rise to an actionable claim. In the case of business it is necessary that the plaintiff should be prevented from carrying on his business as beneficially as before. The fact that light received has become less, gives no right. The dominant owner acquires by prescription so much light as is sufficient for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind with reference to the locality and surroundings concerend and the amount received during the period of prescription period is immaterial. Where the raising of a compound wall makes the habitation of a neighbour's room uncomfortable, so much of wall as produces this effect will be removed. 57 Ind. Cas. 706 (Cal.).

——S. 35—Light and air — Infringement—What amounts to.

The owner of dominant tenement is entitled to so much light through his ancient windows as is required for ordinary purposes of inhabitancy or business and there is no infringement of the easement if the act complained of is not a nuisance. 42 Cal. 46=18 C.W.N. 933=41 I.A. 180=27 M.L.J. 117=1 L.W. 561=16 M.L.T. 204=(1914) M.W.N. 631=12 A.L.J. 1166=16 Bom. L.R. 803=20 C.L.J. 353=24 Ind. Cas. 300 (P.C.).

——S. 35—Light and air—Damages.

When by the closing of certain ventilators in a house a thorough draft for the house and effective ventilation is not allowed, the injury is so serious that the house will be substantially useless. In India the right of air is more important than the right to light; damages will be awarded when the injury is not detrimental to the existence and use of the property. 6 S.L.R. 255=19 Ind. Cas. 843.

——S. 35—Light and air—Obstruction—Test of actionable Nuisance.

In a suit for removal of an obstruction to light, the question to be considered is that the owner of the dominant tenement is entitled to a certain quantity of light and air sufficient for puposes of habitancy or business of the tenement and that an obstruction neither lessening the selling value of the house nor affecting the comfort and convenience of the occupier is not an actionable nuisance. 20 P.W.R. 1909=8 P.R. 1909=33 P.L.R. 1909=1 Ind. Cas. 441.

——S. 35—Light and air—Injunction—'Quia timet action:—There are two necessary ingredients for a **quia timet** action. There must, if an actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will be very substantial or irreparable. 9 Bom. L.R. 912=32 B. 146.

5. Party wall.

—S. 35—Party wall—Rights of the two neighbours inter se—Construction by one of them on half of the width of the wall—If ouster.

A party wall of which the two adjoining owners are tenants-in-common cannot be treated as a wall divided longitudinally into two strips, one belonging to each of the owners. One of them is, therefore, entitled to the use of the whole width of the top of the wall subject to a similar right of the other and a construction by which one of them encroaches upon a width of 14 inches out of a width of 21 inches is an ouster in so far as the width occupied by the other is concerned and the latter is entitled to perpetual injunction. 37 P.L.R. 120=153 Ind. Cas. 87.

6. Right of privacy.

——Ss. 35 and 33—Right of privacy—Disturbance—Relief.

A plaintiff cannot be granted any relief in a case where there has been no fresh invasion of his right of privacy but merely a more restricted view has been brought about by an alteration in the house of the defendant and by this restricted view, a suspicion has been created in the mind of the plaintiff that some one might, unobserved, look into that part of his house which was always open to the same view. A.I.R. 1945 Oudh. 308=1945 O.W.N. (C.C.) 313=1945 A.W.R. (C.C.) 216=20 Luck. 575=222 Ind. Cas. 347.

7. Right of way.

——S. 35—Right of way—Inconvenience.

That inconvenience to any particular individual does not justify restriction of right of way has been fully established. 2 Lah. L.J. 499.

8. Right to discharge water.

——S. 35—Right to discharge water on land—Person claiming to be owner of land—If prevented from establishing right to easement.

Where, in a suit to restrain the defendants from allowing the water from a **mori** and spouts on the defendants' building to enter upon the plaintiff's open site, the defendants maintain that they were the owners of the vacant land on which the water was discharged, and alternatively they claim an easement to discharge water through the **mori** and the spouts over this land, assuming that the land was of the plaintiff and the only issue framed in the suit is as to easement, then, the mere setting up of a claim of ownership over the land does not prevent the defendants from establishing a right to easement. A.I.R. 1939 Bom. 149=41 Bom. L.R. 168=I.L.R. (1939) Bom. 140=183 Ind. Cas. 139.

9. Right to open windows.

——S. 35—Right to open windows—Raising of proof.

The right to open and shut widows and shutters into adjoining land can be acquired as an easement. The owner of such an easement is entitled to restrain the servient owner by an injunction from interfering with his rights of easement by erecting a wall or a building close to the boundaries. The Court could issue a mandatory injunction directing defendant to lower the roof of his house so as to enable plaintiff to shut and open the window freely. 7 L.W. 332=45 Ind. Cas. 435.

10. Right to make openings in wall facing street.

——S. 35—Right to make openings in wall facing street.

If a street, although a private property of a person, is accessible to the public, any one has a right to make openings in his own wall facing the street and the owner of the street, therefore, cannot obtain an injunction restraining a person making such an opening. A.I.R. 1938 Lah. 846=179 Ind. Cas. 762.

11. Right to support.

——S. 35—Right to support—Infringement of right—Actual damage, if essential.

The owner of land has a right to support from the adjoining soil but this right is not a right to have the adjoining soil remain in its natural state but a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support.

Where, however, an act threatening danger to a person's land is such that injury will inevitably follow, a court may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before institution of suit. A.I.R. 1933 Rang. 18=11 R. 47=143 Ind. Cas. 292.

——S. 35—Right to lateral support by adjacent land—Granting of injunction—Occurrence of actual damage, if necessary.

Every landowner has a right to the support of his land in its natural state, and this right is a right of property and not an easement.

When the owner of a piece of land does anything in his own land so as to let land adjacent to his own slip or go down or subside, the Court will interfere by injunction to prevent irreparable damage to such land, even if no actual damage is sustained. A.I.R. 1932 Cal. 542=59 C. 363=138 Ind. Cas. 667.

——Ss. 36 and 24—Removal of obstruction.

It cannot be said that a person can abate a nuisance with a **bona fide** intention. A dominant owner cannot himself abate a wrongful obstruction of an easement. 61 M.L.W. 387 (1)=1948 M.W.N. 353 (1) =A. I. R. 1948 Mad. 477=49 Cr. L. J. 716=(1948) 1 M.L. J. 395.

——S. 36—Removal of obstruction.

A person is not justified in taking the law in his own hands and removing the wrongful obstruction of an easement contrary to the provisions of S. 36 of the Easements Act. 101 Ind. Cas. 604=29 Bom. L.R. 484 =28 Cr.L.J. 476=51 Bom. 487=8 A.I.Cr.R. 72=A.I.R. 1927 Bom. 363.

——S. 38—Continuous Easement — Cesser of enjoyment.

To disentitle a dominant owner to an easement on the ground of non-user, the permanent alteration in the dominant heritage must be of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future. 25 Ind. Cas. 383 (Mad.)

——S. 38—Implied release—Non-user of prescriptive right.

Two lands of the same owner were sold to two different persons and the sale deed to plaintiffs predecessor provided that "the used water and rain water of the site sold should be made to flow to the street through the sluice to be constructed in the compound wall opposite to the passage." The right granted was never enjoyed nor was it obstructed by the servient owner till within three years before suit. In an action by the plaintiff to restrain the defendant from obstructing the flow of drain water from his land on the defendant's land, **Held** that the mere non-exercise of the prescriptive right did not amount to an implied release of the right within S. 38 of the Act. 34 Mad. 487=(1910) M. W. N. 571=8 M. L. T. 292=7 Ind. Cas. 575.

——S. 38—Light and air—Agreement by one of co-owners.

An agreement by one of several co-owners of a dominant tenement to release an easement is not effectful against the other co-owners. 6 S.L.R. 265= 19 Ind. Cas. 908.

——S. 38—Light and air—Extinguishment.

The easement of light and air falls within the definition of immovable property and can be extinguished by the dominant owner releasing it, expressly or impliedly, to the servient owner. 12 C.W.N. 969=35 C. 889.

——S. 38—Release—Construction.

Where the eastern wall of **A**'s house contained ventilators which **A** was enjoying for more than 20 years but in 1902 **A** agreed with **B**, the adjoining owner, that he would allow the ends of rafters of the next storey which **B** might build, to be placed on the wall.

Held, that the agreement will not give **B** the right to so build the next storey as to obstruct the ventilators enjoyed by **A**. A.I.R. 1923 Lah. 249.

——S. 41—Grant—Construction.

The scope of a grant of easement (right of way) must be determined by the terms of the contract between the parties. Where there is nothing in the terms of the grant that it was to continue only until such time as the necessity was absolute and there was no evidence in support of such agreement it must be held that the grant was not limited till the necessity for it existed. 115 Ind. Cas. 303=A.I.R. 1929 Oudh 351.

——S. 41—Termination of necessity.

In considering the questions of easements of necessity, convenience is not the test, but absolute necessity. They end with the necessity creating them. A way of necessity therefore is extinguished when the necessity terminates by the dominant owner acquiring adjoining property through which he can pass and repass to the old dominant tenement without reference to the servient tenement, and when once extinguished the dominant owner cannot revive it by any acts on his part. 33 All. 467; 19 Bom. 797; 4 C.L.J. 367; 2 Bing. 76 and 60 Ind. Cas. 504, Rel. on; 28 Mad. 495, Not appr. A.I.R. 1930 Mad. 789=1930 M. W. N. 120=127 Ind. Cas. 646=33 M.L.W. 191.

——S. 43—Change in dominant heritage.

Quaere.—Whether an easement is lost by merely rebuilding the dominant tenement. A.I.R. 1937 Lah. 419 =39 P.L.R. 712=173 Ind. Cas. 57.

——S. 43—Increase in burden—Additional burden separable from original burden.

Where the additional burden which is imposed on a servient tenement is separable from the original burden, the imposing of additional burden does not altogether extinguish the easement. A. I. R. 1938 Lah. 751=40 P.L.R. 298=179 Ind. Cas. 262.

——S. 43—Increase of burden—Test.

There was a parnala or a waterspout on the roof of the defendant's house to discharge water on to plaintiff's land. The defendant raised the height of the roof and along with it that of the waterspout by about $2\frac{1}{2}$ or 4 feet.

Held, that no additional burden was thrown on the servient tenement and the easement was not destroyed. 102 Ind. Cas. 447=A.I.R. 1927 Lah. 492.

——S. 43—Increase of burden—Test and remedy.

If, whatever steps the servient tenement can take, must necessarily interfere with the lawful enjoyment of the original arrangement and the additional burden

cannot be reduced, then the easement is extinguished, but where the burden can be reduced without difficulty, to original limits, the easement is not extinguished.

At one time it was thought that the right to ancient light could be lost by pulling down the buildings having the right; that is not the law now. 91 Law Times 816, Foll.

The remedy open to the owner of the servient tenement is to proceed against the person who claims the wrongful enlarged user and on his refusal to desist, to take the proceedings for an injunction. 65 Ind. Cas. 643=44 All. 343=20 A.L.J. 202=A.I.R. 1922 All. 28.

——S. 43—Increase in burden—Onus of proof—Second appeal.

The owner of an easement is precluded from increasing his right on the alteration of his dominant tenement. In a case, where by change of height, eaves discharge water with increased force, it is held that an additional burden is put upon the plaintiff's land; in order to disprove the fact of additional burden on the servient tenement and obtain an easement over it, the owner of the dominant tenement has the onus of proof and has no right to produce expert evidence for the first time in second appeal. 32 C.L.J. 27=24 C.W.N. 896 =58 Ind. Cas. 854.

——S. 43—Right to drop water from eaves.

An owner of the dominant tenement had a right to drop water from his eaves at a distance of seven feet height. He increased the height three times and allowed water to drop through pipes. **Held** that his easement was extinguished by the increase in burden. 58 Ind. Cas. 937 (Pat.).

——S. 46—Easement, if extinguished by unity of possession of dominant and servient tenements.

The acquisition of a right of way is not extinguished, but only suspended, by unity of possession of the dominant and servient tenements where the ownership of the two estates is not co-extensive and equal in validity, the dominant tenement being held for a term of years only and the servient tenement in full right of ownership. A.I.R. 1939 Rang. 421=1940 Rang. L.R. 93= 185 Ind. Cas. 605.

——S. 46—Extinction—Test—Revival.

The unity of the dominant and servient estates in the same person extinguishes the easement appurtenant to the dominant estate, for no person can have an easement on land which he himself owns. But unity of title of the two estates will not extinguish an easement, unless the ownership of the two estates be co-extensive, equal in validity, quality and all other circumstances of right. If one estate is held in fee and the other for a term of years, there is no unity of possession that will extinguish an easement of one estate as against the other: but the unity of possession in such cases will only suspend the easement during the time of such unity of possession. Consequently, an easement may be revived, after it has been extinguished by the union of the dominant and servient tenements in one owner by their subsequent severance, provided the easemant is apparent, continuous and essential to the enjoyment of the dominant tenement. If there has been unity of possession merely an easement which has been thereby suspended will revive on severance of the union but if there has been unity of seisin for estates in fee simple and not unity of possession merely, all easements are absolutely extinguished and will not revive, unless they are re-created on severance of the former dominant and servient estates. 70 Ind. Cas. 663=36 C.L.J. 161=50 Cal. 356=A.I.R. 1923 Cal. 8.

——S. 46—Extinguishment—There must be merger of dominant and servient tenements.

Before there can be any extinguishment of an easement, there must be a merger of the servient and dominant tenements so as to result in the single ownership of both.

Where therefore, the owner of the dominant tenement acquires the right of a co-sharer in the servient tenement the ownership of the two tenements does not merge into one and consequently there is no extinguishment, but merely a suspension of the easement (a right of way) which can revive after a decree for partition. A.I.R. 1941 Cal. 289=199 Ind. Cas. 689.

——S. 46—Joint ownership.

Where the dominant owner had an easement right in respect of ventilators in a wall of his house the fact that the adjoining servient owner acquires by agreement a joint ownership in the wall will not operate to extinguish the easement. It would have been otherwise if he had acquired the joint ownership of the whole house of the dominant owner. A.I.R. 1923 Lah. 249.

——S. 46—Right maturing into easement—Subsequent assertion of ownership, if can destroy easement—Subsequent allegation that right was enjoyed as public right or right in gross, if can do so.

An assertion of ownership, after the period of user has matured into an easement cannot deprive the right already acquired and the allegation that it was being enjoyed as a public right or a right in gross after the easement had been acquired cannot equally do so. It cannot stand in a worse position than that of the claim of ownership. A.I.R. 1942 Mad. 392=1942 M.W.N. 209 =55 L.W. 142=1942 1 M.L.J. 373=206 Ind. Cas. 528.

——S. 47—Easement of necessity—Dispossession—Period.

The period of dispossession sufficient to bar a claim of easement of necessity is twelve years. 4 S.L.R. 180=8 Ind. Cas. 939.

——S. 47—Light and air—Dominant tenement remaining unused for over 20 years—Easement if destroyed.

The user of a building has no materiality whatsoever in cases of easement of light and air. Even where the dominant tenement remains unused for over 20 years, easement of light and air is not destroyed. A.I.R. 1945 Cal. 438=221 Ind. Cas. 495.

——S. 47—Light and air—Abandonment—Non-user.

Whether a prescriptive right to light and air is lost through abandonment, depends on the intention of the parties to be gathered from the circumstances and the interval of non-user. It is not necessary for the building to enjoy the light, that it should be identical with that which acquired the right, either in structure or the purposes for which it is to be used. 49 Ind. Cas. 752 (Pat.).

——S. 47—Natural right—Right of public to go in procession.

The right of people to go in procession through public streets is a natural right and cannot be curtailed on the ground that that right has not been exercised or has been obstructed. 32 Mad. 478=19 M.L.J. 617=1 Ind. Cas. 716.

——S. 47—Light and air—Non-use no release.

Mere blocking up of the apertures of ancient windows would not necessarily amount to an abandonment of rights of easement. The non-use of an easement is not an implied release of it and the transfer of the dominant tenement carries with it the easement which then existed, although in suspense for the time being. 12 C.W.N. 969=35 C. 889.

——S. 47—Non-user.

——Right of repairs being a discontinuous easement cannot be extinguished even though it was not enjoyed

within two years next preceding the suit. 1941 N.L.J. 655.

——**S. 47—Non-user by agreement—Effect.**

An easement is not extinguished where its user is suspended in pursuance of a contract between the dominant and the servient owners. A person who purchases the servient tenement in an execution sale with knowledge of the easement is bound thereby. 56 P.W.R. 1918=84 P.L.R. 1918=45 Ind. Cas. 618.

——**S. 47—Non user by agreement—Effect.**

Where the non-user of a right of way for some years before the date of suit was by agreement, **held** that the right subsisted. 5 M.L.T. 216=4 Ind. Cas. 1127.

——**S. 47—Non-user of natural rights.**

An easement is not extinguished by non-user for a period less than twenty years. Right attaching as a natural incident of ownership cannot be extinguished by non-user however long continued. 3 S.L.R. 228=6 Ind. Cas. 881.

——**S. 47—Non-user—No obstruction by servient owner—Whether right affected.**

Two lands of the same owner were sold to two different perons and the sale-deed to plaintiff's predecessor provided that "the used water and rain water of the site sold should flow to the street through the sluice to be constructed in the compound wall opposite to the passage." The right granted was neither enjoyed, nor obstructed by the servient owner till within three years before suit. In a suit for injunction, **Held**, that the non-enjoyment of the right does not extinguish the easement under S. 47 if there was no obstruction by the servient owner before three years previous to the suit. 34 Mad. 487=(1910) M.W.N. 571=8 M.L.T. 292=7 Ind. Cas. 575.

——**S. 47—Right to water—Non-user.**

When an easement right to the water in a stream is not enjoyed for 20 years continuously, the right is extinguished. 73 Ind. Cas. 66=18 M.L.W. 404=1923 M.W.N. 454=A.I.R. 1923 Mad. 674.

——**S. 47—Right to water—Non-user—Extinction.**

The right to take a half share of the water from the well on another's land for irrigating one's own land, is an ordinary easement liable to be extinguished under S. 47 if not exercised for more than 20 years and not an easement of necessity. Such right does not of itself import ownership of half the well. 45 Bom. 80=A.I.R. 1921 Bom. 417.

——**S. 47—Right of Govt. to claim water cess for** water flowing through **Pattah** land—Classification of bed as **poramboke**, if necessary—Right to easement as against Govt.

Water flowing continuously through a rill, **Kuttai** and another water-course may form a natural stream in which easement rights may be acquired as against Govt. Once the existence of an easement is proved as against Govt., the Govt., must show under S. 47 that it interrupted that easement more than twenty years ago or that the plaintiff rendered its use impossible. Mere failure on plaintiff's part to repair the breach is not enough. If the Govt. wished to claim right to water flowing through **pattah** land, they can do it only when classifying the bed separately as **poramboke**; otherwise the **ryot** can retain as his property. 31 Ind. Cas. 982. (Mad.)

——**S. 47—Right of upper owner to flow water over** lands of lower owner—Non-user—Effect.

A Right of upper owner to flow water to and over lands of lower owner, is a right which is not acquired, but is an incident of property owing its origin to disposition and arrangements of nature. It is, therefore, incapable of being lost by non-user and the maxim "**tantum prescriptum quantum possessum**" has no application. A.I.R. 1942 Cal. 261=74 C.L.J. 95=205 Ind. Cas. 22.

——**Ss. 49 and 51—Possession as lessee of land—** Union of dominant and servient tenement.

The possession of land claimed to be subject to an easement for more than twenty years by the dominant owner as demisee operates as a union of the dominant and servient tenements in the claimant. The easement is suspended during this time. If the suspension continues for twenty years, the easement is destroyed. The right to an easement cannot be held to have been enjoyed separately during the period of the lease. (1913) M.W.N. 95=16 Ind. Cas. 375.

——**S. 50—Exercise of right—No right to compel.**

The owner of the servient tenement cannot compel the owner of the dominant tenement to continue the exercise of his right even where that right has been exercised uninterruptedly for over 20 years and even if its exercise should be beneficial to the servient tenement. 69 Ind. Cas. 947=4 P.L.T. 81=1922 P.H.C.C. 305=2 Pat. 110=A.I.R. 1923 Pat. 65.

——**S. 50—Exercise of right—No right to compel.**

The owner of a servient tenemant over which the dominant owner had acquired a right to discharge his water, cannot insist that the water should be continued to be so discharged. 46 Ind. Cas. 24 (Cal.)

——**S. 50—Exercise of right—No right to compel.**

An easement exists only for the benefit of the dominant tenement and a servient owner gets no right to insist on its continuance or to sue for damages on its abandonment. 2 C.L.R. 141 Rel. 17 C.W.N. 1066=18 C.L.J. 131=20 Ind. Cas. 315.

——**S. 50—Compensation for damages caused by extinguishment or suspension.**

When it was urged that, although the natural light coming in to the dominant tenement had been diminished, the reflected light had increased with the result that the rooms were better lighted than before, but it was admitted that if the building was raised the light coming in the building would be seriously affected: **Held**—That the right of the dominant owner (to light) should not be made dependent on his refraining from exercising his undoubted right of raising the height of his building; there was thus a substantial interference with his rights: 12 C.W.N. 519=35 C. 661.

——**S. 50—Infringement of right to light and air—Injunction**:—Where a person threatens to invade another person's right, damages cannot be ascertained. There is no rule of law that ancient lights may be interfered with by a building provided it leaves them an angle of 45° of light, but in judging of the probable effect of a proposed building upon ancient lights the court may not unreasonably regard the fact that an angle of 45° 8 will be left as **prima facie** evidence that there will be no substantial interference and may require this presumption to be clearly rebutted by satisfactory evidence. 5 Bom. L. R. 446.

——**S. 50—Light and air** — Disturbance of right—Substantial damage—Physical comfort:—For the purpose of applying the test of the plaintiff's physical comfort, we must look to the state of their property as it is, not as it was or as it may be. 7 Bom. L.R. 825=30 Bom. 319. **See also**: 20 M.L.J. 292.

——**S. 50—Suit relating to servient owners—Parties.**

A decree based on an easement cannot be passed when all the servient owners are not parties. 14 C.W.N. 15=5 Ind. Cas. 23. **See also**: A.I.R. 1933 Cal. 882=60 Cal. 1072=149 Ind. Cas. 91.

——**S. 51—Dominant tenement rebuilt—Additional burden—Whether can be imposed.**

When a dominant tenement is rebuilt, the dominant owner has no right to impose a greater burden on the servient tenement than the prescriptive quantity of the right enjoyed. Blocking up an old window and building another of the same dimensions in another place is an imposition of a burden on the servient tenement which was not existing till then. But the right of the dominant owner under the common law to free access of light and air through an ancient window is not lost by shifting the window backwards or forwards. 9 S.L.R. 101=33 Ind. Cas. 615.

——S. 51—Regrant—Fresh user—Acquiescence.

Where defendant had had a right to take water from the well on plaintiff's land for irrigating his (defendant's) land but this right was extinguished on account of non-user for more than 20 years, and plaintiff permitted defendant to repair the well which had fallen into ruin and defendant did accordingly and used the water of the well for the purpose of irrigation,

Held, that the plaintiff must be held to have regranted the easement to defendant and that he was estopped from questioning defendant's right on the ground of want of registered deed to support the grant of the easement. 45 Bom. 80=A.I.R. 1921 Bom. 417.

——S. 51—Revival.

An easement which is once extinguished cannot be revived by any act on the part of dominant owner. 1930 M.W.N. 120=A.I.R. 1930 Mad. 789=127 Ind. Cas. 646=33 M.L.W. 191.

——S. 51 (c)—Revival.

The word 'such' in S. 51 cl. (c) of the Easements Act cannot be so construed as to mean 'a building of the same dimensions.' Rather it is a word of relation used simply to refer to the antecedent adjective—that is to the destroyed dominant character of the building just mentioned. 7 Bom. L.R. 352.

——S. 52.

Synopsis.

1. Common privy for tenants of rooms.
2. Cutting wood.
3. "Interest in property."
4. Licence.
5. Licence and easement.
6. Licence and lease.
7. Licensee—If can sue.
8. Licensee—If entitled to trees on land.
9. Licensee—Rights of.
10. Use of land as sehan.
11. Miscellaneous.

1. Common privy.

——S. 52—Common privy.

Where the landlord provides for the use of his tenants residing ina number of rooms a privy which however is not expressly included in the lease of the rooms, the tenants are mere licensees in respect of the privy and the privy remains under the control of the landlord, both as regards user and repairs. 101 Ind. Cas. 210=51 Bom. 274=29 Bom. L.R. 78=A.I.R. 1927 Bom. 115.

2. Cutting wood.

——S. 52—Cutting of wood—Right to—When a licence.

One or more inhabitants of a village taking wood from the landlord's jungle without the latter's knowledge cannot by so doing for any length of time acquire a right to cut and appropriate wood contrary to the wishes of the latter. Similar acts done with the permission or acquiescence of the owner being referable to a licence express or implied cannot likewise confer a right as against him. 123 Ind. Cas. 377=A.I.R. 1930 All. 338.

3. "Interest in property".

——S. 52—"Interest in the property"

The right to excavate the earth and to carry it away for the purpose of making pots is in the nature of a benefit arising out of land, or amounting to an interest in land, and as such it will make the licence irrevocable at the option of the owner of the land. 107 Ind. Cas. 522=23 N.L.R. 192=A.I.R. 1928 Nag. 87.

——S. 52—"Interest in property".

Fawcett, J.—The words "an interest in the property" in S. 52 are presumably intended to cover cases where there might be a right in the property granted such as a lease, or a right of joint possession. 101 Ind Cas. 393=29 Bom. L.R. 312=A.I.R. 1927 Bom. 240.

4. Licence.

——S. 52—Licence — Nature of — Lapses with death of licensor.

A licence does not create an interest in the land as it is merely leave to do a thing lawfully which otherwise would be unlawful and it is thus a matter purely personal between the grantor and the grantee of the licence. Such licence must be held to have elapsed with the death of the licensor. A.I.R. 1940 Mad. 102=50 L.W. 571=1939 M.W.N. 1225=187 Ind. Cas. 376.

——Ss. 52 and 56—Licence—Nature of right.

A licence is not annexed to the property in respect of which it is enjoyed, nor is it a transferable or heritable right, but is a right purely personal between grantor and licensee. Unless a different intention appears, it cannot even be exercised by the licensee's servants or agents. So where, on the death of the original licensee, his heirs continue in in occupation, they are on no greater footing than tenants at will. They are trespassers whose possession is adverse to the owner of the property. 1930 M.W.N. 1242=131 Ind. cas. 175=54 Mad. 554=A.I.R. 1931 Mad. 216=33 M.L.W. 455=60 M.L.J. 709.

——S. 52—Licence—Nature of.

A licence is personal and not transferable by sale. A.I.R. 1934 P.C. 101=3 A.W.R. 841=39 L.W. 618=1934 A.L.J. 457=66 M.L.J. 510=150 Ind. Cas. 232 (P.C.)

——S. 52—Licence—Permission to use land as a cremation ground—Enjoyment of the use—Licensees:—It appeared that in 1866, on application to the local authorities the plaintiffs received permission to use the lands in suit as a cremation ground; and then plaintiffs, as a matter of fact, made use of the lands in dispute for the purpose of cremation since 1886. Held, that the plaintiffs were mere licensees. 8 Bom. L.R. 310.

——Ss. 52, 60—Licence—Permission to District Board to occupy land and use it for purposes of school—Buildings of permanent character—Suit to recover land by paying compensation.

A person gave a certain property to the District Board for the purposes of a school. The District Board was entitled to hold possession so long as the school was in existence and the land was required for the purposes of the school, and the person was not entitled to reclaim possession of the land so long as the land was required for the purposes of the school; no deed of gift was executed and there was no transfer of ownership. There was

no relationship of landlord and tenant between the parties. The Board erected the works of permanent nature by sinking wells and erecting compound wall:

Held, that the permission granted to the Board to hold the land and use it for the purposes of the school was in the nature of a licence.

Held, also that the well and the compound wall could be regarded as works of permanent nature within the meaning of S. 60.

Held, further that the grantor was not entitled to recover land even on payment of compensation because S. 60 does not recognize any such exception. A.I.R. 1940 Lah. 18=186 Ind. Cas. 890.

——S. 52—Licence—Revocation—Licence coupled with interest—Licence granted for consideration. I.L.R. (1945) 2 Cal. 361=A.I.R. 1945 Cal. 413.

——Ss. 52 and 60—Licence—Weighman in a market—Allowed to continue as such in a new market—Exclusion privileges.

A weighman in an old market, allowed by Government to continue the same calling in the new market does not acquire any exclusive privilege and is only a licensee. 12 A.L.J. 447=23 Ind. Cas. 922.

5. Licence and Easement.

——S. 52—Lisence and Easement—Test—Concession to villagers to enjoy shamilat personally—Whether an easement.

Easement connotes that there must be a dominant as well as a servient tenement. Consequently, a concession granted to villagers personally to enjoy the shamilat of another village is a licence and not a right of easement. A.I.R. 1934 Pesh. 96=152 Ind. Cas. 141.

——S. 52—Licence and easement.

Where on a partition between two brothers, a house with a well fell to the share of one of them, while a house without a well to the others' share and in the partition deed, it was stated that the latter should, "out of brotherly affection be allowed to take the water of the well, and that he was asking (it), not as a matter of right but simply out of (brotherly) regard," the first brother put up a wall near the well to prevent water being taken out of it; in a suit by the aggrieved brother to establish his right to take water from the well:

Held, that the right acquired by the plaintiff under the deed was not an easement but was a licence as defined in S. 52. 101 Ind. Cas. 393=29 Bom. L.R. 312=A.I.R. 1927 Bom. 240.

6. Licence and lease.

——S. 52—Licence and lease—Test to determine if licence only is granted.

The important criterion for determining whether the donee was a mere licensee or whether some interest in the property has been transferred to him is to see if exclusive possession is granted. If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purpose for which it may be used, it is in law a demise of the land itself. A.I.R. 1933 All. 911=149 Ind.Cas. 486.

——S. 52—Licence and lease—Test.

The main test for deciding whether a person is a licensee of a property or a lessee is that of exclusive possession. If the effect of the agreement is to give exclusive possession to the holder, though subject to certain reservations then it is a lease; if the agreement is merely for the use of the property in a certain way and on certain terms while it remains in the possession and control of the owner it is a licence. 32 Bom. L.R. 332=A.I.R. 1930 Bom. 165.

——S. 52—Licence and lease—Test.

It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a licence, and not as a lease. Having regard to the rights of a lessee, which are are specified in S. 108 of the Transfer of Property Act, in particular the rights to growing crops and to put up structures, it seems difficult to say that there could be a valid lease not of a definite area of immovable property but of an area the position of which varies from time to time. On the other hand, it may be said that "immovable property" (as defined in the General Clauses Act) includes not only land but benefits to arise out of the land so that there can be a lease of the benefit of keeping chattels, such as a car and carriage, within certain special limits although the place occupied by the chattels might vary from time to time. Ordinarily the law takes it that a case of that kind is not one of a demise, but that of a licence. The mere fact that a person has had the exclusive use of a particular cubicle for two years and that it was the intention of the parties that no one else should use that cubicle so long as the person kept his car on the premises is not in law sufficient to show that the agreement was a demise or a lease and not a licence. 88 Ind. Cas. 316=25 Bom. L.R. 84=A.I.R. 1923 Bom. 228.

——S. 52—Licence and lease—Test.

——The distinction between a lease and a licence is "not a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land." 57 C. 655=33 C.W.N. 852=A.I.R. 1929 Cal. 739.

——S. 52—Licence and lease—Test.

The difference between a lease and a licence is that, in the case of a licence there is no interest in immovable property transferred to the licensee; while in the case of a lease there is a transfer or carving out of such interest in favour of the person in whose favour the lease is granted. One chief consideration is whether there is any right of exclusive possession given. If the effect of the document is to give the holder an exclusive right of occupation of the land, it will be a demise of the land but it is not a mere question of words but of substance. The mere calling a document a licence would not affect the question but in arriving at a conclusion where the terms are not clear, one has to see what the circumstances are to judge the intention of the parties. It is relevant to consider what the rights of the parties were and what the object of the agreement was. The mere fact that there are restrictive covenants would not by itself make a lease a licence if the other terms are clear, but in considering what the intention of the parties was, it is relevant to see what control one party has over the property on which another party is allowed to do certain things.

Provisions that the grantor should have "free access at all times," that the grantee should not sub-let or transfer his rights without the grantor's consent, that upon the determination of the licence the grantors might re-enter upon and re take and absolutely retain possession, etc., do not establish a lease where

the other terms and circumstances show that no interest in immovable property was transferred or that exclusive possession of land was not given. Conditions such as the ones referred to above, which restrict the licensee's rights and which, as the licensee cannot claim such rights even in absence of such provisions, are unnecessary in a licence and would be natural in a lease, may be due to extra caution on the part of the parties and do not necessarily indicate that a lease was intended.

In this case, certain documents by which leave was given by a Railway company to stack coal on station yards were held to constitute a licence and not a lease. 86 Ind. Cas. 683=48 Mad. 368=A.I.R. 1925 Mad. 434=48 M.L.J. 161 (F.B.).

——S. 52—Licence and lease—Test.

An agreement by which a certain quantity of grain is agreed to be paid to the owner every year on account of the damage to be sustained by him by his allowing the other persons to take their cattle or carts over a strip of land is lease and not a licence nor an easement and the payment claimed is rent. 92 Ind. Cas. 683=A.I.R. 1926 Nag. 174.

——S. 52—Licence and lease—Test.

Where a plain piece of paper unstamped and unregistered recites that the plaintiff has been given permission to plant trees on a certain plot,

Held, that if the document is to be considered a mere licence then, under S. 52 of the Easements Act, it cannot create any interest in the property; and that if it is to be treated as a lease it is invalid under the provisions of S. 107 of the Transfer of Property Act, and that in either case a person in actual occupation of the plot cannot be ejected by means of that document. 96 Ind. Cas. 410 =A.I.R. 1926 Oudh 609.

7. Licensee—If can sue.

——S. 52—Licensee—If can sue.

There is no such general proposition of law that a licensee can in no case, maintain a suit if his rights are affected, by the action of another party. In each case the question whether a suit by a licensee is maintainable would depend upon the cause of action alleged in the plaint and the nature of the relief claimed by him. A.I.R. 1946 All. 284=1946 O.W.N. (H.C.) 1=225 Ind. Cas. 226.

——S. 52—Licensee—If can sue.

A licensee has no interest in property, and so cannot maintain a suit for possession. 103 Ind. Cas. 43=A.I.R. 1927 All. 633.

8. Licensee—If entitled to trees on land.

——S. 52—Licensee—If entitled to trees on land.

A licensee is not entitled to trees on land. A.I.R. 1944 Pesh. 34=46 P.L.R. 266=219 Ind. Cas. 81.

9. Licensee's—Rights of.

——S. 52—Licensee—Rights of.

A licensee is a person without any title and has no interest in the land. 38 All. 178=14 A.L.J. 137 =32 Ind. Cas. 346.

10. Use of land as "sehan".

——Use of land as "sehan".

Use of **abadi** land as a **sehan** amounts to mere licence under S. 52, Easements Act. A.I.R. 1934 All. 836=153 Ind. Cas. 670.

11. Miscellaneous.

——Ss. 52 4, 60 (a), 64.—Miscellaneous—Secretary of State wishing to take over certain property having theatre thereon and agreeing through Improvement Trust, his agent, with its owner **B** to give him some other plots in other locality and to build there theatre for **B**—Such new plots situated at distance from main road and Secretary of State agreeing to give right of way over certain plots connecting main road—Deed of exchange transferring to **B** plots with theatre newly built—Covenant that **B** would have free right to passage over land specified—**B** allowed to erect a portico at entrance of way and to put sign boards on it—Plots between theatre and main road subsequently sold by Improvement Trust and purchased by one **T** who had notice of conditions of agreement between Secretary of State and **B**—Portico not built by **B**—**T**, with permission of Improvement Trust, building theatre and constructing portico on land on which **B** was allowed to build same—Protest by **B** to Improvement Trust—Suit by **B** against Secretary of State, Improvement Trust and **T** for injunction, demolition of portico and possession of land and for damages—**B**, during pendency transferring all his rights under agreement to other persons who joined as co-plaintiff's —**B** dying and judgment pronounced by trial Court in ignorance of his death.

Held, (i) that there was no intention on the part of the Secretary of State to transfer to **B** the land on which the portico was to stand. The grant made to him was a grant of a licence to construct a portico and a right to keep on the portico constructed by himself (or if the licence should be withdrawn by some one else) a sign-board, subject to that sign-board being approved by the Improvement Trust. The right which was granted in connection with the construction of the portico was one which fell clearly within the provisions of S. 52 of the Easements Act;

(ii) that the licence being revocable, there could be no claim for injunction or demolition. Plaintiffs could not recover damages from the Secretary of State as they did not prove that they had sustained any damage. Also that as **B** had protested to the Improvement Trust about the construction of the portico, he was not estopped by the principle of acquiescence;

(iii) the plaintiffs were only entitled to a declaration that they had a right to fix a sign-board, electric or otherwise, on the portico built by **T**. A. I. R. 1939 Oudh 196=1939 O.W.N. 500=181 Ind. Cas. 662.

——S. 52—Miscellaneous — Permissive occupation as agent—Construction of building—Plea of licence.

Where, in a suit by the reversioners to recover possession of a house which had been constructed during the lifetime of the widow, the defendant set up a plea of licence but it was found that he was the general agent of the late widow and not an agricultural tenant to whom the plot of land had been granted for building a house:

Held, that the plea of licence could not be sustained and that the plaintiffs were entitled to recover. 132 Ind. Cas. 799=8 O.W.N. 714.

——S. 53—Owner's right to use land when market is not in progress — Trader using market constructing shed in market—Whether a trespasser.

The owner of a market has a right to use the land as he pleases during periods when the market is not in progress, and in the absence of some special contract or enactment permitting it, any person using it cannot put up a construction on it.

In the absence of statute, the right to hold a market or fair is an incident of the ownership of the land. A trader using the market on market days constructing a shed in the market constitutes himself a trespasser and must remove it. A.I.R. 1937 Nag. 62=I.L.R. (1937) Nag. 148=168 Ind. Cas. 215.

——S. 54—Implied licence—Construction.

A and B cotton mill companies owned adjoining lands and had common agents. On the land of A company a godown was built and a tank was excavated for the use of the B company by the common agents. Later on, the two companies were managed by separate agents. A company had never challenged the arrangement. In 1916 disputes arose between the agents and in 1923 A company sued to recover possession of the land.

Held, that under the circumstances there was a grant of a licence implied from the conduct of the A company acting by its agents and that the B company was entitled to rely on the principle of Ramsden v. Dyson, (1865) 1 H. L. 129 to the effect that it had built upon A company's land in the expectation induced by the A company that it would be granted a permanent lease of that land. 123 Ind. Cas. 481=53 Bom. 792=31 Bom. L.R. 1310=A.I.R. 1930 Bom. 84.

——S. 54—Implied licence—What is.

N had built a house on another's land with the permission of his predecessor-in-title. After N's death two of his sons executed an agreement to pay ground rent for the land and to vacate in case of default. Afterwards it was found that N's sons including the executants of this agreement and their descendants had abandoned the house, and that the house was in the occupation of N's daughter and her son,

Held, that the agreement to pay ground rent was not binding on the latter and that they were licensees deriving title directly from N and not tenants. 78 Ind. Cas. 215=A.I.R. 1925 All. 203.

——S. 54—Use of channel merely as licensee —Lost grant, if can be presumed.

The right to use the channel cannot be said to have a legal origin in a lost grant in cases where the persons are allowed to use the channel merely as licensees. A.I.R. 1937 Cal. 572=I.L.R. (1937) 1 Cal. 569=172 Ind. Cas. 320.

—S. 55—Trees—They are property not of licensee but of Government —Distinction between felling and appropriating pointed out. A I.R. 1944 Pesh. 34=46 P.L.R. 266=219 Ind. Cas. 81.

——S. 55—Trees.

Where a person has planted trees on another's land under an implied licence, the trees do not go with the land and the person who planted the trees can remove them. A. I. R. 1941 Mad. 379=53 M. L. W. 230=(1941) 1 M. L. J. 161=1941 M.W.N. 87.

——S. 55—Rights of Licensee.

A licence to live for generation must be presumed to permit all enjoyments of life by the licensee without restriction. Eating meat or beef is such a reasonable enjoyment of life and it does not per se injure the rights of others.

Held, that a licensee has a right to slaughter cows at his residence. 125 Ind. Cas. 14=1930 A. L. J. 875=A. I. R. 1930 A. 753.

——S. 56—Act, if retrospective—U. P. Easements (Extending) Act (VIII of 1891)—Licensor—Terms of licence to be placed before Court—Houses built in cities on landlord's site—Licensee's right to transfer—Whether can be presumed.

The Easements Act is not retrospective in its effect and its provisions were extended to United Provinces of Agra and Oudh by Act VIII of 1891. Neither the Easements Act V of 1882, nor the amending Act, VIII of 1891, can affect the rights which were acquired before 1891.

The words "unless a different intention is expressed or necessarily implied" in S. 56, Easements Act, are, very important. The terms of the licence must be placed before the Court by the licensor and then only it will be in a position to determine as to whether or not, having regard to them, the licensee had a right of transfer.

In cases of houses built in cities on the land belonging to landlords there can be no presumption that they have no power of transfer. If the landlord contends that the tenant had no right to transfer the building which he had built and which he was occupying, it is for him to show that under the terms of the licence, the right of the teneant was limited and it was expressly agreed that he would be incompetent to make a transfer or it was open to him to prove the existence of a custom prohibiting the right of transfer. So far as houses built by tenants in villages are concerned, the rights between the parties are different. A tenant building a house in a village site has only a right to occupy so long as the the tenancy lasts or so long as he does not abandon the village. But the same principle cannot apply to houses built in a city. A.I.R. 1934 All. 336=18 R.D. 353=1934 A.L. J. 728=A.W.R. 1198=153 Ind. Cas. 692.

——S. 56—Interpretation.

—Fawcett, J—The words "save as aforesaid" in the second part of S. 56 bring in the words "unless a different intention is expressed or necessarily implied." 101 Ind. Cas. 393=29 Bom. L.R. 312=A.I.R. 1927 Bom. 240.

——S. 56—Irrevocable licence.

The becoming irrevocable of a licence does not make it transferable. 84 Ind. Cas. 284=5 L.R.A. Civ. 532=A.I.R. 1924 All. 825.

——Ss. 56 and 60—Licence—Kinds and nature of—Revocability—Text—Agreement between parties—Effect of.

A licence may be of two kinds: a bare licence which is purely a matter of personal privilege, and a licence coupled with a grant or interest; e.g., a right to do or to continue to do, in or upon, the immovable property of the grantor something which would, in the absence of such right, be unlawful; such right should not however, amount to an easement or to an 'interest' in the property. A bare licence without more is always revocable at the will of the licensor and is not assignable. The power of revoking a bare licence is not affected by the fact that the licensee has paid valuable consideration for the licence being given to him.

An exclusive licence does not differ in its incidents from an ordinary licence; a breach of an exclusive licence may give the licensee a right of action, but if it is otherwise revocable, then on its revocation the implied covenant will give a right of action in damages as on breach of contract. If a licence is coupled with a grant or interest, the grantor cannot in general revoke it so as to defeat the grant to which it is incident. A bare licence becomes irrevocable when the licensee, acting upon the licence, executes a work of a permanent character and incurs expense in doing so. Subject to any agreement to the contrary, a licence is ordinarily revocable unless it is coupled with a grant or interest or the licensee has spent money in executing works of a permanent nature.

But in a licence which is **prima facie** irrevocable either because it is coupled with a grant or interest, or because the licensee has erected works of a permanent nature, there is nothing to prevent the parties from

agreeing expressly or by necessary implication that the licence shall nevertheless be revocable. Similarly there will be nothing to prevent the parties from agreeing expressly or impliedly that a licence which is **prima facie** revocable should nonetheless be irrevocable. A.I.R. 1950 E.P. 40.

——S. 56—Partnership.

The mere fact that a licensee enters into a partnership with others or another in respect of profits or losses of the business for the carrying on of which he has obtained a licence does not necessarily involove either a sale, transfer or subletting of the licence. 92 Ind. Cas. 112=22 M.L.W. 679=A.I.R. 1926 Mad. 218.

——S. 56—Right of residence.

The site of a hut in a grove in which a licensee is permitted to live belongs to the zamindar and neither the right of occupation of the huts nor the site can be transferred by the licensee. 110 Ind. Cas. 465=A.I.R. 1928 All. 659.

——S. 56—Right to build.

When, in a non-agricultural village, the zamindar grants leave to a person to build a kachcha house on party land, the grantee becomes a mere licensee and a transfer by him of his right to build is not enforceable. A.I.R. 1925 Oudh 262; 29 All. 133 and 33 All. 757, Dist. 103 Ind. Cas. 681=1 L.C. 238=A.I.R. 1927 Oudh 314.

——S. 56—'Riyayas'—Right to transfer—Presumption.

In case of 'riyayas' occupying houses in cities and towns, it is to be presumed that they have a right of transfer, unlike those who inhabit agricultural areas, and so if a licensor sues to eject the transferee of a 'riyaya' he has to prove not only his ownership but must also prove the existence of custom or terms of the grant under which the house in dispute was built which make the transfer thereof invalid, entitling him to recover possession of the site. 117 Ind. Cas. 365=A.I.R. 1929 All. 494.

——S. 57—Duty of licensor.

Under S. 57 the licensor is bound to disclose any defect in the property likely to be dangerous to the licensee of which the licensor was aware but the licensee was not. In other words the licensor is under a duty not to lay a trap either at the beginning of the licence or during its continuance and if the licensor does not disclose any hidden risk in the use of the subject of the licence to the licensee of which the latter is not aware that amounts to negligence and if any loss is caused due to such negligence, the licensor is liable for damages. 101 Ind. Cas 210=51 Bom. 274=29 Bom. L.R. 78=A.I.R. 1927 Bom. 115.

——S. 57—Duty of licensor.

—It is an elementary rule that the grantor of licence is under an obligation to put the licensee in a position to enjoy the licence. 72 Ind. Cas. 270=36 C.L.J. 271=A.I.R. 1923 Cal. 49.

——Ss. 59, 60—Effect of words "as such"—Licence granted by transferor—Effect of transfer—Work of permanent character—Right to revoke incomplete.

S. 59 cannot be construed as giving the transferee any better rights than were possessed by his transferor, much less as meaning that the effect of the transfer is **ipso facto** to put an end to all previous licences. The proviso to the section only means that even if the transferor does not revoke the licence, the transferee can do so.

It cannot be said that because the building has not been completed, therefore, the work already executed is not of a permanent character. A.I.R. 1931 Oudh 364=8 O.W.N. 728=7 Luck. 175=132 Ind. Cas. 536.

——S. 59—Grant for consideration—Not revoked on transfer.

A grant for consideration of a right to build a pucca structure on the land of the grantor under the terms of the contract cannot be revoked by the subsequent transfer of the property. 74 Ind. Cas. 369=9 O.L.J. 629=27 O.C. 64=A.I.R. 1923 Oudh 114.

——Ss. 59 and 60—Irrevocable licence—If restricted to licensee's life—Onus of proof—Sale of property by licensor—If extinguishes such licence.

As a rule a licence is personal both to the grantor as well as the licensee (grantee). A licence is not annexed to the property in respect of which it is enjoyed and is so evanescent that it is neither transferable nor heritable. But a licence becomes irrevocable under the circumstances mentioned in S. 60 of the Easements Act. Under S. 60 (**b**) when the licensee, acting upon the licence, has executed a work of a permanent character, and incurred expenses in the execution, the licence cannot be revoked by the grantor. The onus to eastablish that a licence falling under S. 60 (**b**) is restricted to the life of the licensee and does not enure to the benefit of the heirs of the licensee lies on those asserting to that effect. S. 59 of the Act cannot be interpreted as enabling the licensor to put an end to an irrevocable licence by a transfer of the property affected by the licence. A transfer does not **ipso facto** extinguish a licence. The transeferee does not get any better rights than possessed by the transferor. I.L.R. (1951) Nag. 86=1950 N.L.J. 460=A.I.R. 1951 Nag. 215.

——Ss. 59 and 60—Irrevocable licence—Transferee of grantor also cannot revoke it.

If the licence is for some reason irrevocable by the grantor himself S. 59 does not authorise the transferee to revoke it. The provisions of S. 59 are in this respect subject to the provisions of S. 60. A.I.R. 1946 Oudh 17 =1945 C.W.N. 308.

——S. 59—Licensor's death.

When the grantor of a licence dies, his heir can treat the licensee as a trespasser without giving notice of revocation of the licence with respect to immovable property. 68 Ind. Cas. 107=18 N.L.R. 76=A.I.R. 1922 Nag. 162.

——Ss. 59 and 60—Transfer of property by grantor, effect of—Death of licensee—Effect.

Where the grantor of a licence transfers the property, the transferee is not bound by the licence.

A licence is not annexed to the property in respect of which it is enjoyed, nor it is a transferable or heritable right, but is a right purely personal between grantor and licensee. Therefore, where a licensee dies, the licence expires and the legal representatives of the licensee hold as mere trespassers. A.I.R. 1931 Mad. 216=33 M.L.W. 455=60 M.L.J. 709=1930 M.W.N. 1242=54 M. 554=131 Ind. Cas. 175 (D.B.)

——S. 59—Transfer by licensor—Effect.

Where the licensor transfers the property to another the licence ceases to exist by operation of law. 77 Ind. Cas. 140=44 All. 726=20 A.L.J. 608=A.I.R. 1923 All. 140.

——S. 59—Transferee of licensor—Rights.

The transferee contemplated by S. 59 must be a person who was not the licensor himself. The section has no application to a case in which one of two joint licensors transfers his interest in the property, with respect to which the licence has been granted, in favour of his co-licensor. 98 Ind. Cas. 814=A.I.R. 1929 All. 197.

——S. 59—Transferee, rights of.

Under S. 59, the transferee is not as such bound by the term of the licence granted by the vendor. The wish expressed by the vendor in the deed of sale in favour of the licensee that licence be respected by the

vendee has no legal effect and in spite of it, according to the terms of S. 59, it is open to the transferee to withdraw the licence. 7 O.W.N. 468=127 Ind. Cas. 46=A.I.R. 1930 Oudh 203.

——S. 59—Transferee's right.

Where a structure of a permanent character has been made in pursuance of a licence the transferee has no greater right than that possessed by his transferor and is bound by the licence. 97 Ind. Cas. 337=A. I. R. 1926 All. 714.

——S. 59—Transferee of licensor—Rights.

S. 59 cannot be interpreted so as to give the transferee a right of revocation of a licence which would not be exercisable by the transferor himself. 37 All. 91, **Foll.** 102 Ind. Cas. 26=1 L.C. 44=A.I.R. 1927 Oudh 206.

——Ss. 59 and 60—Transferee of licensor—Right of—Revocation.

The transferee of a licensor cannot revoke a licence, when the licensee has effected a work of permanent character and incurred expenses. 37 All. 91=13 A.L.J. 1=26 Ind. Cas. 445.

——S. 60.

Synopsis.

1. **Applicability.**
2. **Building licence.**
3. **Conditional licence.**
4. **Denial of title.**
5. **Eviction on payment of price of materials.**
6. **Implied licence.**
7. **Inference of revocation.**
8. **Interpretation.**
9. **Licensees rights.**
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12. **Revocation.**
13. **Transfer by owner.**
14. **Works of permanent character.**
15. **Miscellaneous.**

1. Applicability.

——S. 60 (b)—Applicability—Conditions.

Two conditions must be fulfilled for the application of S. 60 (b) of the Easements Act. They are (1) the licensee acting on the licence must execute a work of a permanent character and (2) incur expenses in the execution. Hence the above mentioned provision of law cannot apply to a case where the work of a permanent character on the land was allowed to fall down and the land permitted to remain **parti** and no other work has been executed in its place for ten or eleven years. 1950 A.W.R. 16.

——S. 60—Applicability.

S. 60 (b) applies equally to permanent works executed on the land of the licensor, or on the land of the licensee, provided the licensee has acted upon the licence in executing the work. 31 Bom. L. R. 1331=124 Ind. Cas. 97=A.I.R. 1930 Bom. 70.

2. Building licence.

——S. 60—Building licence—Revocation.

Under S. 60 when a licensee has, acting on the licence, made a work of a permanent character the lessor cannot revoke the licence. A.I.R. 1942 Oudh 496=1942 A.W.R. (C.C.) 328 (1)=1942 O. W. N. 592=202 Ind. Cas. 734.

——S. 60—Building licence—Revocation—(Punjab).

If the licensee, acting upon the permission granted has executed a work of a permanent character, and has incurred expenses in its execution, it is not open to the licensor to revoke the licence at his option and resume the land even on offer of compensation. This rule being in consonance with equity, justice and good conscience should be given effect to in provinces like the Punjab where the Easements Act is not in force. A.I.R. 1940 Lah. 509=I.L.R. (1941) Lah. 413=43 P.L.R. 544=194 Ind. Cas. 518.

——S. 60—Building licence—Revocation.

The principle of S. 60 (**b**) is that the licensee, acting upon the licence, should execute work of a permanent character soon after the grant of a licence or within a reasonable time. The section does not impose a duty upon the licensee who has already complied with the terms of the licence to maintain work of a permanent character up to any particular standard of repair. Where the licensee has carried out the terms of the licence for building purposes and has incurred expenses in its execution, the licence becomes irrevocable under S. 60 (**b**) and the licensee can be evicted from the premises only when the purpose of the licence is abandoned within the meaning of Cl. (**f**) of S. 62, in other words, when the licensee has actually abandoned the house whatever the state of repair might be. The view that the licensee must show not only work of a permanent character in existence for the time being but a costly building of a permanent character is not sound. If this view is held to be correct, the result would be that a great majority of poor people, who are less favoured and are unable to erect costly buildings for residential purposes, would be liable to eviction at the sweet will and pleasure of the licensor at any time. Such could not have been the intention of the Legislature in enacting S. 60 (**b**) of the Easements Act. A.I.R. (Vol. 29) 1942 Oudh 180=17 Luck. 472=1941 O.W.N. 1340=1941 R.D. 1160=1941 A.W.R. Rev. 1148=198 Ind. Cas. 184,

——S. 60 (b)—Building licence—Portion of plot left vacant for using it as sahan darwaza—Licensee, if can sue for possession of such portion—Licence, whether revocable.

It is only reasonable that a person who builds a house in a village should have the use of as much vacant land outside his house as is necessary for the proper enjoyment of his house. Such vacant land is appurtenant to the house as **sahan darwaza**. Where, therefore, a licensee has proceeded to build the house, keeping a portion of the land vacant in order that he might use it as his **sahan darwaza**, he has a possessory interest in the land to which the licence relates such as will entitle him to maintain a suit, whether against his licensor or against a third party. As against the licensor, the licence is unrevocable under S. 60 (b). A.I.R. 1940 All. 324=1940 A.L.J. 354=1940 A.W.R. 290=1940 R.D. 187=189 Ind. Cas. 835.

——S. 60—Building licence—Revocation.

Where the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution, the licence cannot be revoked by the grantor on payment of compensation.

In the absence of a clear finding to the contrary, a Judge in second appeal is entitled to examine the record and the circumstances of the case and come to the conclusion that the work executed is of a permanent character. He is not bound to send an issue to the lower Appellate Court on this point. A.I.R. 1933 All. 842=56 A. 207=1933 A.L.J. 1422=145 Ind. Cas. 948.

——S. 60—Building licence.

Where a licensee constructs permanent building on licensor's site under implied licence, the licence is irrevocable as to building and licensee cannot be ejected. The irrevocability is restricted to the portion covered by building. 8 All. 69, **Rel. on.** 118 Ind. Cas. 676=A.I.R. 1929 Nag. 269.

——S. 60—Building licence—Partial execution of works.

A licence cannot be revoked even when part only of a work of a permanent character has been executed by the licensee: A.I.R. 1924 Nag. 254, **Rel. on.** 117 Ind. Cas. 224=A.I.R. 1929 Nag. 141.

——S. 60—Building licence.

Where a licence is granted to build houses on the site and the licensees have erected a work of a permanent nature on the site the licence cannot in view of the provisions of S. 60 be revoked. 100 Ind. Cas. 479=A.I.R. 1927 All. 342.

——S. 60—Building licence.

Where land had been given to a licensee free of rent for building a house thereon and the licensee built a permanent structure the licence became irrevocable and the licensor could not afterwards revoke the licence, nor could he claim damages for use and occupation. 91 Ind. Cas. 1031=13 O.L.J. 170.

——S. 60—Building licence—Revocation.

A mere licence is irrevocable when the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in so doing. In cases falling within this rule, if the licensor desires to be able to revoke he must expressly reserve the right when he grants the licence, or limit it as to duration. 94 Ind. Cas. 923=22 N.L.R. 162=A.I.R. 1926 Nag. 376.

——S. 60—Building licence.

A licence cannot be revoked, if the licensee acting upon the licence has executed a work of a permanent character unless the licence is shown to have been granted under restrictive conditions of the nature set up. 78 Ind. Cas. 215=A.I.R. 1925 All. 203.

——S. 60—Building licence.

Construction of a house by licensee acting on licence makes licence irrevocable. 84 Ind. Cas. 284=5 L.R.A. Civ. 532=A.I.R. 1925 All. 825.

——S. 60—Building licence—Revocation.

Where plaintiff allowed deft. to execute on plaintiff's land an irrigation scheme of considerable expense and permanent benefit to a very large number of villages, **Held,** that the agreement created a licence which could not be revoked at the instance of the plaintiff. 47 Ind Cas. 166 (Pat.)

——Ss. 60 and 64—Building licence.

A licensee permitted to build a house and reside therein is entitled to be indemnified if evicted by the licensor's successor. A bare licence may be revoked at the grantor's will and on reasonable notice, but a licence coupled with grant is irrevocable. A licence, allowing structures to be built, cannot be revoked unless the licensee is compensated. 19 C. L. J. 321=19 Ind. Cas. 853.

3. Conditional Licence.

——S. 60—Conditional licence to erect structure—Erection of structure—If can be pleaded as a bar against eviction according to the conditions.

Where a licensee executes a work of a permanent character under a clear understanding that he or his heirs may be called upon after a certain time to leave the land, it is not open to him to plead such work as a bar against his eviction. S. 60 of the Easements Act does not override any such condition in the licence. A.I.R. 1950 All. 661=1950 A.W.R. 506.

——S. 60—Conditional licence that landlord would have right to get site vacated at any time deprives licensees of benefit of S. 60.

A condition in the licence that the landlord would have the right to get the site vacated, whenever he so chose, by the licensee, deprives the licensee of the benefit of S. 60. There is no provision of law to prevent a party from binding himself to surrender land although there may be a construction of a permanent character standing therein. A contract to the contrary disentitles the licensee from deriving advantage conferred by S. 60. A.I.R. 1942 All. 330=1942 A. L. J. 386=1942 A.W.R. (H.C.) 217=202 Ind. Cas. 678.

——S. 60—Conditional licence.

Agreement by which defendants were allowed to retain possession of land on payment of nominal rent subject to the condition that whenever the owners wished the defendants to give up the land, the defendants would immediately remove the materials of their house from the land and deliver possession—Plaintiff's suit for ejectment — Defendants resting their plea on S. 60:

Held, that it was a licence merely to remain in possession of the plot and not to build the house and S. 60 was inapplicable. A.I.R. 1932 Oudh 264=9 O.W.N. 568=139 Ind. Cas. 365.

4. Denial of title.

——S. 60—Denial of title.

The denial of title does not operate to a forfeiture of a licence. 113 Ind. Cas. 757 (All.)

——S. 60—Denial of title.

A licensee in possession does not, like the tenant, by denying title of the grantor of the licence forfeit the licence and become liable to ejectment. (1901) A.W.N. 157 and 39 All. =621, Foll. 75 Ind. Cas. 596=A.I.R. 1923 All. 403.

——S. 60—Denial of title.

A licensee in possession does not like a tenant, by denying the title of the grantor of the licence, forfeit the licence and become liable to immediate ejectment. (1901) A.W.N. 157.

5. Eviction on payment of price of materials.

——S. 60—Eviction on paying price of materials.

Turning out the **ryot,** on payment of the price for his materials of the house is not unreasonable. A.I.R. 1942 Oudh 115=17 Luck. 494=1941 O.W.N. 1316=1941 R. D. 1149=1941 A.W.R. 1111=198 Ind. Cas. 509.

6. Implied licence.

——Ss. 60 (b), 64—Implied licence — Building of wall—Failure to protest—Implied licence—Erection of work of permanent character—Power to revoke—Right to injunction.

Where the defendant to whom a wall belonged knew that the plaintiff an adjacent house owner, was constructing a wall above the defendant's wall and did not make any protest until it was built:

Held, that there was an implied grant of licence by the defendant to the plaintiff that could not be revoked as the plaintiff had executed a work of a permanent character and incurred expenses in the execution and the defendant was not entitled to demolish the wall. A.I.R. 1932 All. 572=1932 A. L. J. 758=136 Ind. Cas. 821.

——S. 60—Implied licence to build.

Acquiescence may be express or implied. In a large town (where ordinarily the **malguzar** permits persons who are not his tenants, to build on his **ab d**) the defendant started building a substantial house on a vacant site in the **abadi.** Soon after he started building, the **malguzar's** agent told the defendant not to build on that site. Defendant replied that he would go and see the malguzar and settle the matter with him. The agent reported the matter to the malguzar who took no further action until he filed his suit seven years later for recovery of the land,

Held, that no inference was possible from the facts but that the plaintiff intentionally induced the defendant to believe that he might build on the site without any interference by the plaintiff or any fear of the plaintiff ever attempting to evict him and on the same terms as all the other holders of sites on the **abadi** and that the suit must be dismissed under S. 60 of the Easements Act. 73 Ind. Cas. 137=A.I.R. 1921 Nag. 167.

7. Inference of revocation.

——S. 60 — Inference of revocation of licence, when can be made.

Where it was with the plaintiff's permission that the defendant Committee put up a thatch on the **chabutra** adjoining the mosque to afford accommodation for the growing needs of the school within one portion of the mosque:

Held, that the position of the Committee was no better than that of a licensee and the attempt of the defendant to build on the **chabutra,** the protest of the plaintiff and the denial of its rights followed by the suit, were circumstances which led to the inference that there was a revocation by the plaintiff of the licence granted by him. A.I.R. 1934 All. 732= 4 A.W.R. 461=153 Ind. Cas. 1095.

8. Interpretation.

——S. 60—Interpretation.

Fawcett, J.— S. 60 (a) does not necessarily use the words 'transfer of property' in the limited sense of a transfer as defined in the Transfer of property Act. 101 Ind. Cas. 393=29 Bom. L.R. 312=A.I.R. 1927 Bom. 240.

9. Licensees rights.

——S. 60—Licensees rights—Breach of contract by grantor—Revocation—Damages.

A licensee is entitled to damages for breach of any contract or for an improper revocation of his licence in a proper case; the Court will allow revocation only on payment of the expenses incurred by the licensee. (1918) M.W.N. 772=49 Ind. Cas. 811.

——Ss.60 and 64—Licensee's rights—Compensation.

A licence is irrevocable if the licensee, acting upon it, has executed works of a permanent character and has incurred expenses in their construction. The grantor of the licence, however, can revoke it, if he makes compensation to the licensee for the loss he may incur by the revocation of the licence. 12 C.L. J. 443=8 Ind. Cas. 798.

10. Licence to reside in building.

——S. 60 — Licence to reside in a building—Eviction.

The section does not apply, where a person gives licence to another to occupy an already existing house; the licensee in such a case can be ejected at the will of the licensor. 5 Ind. Cas. 175 (All).

11. Licence to tenant to occupy enclosure.

——S. 60—Licence to tenant to occupy enclosure in village — Revocation on tenant ceasing to cultivate: — Certain zamindars owing land in two adjacent villagers permitted a tenant, who was an occupancy tenant in village **B**, and also cultivated some land in village **N** to occupy a cattle-yard and shed situated in village **N**. The tenant ceased to cultivate land in **N**, but still retained possession of cattle-yard and shed, and, in spite of repeated demands by the zamindars, refused to vacate them. **Held,** that the tenant was merely a licensee of the cattle-yard and shed, and that the licence could be, and had been, revoked; and, further, that the tenant was not entitled to retain possession merely because the cattle-yard and shed were useful to him in connection with the cultivation of his occupancy holding in the adjacent village **B.** (1901) A.W.N. 42.

12. Revocation.

——S. 60—Revocation.

(1) A mere licence is revocable at will. (2) A licence coupled with a grant or interest is not revocable except for sufficient cause, till the grant to which the licence is incident, is exhausted and, (3) a licence which would otherwise have been revocable is not revocable if there is a contract (which means an agreement for consideration) between the licensor and the licensee not to revoke the licence for a time or indefinitely till the period mentioned in the contract expires. The contract may be either express or may be implied. A.I.R. 1945 Cal. 413=49 C.W.N. 346=I.L.R. (1945) 2 Cal. 361.

——S. 60—Revocation.

A licence to use the land of another unless coupled with a transfer of the property is revocable subject to the right of the licensee for damages if revoked contrary to the terms of any express or implied contract. A mere licence is revocable at the will of the licensor unless it is coupled with a grant and in that case it will become a lease and would require compulsory registration. 120 Ind. Cas. 673=30 P.L. R. 746.

——S. 60—Revocation.

Where on partition one of the brothers is allowed to take water from the well of the other 'out of brotherly affection' and 'not as a matter of right'— it amounts to a licence coupled with a transfer of property and irrevocable under S. 60 (a) of the Easements Act. 101 Ind. Cas. 393=29 Bom. L.R. 312=A.I.R. 1927 Bom. 240.

——S. 60—Revocation on compensation.

In view of the provisions of Cl. (b) of S. 60, where a licence has become irrevocable, the Courts cannot allow a licensor to revoke the licence, on condition of his making compensation to the licensee for loss incurred by the revocation of the licence. 98 Ind. Cas. 814=A.I.R. 1927 All. 197.

——S. 60 (b)—Revocation.

A licence cannot be revoked during licensee's life time when the licensee has made permanent improvements. 48 Ind. Cas. 723 (Mad.).

——S. 60—Revocation.

A licence coupled with a void grant is revocable save (1) when the licensee entered into occupation and paid rent and (2) when the licensee acting on the licence has executed a work of permanent character, and incurred expense in so doing. A licence is in its nature revocable but a licence coupled with a grant is irrevocable. 12 N.L.R. 75=34 Ind. Cas. 471.

——S. 60—Revocation.

Where a licence coupled with a transfer of property is granted, the transferee of the licensor is not entitled to revoke such licence. The law on the subject is the same after the passing of the Act V of 1882. 13 A.L. J. 886=30 Ind. Cas. 581.

13. Transfer by owner.

——S. 60—Transfer by owner.

Transfer by licensor of ownership does not revoke licence. 79 Ind. Cas. 173=20 N.L.R. 60=A.I.R. 1924 Nag. 254.

14. Works of permanent character.

——S. 60—Works of "permanent character"—Tests.

Whether a structure is of a permanent character has to be decided on two considerations: (1) the

material used, and (2) the purpose for which building is erected. The material used may be granite, stone, marble, cement concrete, table-moulded bricks, country bricks, or clay or mud. There can be no absolute standard as regards the material for judging whether the structure is permanent or temporary. If a poor man wishes to build a permanent structure for his residence, he would choose the cheapest material such as mud. Consequently, the mere fact that a structure has mud walls would not be conclusive to prove its temporary character. A.I.R. 1943 Nag. 77=1942 N.L.J. 145=I.L.R. (1943) Nag. 226=203 Ind. Cas. 540.

——S. 60—Works of permanent character—Test.

It would be inequitable, unjust and unfair, to allow a licensor to order that the licensee should forthwith remove the work of a permanent character which he has put up after incurring expenditure. In such an event, the transaction ceases to be a mere licence revocable at will, but may, in certain circumstances, amount to a licence coupled with a transfer of interest or, at any rate, a case where the licensee, acting upon the licence has executed a work of a permanent character and has incurred expenses in the execution so as to make the licence irrevocable. So long as the construction subsists, the right to revoke it would be in abeyance.

Even a mud house or **kachcha** house may be a work of a permanent character. Where it appears from the long period of occupation in a house, its dimensions and the value of the structure that the house is a work of permanent character in executing which the party's ancestors incurred expenses, it is not necessary for the party to show that a large sum of money had been actually spent, in order to bring the case within the scope of the principle underlying S. 60. A.I.R. 1934 All. 517=1934 A.L.J. 698=4 A.W.R. 1109=56 A. 975=149 Ind. Cas. 389.

——S. 60 (b)—'Work of a permanent character', meaning.

The expression "a work of a permanent character" as used in S. 60, (b) is intended to denote some work which is not merely of a temporary nature. A residential house in which the licensees have been residing for a long number of years must be held to be a work of a permanent character in spite of its having a tiled roof which would presumably require to be renewed from time to time.

The Easements Act does not contain any provision allowing revocation of a licence in such a case on payment of compensation. A.I.R. 1933 Oudh 69=9 O.W.N. 989=8 Luck. 278=140 Ind. Cas. 889.

——S. 60—Work of permanent nature—Railway siding.

Two companies owning adjoining lands managed by common agents erection of building and tank on premises of one for use of another—Rule in **Ramsden v. Dyson,** (1865) 1 H. L. 129 **held** to be applicable. Licence presumed to be granted and irrevocable under S. 60 (b). 123 Ind. Cas. 481=53 Bom. 792=31 Bom. L.R. 1310=A.I.R. 1930 Bom. 84.

——S. 60—Work of permanent character—Railway sidings.

A and **B** companies were managed by common agents. The agents acting on behalf of the companies applied to railway company to provide a private railway siding for the use of the companies which the railway company did. The rails leading to the **A** company's land passed through the **B** company's land. The expenses incurred in laying out rails and siding were borne by each company contributing its quota. Later on, the management passed on to separate agents. Disputes having arisen between the two companies, **B** company prevented the other company from using the railway line that passed through its land. **A** company sued to obtain a perpetual injunction restraining **B** company from obstructing the use of the railway line,

Held, that as the **A** Company executed work of a permanent character and incurred expenses in the execution, the licence could not be revoked under S. 60 (b). 31 Bom. L.R. 1331=A.I.R. 1930 Bom. 70=124 Ind. Cas. 97.

[Reversed by A.I.R. 1936 P.C. 77=38 Bom. L.R. 353=160 Ind. Cas. 837=70 M.L.J. 190 (P.C.)]

——S. 60—Work of permanent character—Mud building.

A building which is meant for permanent residence, though built with mud and costing only a few rupees, is a building of a permanent character. 28 All. 741, Foll. 113 Ind. Cas. 757.

——S. 60—Work of permanent character—Test.

Whether the building is a work of a permanent character depends on the nature of the building and not on the intention of the persons occupying it. At the same time the fact that it has been occupied as a residential house for considerable period is a fact which is to be taken into consideration in deciding whether it is a structure of a permanent character or not. 97 Ind. Cas. 337=A.I.R. 1926 All. 714.

——S. 60—Work of permanent character—Kuchcha house.

Buildings of mud walls and thatched roof built for the purpose of school and which were in existence and kept under regular repair for about 30 years were held to be a work of a permanent character. 102 Ind. Cas. 26=1 L.C. 44=A.I.R. 1927 Oudh 206.

——S. 60—Work of permanent character—Kuchcha house.

Even the construction of a Kuchcha hut by the licensee may be treated as a work of permanent character. 94 Ind. Cas. 923=22 N.L.R. 162=A.I.R. 1926 Nag. 376.

——S. 60—Works of permanent character—Kuchcha house.

A Kuchcha thatched house may be a work of a permanent character, where it has been used as a residence for a good many years and there is no evidence to indicate that it is only a temporary structure. 84 Ind. Cas. 264=5 L.R.A. Civ. 400=A.I.R. 1924 All. 750.

——S. 60—Work of permanent character—Kuchcha house.

A Kuchcha thatched house may be a work of a permanent character and the fact that the thatch is renewed from time to time does not make it a work of a temporary character. 78 Ind. Cas. 215=A.I.R. 1925 All. 203.

——S. 60 (b)—Work of a permanent character.

A katcha thatched house may be "a work of a permanent character" within the meaning of S. 60 (**b**) of the Easements Act, 1882, although the thatch of the house is renewed from time to time. 3 A.L.J. 765=1906 A.W.N. 216=28 A. 741.

15. Miscellaneous.

——Ss. 60 (a), 52, 4, 64—Miscellaneous:—Secretary of State wishing to take over certain property having theatre thereon and agreeing through Improvement Trust, his Agent, with its owner **B** to give him some other plots in other locality and to build there theatre for **B**. Such new plots situated at distance from main

road and Secretary of State agreeing to give right of way over certain plots connecting main road—Deed of exchange transferring to **B** plots with theatre newly built—Covenant that **B** would have free right to passage over land specified—**B** allowed to erect a portico at entrance of way and to put sign-boards on it—Plots between theatre and main road subsequently sold by Improvement Trust and purchased by one **T** who had notice of conditions of agreement between Secretary of State and **B**—Portico not built by **B**—**T** with permission of Improvement Trust building theatre and constructing portico on land on which **B** was allowed to build same—Protest by **B** to Improvement Trust—Suit by **B** against Secretary of State, Improvement Trust and **T**, for injunction. demolition of portico and possession of land and for damages—**B**, during pendency transferring all his rights under agreement to other persons who joined as co-plaintiffs—**B** dying and judgment pronounced by trial Court in ignorance of his death:

Held, that the withdrawal of the licence to construct porch could not be construed as in any way calculated to defeat the transfer of property made by the licensor and hence the licence granted to **B** was not irrevocable by reason of the application of S. 60 (a). A. I. R. 1939 Oudh 196=1939 O.W.N. 500=181 Ind. Cas. 662.

——**S. 60—Miscellaneous**—Lessee of land and premises near relation of lessor—Lease in year 1893 and not registered—Improvements made by lessee—Suit by lessor for possession—Principles of S. 51, T. P. Act held apply—Decree conditional on payment of improvement costs can be granted and that S. 60, Easements Act did not come into operation. A. I. R. 1938 All. 342=1938 A.W.R. 280=1938 A. L. J. 465=176 Ind. Cas. 135.

——**S. 60—Miscellaneous—Defendants had no** right or interest in land—Plaintiff entitled to partition of materials of house—S. 60, Easements Act if barred the suit.

A certain site belonged to the plaintiff. Father of defendant No. 2 took the land from the plaintiff's father by a registered deed wherein it was provided that no other person would be allowed to reside in the house without the permission of the **zemindar.** On the death of **A**, the house was succeeded to by **A**'s daughter and his son **N**. **A**'s daughter sold her 1-3rd share in the materials of the house to the plaintiff. **N** sold his 2-3rd share to defendant No. 1. The plaintiff brought a suit for the partition of his 1-3rd share and for the removal of the 2-3rd materials by defendant No. 1 and for possession over site:

Held, that as regards the suit being barred by S. 60 of Easements Act no question of any licence arose in this case. 156 Ind. Cas. 48.

——**S. 60—Miscellaneous—A granting exclusive** licence to **B** to collect leaves from January 1, 1936, to December 31, 1936—On June 1, 1936, **A** granting to **C** same licence from June 1, 1936, to May 31, 1937—**A** granting on July 1, 1936, to **B** same licence from July 1, 1936, to June 30, 1937.

A granted to **B** exclusive licence to gather and remove leaves for one year from January 1, 1936, to December 31, 1936, inclusive. On June 1, 1936, **A** granted to **C** in respect of the same area exclusive licence to gather and remove the same leaves for one year from June 1, 1936, to May 31, 1937. On July 1, 1936, **A** granted to **B** same licence over same area for the period, July 1, 1936 to June 30, 1937:

Held, that after the first grant **A** was divested of the power to make any such grant to **C** for the period June 1, 1936 to December 31, 1936. But **A** could make a grant to **C** in 1936 to commence on January 1, 1937. He had the power to make such a grant. **B**, seeing that he had only got half of what he thought he was getting, could, of course, repudiate the grant or he could affirm, and take under it for the period, January 1, 1937, to May 31, 1937, claiming from **A** compensation for the loss of half of what was granted to him. **A** having divested himself of his grant to **C** of any power to grant an exclusive licence to anybody until after May 31, 1937, could grant a licence on July 1, 1936 to **B**, but not for any period before May 31, 1937. It would be inoperative until after May 31, 1937. Then **C** could approbate or reprobate. A.I.R. 1938 Nag. 377=I. L. R. (1939) Nag. 432=181 Ind. Cas. 126.

——**S. 60—Miscellaneous.**

Transferees of one of the zemindars cannot sue occupiers of certain plots as licensees for storing manure, etc., where the occupiers on the strength of the licence had been in possession for 12 years and had in pursuance of the licence erected constructions of a permanent character. 78 Ind. Cas. 316=5 L.R.A. Rev. 98=A.I.R. 1924 All. 434.

——**S. 61—Implied revocation—Remedy.**

An appropriation of the land licensed to any use inconsistent with the enjoyment of the licence, works a revocation and the licensee may maintain an action for damages against the licensor for breach of contract in unlawfully revoking it.

Where the licence was for valuable consideration, was accompanied by the grant of a profit **a prendre** and was consequently a licence coupled with an interest, and where the grant entitled the licensee to the exclusive right to catch elephants within the defined tracts and for the specified period but owing to accidental and departmental fires of the Forest Department the licensee was hindered in his operation,

Held, it does not follow as a matter of course that the licensee would be entitled to exclusive occupation of the entire territory during such time. It is impossible to award the licensee damages when the licensee fails as well from uncertainty of cause of damages as from uncertainty of extent of damages. 72 Ind. Cas. 270=36 C.L.J. 271=A.I.R. 1923 Cal. 49.

——**S. 62—Licensee incurring expenses for works** done upon property—Whether can be said to have acted upon licence.

The words "acting upon the licence" mean acting upon a right granted to do upon the land of the grantor something which would be unlawful in the absence of such right. A man does not "act upon a licence" if he does work and incurs expense upon his own property. That he can do without anyone's licence. Works done by the licensee on his own land may be done without the knowledge of the licensor, and it would be impossible to hold that the alleged licensor's land was bound in perpetuity (Subject to S. 62) as the result of some works done by the alleged licensee on his own property of which the former was unaware. S. 62, Easements Act, is not dealing with the effect of an express contract between the parties, but with the consequences to follow from a certain conduct on the part of the licensee which, if done on the land of the licensor, might well give the licensee rights against him. A.I.R. 1936 P. C. 77=1936 A.W.R. 169=70 M. L. J. 190=1936 A. L. J. 145=40 C. W. N. 417=43 L. W. 289=2 B. R. 299=1936 M. W. N. 314=38 Bom. L. R. 353=63 C. L. J. 140=160 Ind. Cas. 837 (P. C.).

[**Reverses** 31 Bom. L. R. 1331=A.I.R. 1930 Bom. 70=124 Ind. Cas. 97.]

——**S. 62 (f)—Residential house in town—Occupier converting it into public temple—Landlord's right of re-entry.**

In the case of a town, the proprietor is not entitled to re-enter upon the land forming the site of residential

house on the ground that the occupier converted the residential house into a public temple, unless it has been shown that he was holding it under any licence for a specified purpose, and that his right of transfer was restricted in any way. A.I.R. 1942 Oudh 427=1942 O.W.N. 351=18 Luck 155=1942 A.W.R. (C.C.) 234=1942 R. D. 548=200 Ind. Cas. 744.

——**S. 62 (f)—Abadi** site originally given to **R** under contract that it be used for building cattle-shed—Site turned into **Bidi** factory—Clear breach of contract—**R** is in the position of licensee and the licence may be deemed to be revoked under S. 62 (**f**) of the Easements Act. A.I.R. 1934 Nag. 158=17 N. L. J. 177=31 N.L.R. 18=150 Ind. Cas. 54.

——**S. 62 (f)**—Where the licence in respect of a house is granted for a specific purpose of residence and the purpose is abandoned or has become impracticable, under S. 62, Easements Act, license to reside in the house must be deemed to be revoked. A I.R. 1933 Oudh 302=10 O.W.N. 398=8 Luck. 509=144 Ind. Cas. 776.

——S. 62—Revocation—Licence—Consideration—Right to damages.

Where the licence was for valuable consideration, was accompanied by the grant of a profit **a prendre** and was consequently a licence coupled with an interest and where the grant entitled the licensee to the exclusive right to catch elephants within the defined tracts and for the specified period but owing to accidental and departmental fires of the Forest Department the licensee was hindered in his operation,

Held, it does not follow as a matter of course that the licensee would be entitled to exclusive occupation of the entire territory during such time. It is impossible to award the licensee damages when the licensee fails as well from uncertainty of cause of damages when the licensee damages when the licensee fails as well from uncertainty of damages as from uncertainty of extent of damages. 72 Ind. Cas. 270=36 C. L. J. 271=A. I. R. 1923 Cal. 49.

——Ss. 63 and 64—Scope—Licence—Revocation— Remedy of licensee — Revocable and irrevocable licences—Rule.

Even where a licence is revocable, the licensee is entitled to a reasonable notice before the licence is revoked. If, however, the licence is revoked without reasonable notice the remedy of the licensee is by way of damages and not by way of an injunction. If, however, the licence is irrevocable, and its enjoyment is obstructed by the licensor, the remedy of the licensee is either by way of injunction or in damages. An irrevocable licence for a term implies an undertaking on the part of the licensor not to revoke it during its term, and a threatened breach of the licence may be prevented by enforcing this implied covenant by means of an injunction. But where the licence has by special agreement, been made revocable on certain grounds as to the existence of which a particular person's opinion has been made the sole test and criterion, and that person has expressed his opinion that such grounds exist for revocation, then there can be no injunction. A.I.R. 1950 E.P. 40.

——S. 63—Revocation of licence—Notice.

A licensee whose licence is revocable is entitled to a reasonable notice of revocation. When the exercise of the rights conferred by the licence involves nothing beyond, there can be no reason to urge against the existence of a power to determine the licence **brevi manu** at the will of the licensor. But if the exercise of the rights has involved the licensee in obligations in other directions, which the determination of the licence will disable him from fulfilling, the licence is determinable only after sufficient notice, for the making of substituted arrangements:

Held, with regard to the facts of the case that the licence was not determined by the institution of proceedings by way of suit. A.I.R. 1932 P.C. 108=61 M.L.J. 958=36 L.W. 91=138 Ind. Cas. 292 (P.C.).

——S. 63—Eviction—Notice to quit.

A suit for ejectment of a licensee is maintainable without notice to quit even though the licensee has erected huts on the land. 27 C. L. J. 523=45 Ind. Cas. 317.

——Ss. 63 and 64.

In the absence of anything showing the restriction as to the method of building by a licensee, of a land set for building purposes, there is no warrant to hold that the licence was granted to build in a particular manner. 18 A.L.J. 781=2 U.P.L.R. (All.) 266=58 Ind. Cas. 410.

——S. 63—Rovocability—Licensee executing works of permanent character.

If on the basis of a licence, the licensee executes works of permanent character, the grantor of the licence. is entitled to revoke it, if he makes compensation to the licensee for the loss he may incur by reason of the revocation of the licence. 8 Ind. Cas. 793=12 C.L.J. 443.

——Ss. 64, 52, 4, 60 (a)—Applicability.

Secretary of State wishing to take over certain property having theatre thereon and agreeing through Improvement Trust, his Agent, with its owner **B** to give him some other plots in other locality and to build there theatre for **B**—Such new plots situated at distance from main road and Secretary of State agreeing to give right of way over certain plots connecting main road—Deed of exchange transferring to **B** plots with theatre newly built—Covenant that **B** would have free right to passage over land specified, —**B** allowed to erect a portico at entrance of way and to put sign boards on it—Plots between theatre and main road subsequently sold by Improvement Trust and purchased by one **T** who had notice of conditions of agreement between Secretary of State and **B**—Portico not built by **B**—**T**, with permission of Improvement Trust building theatre and constructing portico on land on which **B** was allowed to build same—Protest by **B** to Improvement Trust—Suit by **B** against Secretary of State, Improvement Trust and **T** for injunction, demolition of portico and possession of land and for damages—**B**, during pendency transferring all his rights under agreement to other persons who joined as co plaintiffs—**B** dying and judgment pronounced by trial Court in ignorance of his death:

Held, that the licence was in fact revoked by the Secretary of State and the Improvement Trust when they allowed **T** to build the portico. **B** had cause of action only against the Secretary of State and not against **T** whether for damages, for breach of contract or for compensation under the provisions of S. 64. A.I.R. 1939 Oudh 196=1939 O. W. N. 500=181 Ind. Cas. 662.

——S. 64—Applicability.

S. 64 does not apply to a case where the work executed is of a permanent character. A.I.R. 1933 All. 842=56 All. 207=1933 A. L. J. 1422=145 Ind. Cas. 948.

[On appeal from A. I. R. 1932 All. 572=136 Ind. Cas. 821.]

Easements (Extending) Act (VIII of 1891) S. 1—Retrospective effect.

Easements (Extending) Act, 1891, extends the provisions of the Indian Easements Act, 1882, to United Provinces of Agra and Oudh. Neither of the Acts is retrospective and cannot affect the rights which were

acquired before 1891. A.I.R. 1934 All. 336=1934 A.L.J. 728=4 A.W.R. 1198=18 R.D. 353=153 Ind. Cas. 692.

East Bengal Preventive Detention (Continuance) Ordinance (VII of 1949)—If ultra vires—**Government of India Act, S. 88.**

The Governor has no power to extend one ordinance by another ordinance under S. 88 of the Government of India Act, and so the East Bengal Preventive Detention (Continuance) Ordinance (VII of 1949) is **ultra vires**. 51 Cr.L.J. 65=A.I.R. 1949 Dacca 33.

Eastern Bengal and Assam Disorderly Houses Act (II of 1907) S. 2—Notice—Essentials.

A notice requiring the person proceeded against to show cause why he should not vacate the house is not a notice contemplated by this Act and is wholly illegal and an order based on such a notice, for discontinuance of the use of the house as a brothal is bad. A.I.R. 1932 Cal. 369=35 C. W. N. 348=33 Cr.L.J. 475=137 Ind. Cas. 528.

——Ss. 2 and 3—Scope of—Powers under—Extent of.

Under the Eastern Bengal and Assam Disorderly Houses Act the owner or occupier of disorderly houses may be ordered to discontinue the use of a house as a disorderly house but not to vacate it. An order imposing daily fine on prostitutes for non-compliance with an order to vacate their houses is therefore not competent under Ss. 2 and 3 and is **ultra vires**. A.I.R. 1930 Cal. 638=34 C.W.N. 451=129 Ind. Cas. 358.

——Ss. 2 and 3—Scope—Power of magistrate—Revision.

Ss. 2 and 3 of the Act do not create any offence; only S. 6 creates the offence. Power conferred by Ss. 2 and 3 is not a power to hold criminal trial; a magistrate may hold the trial in a way which is ordinarily just; he is not bound to act on legal evidence and need not administer oath. A Court making order under S. 3 of the Act is a Criminal Court and hence the High Court can act in respect of such order under Ss. 435 and 439, Cr.P.C. 37 Cal. 287=14 C.W.N. 404=11 C.L.J. 297=11 Cr.L.J. 112=5 Ind. Cas. 323.

——S. 3—Procedure—Applicability of Cr.P.C.—Duty of Magistrate.

Proceedings under S. 3 of the Act, (2 E. B. and A. of 1907) are not governed by Cr. P. Code. It is not necessary for the Magistrate to act only on legal evidence and he need not administer oath. But before passing an order he must satisfy himself that the house is used as described in S. 2, Cls. (a), (b) or (c) and he may do this in any way that does not violate the ordinary rules of fairness and propriety, but before he can pass an order under S. 3 he must not only be satisfied that the houses are used as brothels but he must further find an additional fact to bring it within the provisions of Cls. (a), (b) or (c). When the cases of a large number of houses are jointly considered, though it is not necessary to draw up separate proceedings and hold separate enquiries, yet in deciding the question whether annoyance was caused, the Magistrate should apply his mind to the case of each house separately. 91 Ind. Cas. 881=30 C.W.N. 91=27 Cr.L.J. 145=A.I.R. 1926 Cal. 307.

——S. 3—Jurisdiction—District Magistrate, if can interfere with order under section.

A District Magistrate cannot interfere with an order passed by a Criminal Court in the exercise of its jurisdiction under S. 3. 45 Cal. 301=21 C.W.N. 1135=27 C.L. J. 89=18 Cr.L. J. 736=40 Ind. Cas. 736.

——Ss. 6 and 7—Inquiry—Authority, if can be delegated—Order to inspector—Inspector directing Sub-Inspector—Report of Sub-Inspector—"Complaint" —Cr. P. C., Ss. 190 and 203.

S. 7 of the Act does not authorise any body to enter the house if the Magistrate can be satisfied in other ways that the nuisance is still continuing. The authority given by S. 7 cannot be delegated to any other person. A District Magistrate ordered the Inspector of Police whom he named, authorising him to make inquiry under S. 7. The latter asked a Sub-Inspector to make the necessary inquiry who reported that the woman was carrying on her profession of prostitution, **Held,** that the District Magistrate could treat the report of the Sub-Inspector as a complaint of facts under S. 6. An offence under S. 6 is one under Local law, and proceedings should only be instituted under the Cr. P. C. The prosecution must show not only that the woman was going on with her profession of prostitution, but that she was still using her house to the annoyance of the inhabitants of the vicinity. If the Magistrate was satisfied after examining the Sub-Inspector on oath, that the annoyance still continued, he should take cognizance upon that complaint under S. 190 (a) Cr. P. C. of an offence under S. 6 of the Disorderly Houses Act. If not so satisfied, he should dismiss the complaint under S. 203, Cr.P.C. 16 C.W.N. 1049=13 Cr.L.J. 691=16 Ind. Cas. 499.

——Eastern Bengal and Assam Excise Act (I of 1910) Ss. 53 and 72—Scope—Possession of excisable article—Prosecution for — Defence—Plea of Bona fide **medicated article containing** bhang**—if offence.**

The accused, a Kaviraj, convicted under S. 53 for manufacturing and selling Kameswar modak containing bhang, can successfully put the defence that the article was a **bona fide** medicated article prepared for medicinal purposes. 14 Cr. L.J. 300=17 C.W.N. 939=19 Ind. Cas. 956.

——Eastern Bengal and Assam General clauses Act, (I of 1909.)

——S. 14—Applicability — Period fixed under R. 13 framed under S. 296 (2), Assam Municipal Act, 1923—if can be cut short.

Section 14 has no application when an act is required to be done in such a way as to leave a clear margin of a definite and stated period of time between the date of the act and the fixed date, and cannot be invoked for shortening the interval of fifteen days mentioned in R. 13 under S. 296 (2), Assam Municipal Act, 1923. A.I.R. 1936 Cal. 424=40 C.W.N. 553=165 Ind. Cas. 606 (2).

——Eastern Bengal Tenancy Act (VIII of 1885), S. 22 (2)—Scope and effect of—if excludes Sch. III, Art. 3, Bengal Tenancy Act.

Where S. 22 (2) of the Eastern Bengal Tenancy Act applies, the special rule of two years limitation in Sch. III, Art. 3 of the Bengal Tenancy Act does not apply. 25 Ind. Cas. 414 (Cal.).

——S. 147 A—Rent suit—Compromise decree—Additional land given and new rent settled—Non-compliance with section — Objection in execution.

In a suit for rent, a decree was made on compromise and the tenant took some additional land and a rent was fixed for the area formerly held by him together with the added area. When execution was sought objection was taken on the ground of non-compliance with S. 147 A of the Eastern Bengal and Assam Tenancy Act. **Held,** the objection raised as to the validity of the decree could not be raised in execution proceedings. 17 C.W.N. 496, Dist. 24 C.W.N. 1070=60 Ind. Cas. 204.

——S. 170 (4)—Applicability—Non-transferable occupancy holding—Execution sale—Rights of landlord purchaser.

Please read the following as headings in place of those already printed in the respective Columns noted against each.

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EAST INDIA COMPANY.	109 - 110
East Punjab Evacuees' (Administration of Property) Act (1947), S. 7.	111 - 112
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ELECTRICITY ACT (1910), S. 44.	155 - 156
ELECTRICITY ACT (1910), Sch.	157 - 158
ELECTRICITY RULES (1937), R. 69.	159 - 160

The section does not debar the landlord when he has himself purchased the holding at a sale in execution of a decree of arrears of rent due thereon, from challenging the rightof the purchaser, not recognised by him, to make the deposite on the ground that as against him such purchaser has acquired no title and therefore cannot apply under O. 21, R. 89, C.P.C. 22 C.L.J. 108=20 C.W.N. 40=28 Ind. Cas. 182.

——East India Company.

See 1. Govt. of India Act.
2. Secretary of State.
3. Tort.

——East India Cotton Associatian—Articles of Association, Art. 96—Construction and scope—Member dying prior to April 21, 1941—if bound to go to arbitration.

Where a member of the East India Cotton Association died before 21st April, 1941, when the bye-law No. 14 came into force, his heir and legal representative was neither entitled nor bound to go to arbitration in connection with a transaction which had been entered into by the member during his life-time as a broker for the constituent.

Part 2 of Art. 96, to the extent to which it makes the obtaining of an award a condition precedent cannot be treated as a bye-law. A.I.R. 1942 Bom. 297=44 Bom. L.R. 692=I.L.R. (1942) Bom. 744=203 Ind. Cas. 322.

——Art. 96—Scope — If binds non-member — Bombay Cotton Contracts Act, S.IV—Effect of.

——Section 4 of the Bombay Cotton Contracts Act does not make the Art. 96 of the Articles of Association of the East India Cotton Association binding on non-members. A.I.R. 1933 P.C. 55=35 Bom. L.R. 303=37 C.W.N. 350=64 M.L.J. 222=1933 M.W.N. 161=60 I. A. 63=37 L.W. 570=57 C.L.J. 99=57 Bom. 218=1933 A.L.J. 605=141 Ind. Cas. 828 (P.C.)

——Bye-law No. 38—Applicability and Scope of—Suit by constituent against pakka adatya.

There was an initial sale of 200 bales of cotton by the defendant who was pakka adatya, for the plaintiff and a contract note dated 6th November 1939, was sent by the defendant to the plaintiff and signed by the plaintiff. Thereafter, owing to fluctuations in the market, the defendant demanded margin money but the plaintiff failed to pay the same. Thereupon, the defendant closed the transaction on 3rd February 1940. On receipt of intimation thereof, the plaintiff repudiated this closing transaction. The defendant thereupon offered to re-sell, if the margin, as demanded, was paid. To that there was no reply. The defendant thereupon sent a contract note with his letter of February 6, 1940, to the plaintiff. The plaintiff retained the same. On March 19, 1940, the plaintiff sent a telegram to the defendant as follows: "Kindly settle 200 bales cotton; vide your contract note C. 694 purchasing market price to day wire settlement." The defendants sent a reply intimating that the purchase had already been effected on February 3, under contract No. 1553 which was already sent and there was no outstanding business. Contract note No. C. 694 was not contract dated November 6, 1939. The plaintiff then filed a suit to recover the amount due to them on the footing of the difference between the price noted in the contract, dated November 6, 1939, and the current price in the market on March 19, 1940:

Held, that the suit was for an unpaid claim and fell within bye-law 38 of the Association, subject to which the contract note dated November 6, 1939, was accepted by the plaintiff. A.I.R. 1941 Bom. 82=42 Bom. L.R. 1135=I.L.R. (1941) Bom. 200=193 Ind. Cas. 779.

—Bye-law No. 74—Applicability — "If the seller fails to tender" — Interpretation of.

Under bye-law 74, if the seller fails to tender delivery of the cotton sold or any portion of it, the buyer may buy in the market on the same day at a reasonable rate on account and at the risk and expense of the seller, or he may invoice back at the spot rate of the cotton contracted for plus the penalty therein mentioned:

Held, that the bye-law only applied on default by the seller, that the opening words "if the seller fails to tender" denoted that there was an obligation on the seller to make a tender, and he failed in that obligation and that the bye-law operated only to work out the rights of the parties which arose on the seller making default in delivery. The whole bye-law comes into operation only when the seller makes default and regulates the working out of the rights of the parties on that basis. A.I.R. 1934 Bom. 107=36 Bom. L.R. 28=58 B. 288=150 Ind. Cas. 49.

—Bye-law No. 82 — Applicability — Implied contract—Sufficiency.

The plaintiffs, certain members of the Association, entered into certain teji mandi and mandi contracts with the defendant in respect of cotton. On the dates upon which the options became exercisable, the defendant against whom the options had gone, refused to sign the contracts for taking or giving delivery, thereby refusing to carry out the terms of the original bargain. The plaintiffs closing the contracts filed a suit to recover the difference from the defendant:

Held, (i) that bye-law 82 of the Association did not, in terms, require an express contract and an implied contract was sufficient; and that as a teji mandi transaction is not a mere wagering transaction, it must be presumed that the parties impliedly agreed that the necessary contracts should be signed in the form required by the bye-laws and that the plaintiffs were entitled to succeed. A.I.R. 1933 Bom. 348=35 Bom. L. R. 640=147 Ind. Cas. 412.

East Punjab evacues' (Administration of Property) Act (XIV of 1947), S. 2—Shares of Indian Company held by evacuee—If vest in custodian.

Shares of Indian Companies held by evacuees are evcuee property and would vest in the custodian. A.I.R. 1950 E. P. 188.

——S. 4—Property vesting in custodian pending appeal by evacuee — Right of evacuee to continue appeal—C. P. Code, O. 22, R. 10.

The vesting of the property of the evacuee in the custodian under S. 4 of the East Punjab Evacuees' (Administration of Property) Act, does not deprive the evacuee of his right to pursue his remedy in a Court of law. If the interest of the evacuee devolves upon the custodian during the pendency of an appeal filed by the evacuee, the custodian no doubt can, if he chooses, apply to be substituted for the appellant under the provisions of O. 22, R. 10, C. P. code. But his failure to do so does not mean that the appeal cannot be continued by the original appellant. 50 P. L. R. 210.

——Ss. 7 and 12—Order of custodian declining to return property—Appeal.

Where an applicant for restoration of property claimed the property not only under S. 12 but also under S. 7 of the East Panjab Evacuees' (Administration of Property) Act on the ground that the property was not evacuee property, an order of the custodian declining to return the property under S. 12 on the ground that the Central Government had not issued an appropriate notification under that section without making a precise order under S. 7, must be deemed to be an order not only under the provisions of S. 12 but also under the provisions of S. 7. An appeal, therefore, clearly lies from such an order to the Court of the District Judge. 50 P.L.R 265.

—East Punjab Evacuee property (Administration) ordinance (1949), Ss. 30 and 110—"Aggrieved person"—Meaning of—Allotment made by Provincial Government in favour of certain person cancelled by custodion—Appeal by such person —If competent.

Under S. 30 of the East Punjab Evacuee Property (Administration) Ordinance, no one has a right of appeal unless he can show that a decision has been pronounced against him which has wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something. In other words, the words "aggrieved person" in the section do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. Where the allotment made in favour of a person by the provincial Government has been cancelled by the custodian under S. 10 of the Ordinance, such person has not been wrongfully deprived of anything to which he was legally entitled and is not an "aggrieved person" within the meaning of the expression as used in S. 30 of the Ordinance and as such an appeal by him is not competent. A.I.R. 1950 E. P. 175.

——East Punjab High Court Rules And Orders, Vol. 5, Chap. 6-D, R. 1—Application for admission or re-admission as pleader—Principles applicable—Pleader struck off rolls on conviction of criminal offence—Re-admission—Considerations.

The use of the word "may" in R. 1 in Chap. 6-D of Vol. V of the Rules and Orders of the East Punjab High Court, makes it quite clear that the High Court has a discretion to refuse to admit a person who is unfit to fill the position of a member of the Bar. If a candidate for admission has done something which would be regarded as disgraceful or dishonourable if done by a member of the legal profession, the Court would be doing nothing more than its duty in declining to admit him. Indeed the admission of a person as an advocate or pleader is regulated by precisely the same principles as the admission of an advocate or pleader who has been struck off the roll and who applies for leave to be again put upon the roll.

When a person is convicted of a Criminal offence, a presumption at once arises that he is not a fit and proper person to remain on the roll of advocates. This presumption is a rebuttable one and it is open to the person concerned to show that the crime of which he was convicted does not detract from the confidence which his clients or the other members of the legal profession repose in him. It is then for the Court to decide whether having regard to all the facts and circumstances of the case his name should be struck off the rolls or whether a higher punishment should be awarded to him. If the Court decides to remove his name, that decision is not final or irrevocable. It may be reviewed after the delinquent has had an opportunity of redeeming his character. The High Court has power, when a legal practitioner has been dismissed for misconduct of any description, to re-admit him after a lapse of time if he satisfies the Court that he has in the interval conducted himself honourably and that no objection remains as to his character and capacity. There is no fixed rule as to the period which should ordinarily elapse before a person can be re-admitted to roll of advocates or pleaders. A.I.R. 1949 E.P. 83 (F.B.)

——East Punjab Public Safety Act (V of 1949), S. 3—Grounds of detention—Power of High Court to adjudicate upon—Cr.P.Code, S. 491.

Where the District Magistrate orders the detention of a person under S. 3 of the East Punjab Public Safety Act, on the ground that he has issued posters which are objectionable from communal point of view, it is not open to the High Court on an application under S. 491, Cr. P. Code, to adjudicate upon the fact whether those posters do or do not suffer from the defect which the District Magistrate ascribes to them. The sole judge of this is the District Magistrate. 4 A.I. Cr. D. 252= 51 Cr.L.J. 888=A.I.R. 1950 E.P. 172.

——S. 3—Object of detention—Punitive or preventive.

The powers conferred on the executive under S. 3 of the East Punjab Public Safety Act are for the purposes of prevention and not for punishment. Where the District Magistrate is of opinion that the detenu had started malicious propaganda and had issued posters which were objectionable from "Communal point of view", then it is open to him to take action against him under S. 153-A, I. P. Code, or under S. 108, Cr. P. Code, and not to order his detention under S. 3 of the East Punjab Public Safety Act. The latter Act is not intended to suspend the ordinary criminal tribunals of the land or to prevent them from exercising their ordinary jurisdiction. A.I.R. 1946 Bom. 32, referred to. 4 A.I.Cr.D. 252=A.I.R. 1950 E.P. 172=51 Cr. L.J. 888.

——S. 3 (4)—Constitution of Advisory Tribunal—Advisory Committee set up under old Act—If automatically becomes Advisory Tribunal.

An advisory committee set up gratuitously to deal with cases under the Punjab Public Safety Act of 1947, cannot automatically, and without any official order or notification in this behalf, become a validly constituted Advisory Tribunal under S. 3 (4) of the Punjab Public Safety Act of 1949. 52 P.L.R. 17=4 A.I.Cr.D. 35=A.I.R 1950 E.P. 162=51 Cr.L.J. 599.

——S. 3 (4)—Order of detention under Punjab Public Safety Act of 1947—Extension of period of detention under—Legality.

The fact that the extension of the period of detention directed under the earlier Punjab Public Safety Act of 1947, was made wrongly under S. 3 (4) of that Act after it was superseded by the East Punjab Public Safety Act of 1949, does not invalidate the order, as a similar order could be passed under the corresponding S. 3 (4) of the latter Act. 52 P.L.R. 60.

——S. 3 (4)—Scope—Reference to tribunal within two months—If mandatory.

The provisions of S. 3 (4), East Punjab Public Safety Act, regarding the reference of cases of detenus to the tribunal are mandatory and although the word "ordinarily" leaves a loophole in the case of delay in such a reference, the word must be taken in this context to mean in the absence of special reasons for not making a reference within two months. The detention of the detenu is illegal if his case is not referred to the Tribunal within two months of his arrest and detention without the existence of any special reason for not referring it within the specified period. 52 P.L.R. 17=4 A.I. Cr. D. 35=A.I.R. 1950 E.P. 162=51 Cr. L. J. 599.

——S. 3 (5)—Applicability and Scope—Detention under Punjab Public Safety Act of 1947.

The provisions of S. 3 (5), East Punjab Public Safety Act, are mandatory, and are intended to be complied with as soon as possible after the first order of arrest and detention, and by the authority making these orders.

These provisions as they stand are not applicable in the case of persons who have been arrested and detained under the Punjab Public Safety Act of 1947 and whose detention is later extended under the East Punjab Public Safety Act of 1949. 52 P.L.R. 60.

——S. 3 (5)—Non-compliance with — Legality of detention.

S. 3 (5) of the East Punjab Public Safety Act requires that the reasons for the arrest of a detenu should be communicated to him "as soon as may be" after he is detained, that is as soon as is reasonably practicable having regard to all the circumstances of the case. The proviso to S. 3 (5) implies that some communication however defective, vague or insufficient it may have been was made to the person concerned. It does not contemplate that the order will not be invalid even if no communication whatsoever is made to him. Therefore, non-compliance with the provisions of S. 3 (5) would render the detention wholly void and inoperative in the eye of law. A.I.R. 1949 All. 396: rel. on. 52 P.L.R. 141=4 A. I. Cr. D. 428= A.I.R. 1950 E.P. 271=51 Cr. L. J. 1335.

——S. 3 (5)—Non-compliance—Legality of detention.

The provisions of S. 3 (5), East Punjab Public Safety Act, are mandatory and must be complied with and non-compliance with them renders the detention of the detenu illegal. 52 P.L.R. 17=4 A. I. Cr. D. 35=A.I.R. 1950 E.P. 162=51 Cr. L.J. 599.

——S. 3 (5)—Some reasons for detention not within scope of Act—Legality of order.

If a reason is given for detention of the person which is not within the scope and ambit of the E. P. Public Safety Act conferring the power upon the detaining authority, then the whole order is vitiated notwithstanding the fact that other reasons given are good, because it cannot be said what it was that operated upon the mind of such authority, whether it was something which was within the power of that authority or something which is foreign and extraneous for the purposes of the Act. A.I.R. 1950 E.P. 222=4 A.I. Cr. D. 347=51 Cr. L. J. 1237.

——S. 3 (5), Proviso—Grounds of detention not giving any particulars—Validity of detention.

The proviso to S. 3 (5), East Punjab Public Safety Act, cannot be read in a manner to say that no information is to be given merely because indefiniteness, vagueness and insufficiency are envisaged by the statute, when sub-S. (5) requires some information to be given. Where the grounds communicated to the detenu merely state that he has taken part in subversive activities and committed breach of the public tranquillity without giving any particulars, the information given is not merely vague, insufficient or indefinite but amounts to no information at all, and the continued detention of the detenu is illegal and improper for non-compliance with all the provisions of the law as contained in S. 3 of the Act. A.I.R. 1950 E.P. 222=4 A.I. Cr. D. 437=51 Cr. L. J. 1237.

——S. 4—Scope — Validity—if infringes Art. 19 (1) (d) and (e) of the Constitution of India—Art. 19 (5) Scope and effect—Reasonableness of restrictions—Tests.

The petitioner was directed by the District Magistrate of Delhi acting under the powers conferred on him by the East Punjab Public Safety Act, 1949 not to remain in the Delhi District, and to immediately remove himself from the Delhi District and not to return to the Delhi District. The order was to continue in force for three months. In an application under Art. 32 of the Constitution praying for the quashing of the order of externment it was contended that the East Punjab Public Safety Act, 1949, under which the order was made, is an infringement of the fundamental rights guaranteed under Art. 19 (1) (d) of the Constitution read with clause (5) of the same Article,

Held, (per **Kania, C. J., Fazli Ali and Patanjali Sastri, JJ.**): It is necessary first to ascertain the true meaning of Art. 19 (1) (**d**) read with cl. (5) of the same Article. There is no doubt that by the order of externment the right of the petitioner to freedom of movement throughout the territory of India is abridged. The only question is whether the limits of permissable legislation under cl. (5) are excluded. Clause (5) of Art. 19 of the Constitution permits the imposition of resonable restrictions on the exercise of of the right conferred by sub-cl. (**d**) of the Article in the interests of the general public. The question which the Court has to consider is whether the restrictions put by the impugned legislation on the exercise of the right are reasonable or not The question whether the provisions of the impugned Act provide reasonable safeguards against the abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of the clause. The Court will be entitled to consider whether the restrictions on the right to move throughout India, **i. e.,** both as regards territory and the duration are reasonable or not. The law providing reasonable restrictions on the exercise of the right conferred by Art. 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of the procedural part of the law. The narrow construction sought to be put on the expression 'reasonable', to restrict the Court's power to consider only the substantive law on the point, is not correct.

The East Punjab Public Safety Act, 1949, in giving the Provincial Government or the District Magistrate (whose satisfaction was final) the power to make an order of externment does not amount to an unreasonable restriction on the exercise of the citizens' right. This is not legislative delegation. The desirability of passing an individual order of externment against a citizen has to be left to an officer. In the Act such a provision cannot be made. The satisfaction of the officer thus does not impose an unreasonable restriction on the exercise of the citizens' right. The provision that the order was to remain in force for three months is not **prima facie** unreasonable.

Under the proviso to S. 4 (5) the Provincial Government is not permitted to order the exclusion or removal from the Province of a person ordinarily residing in the Province, and similarly the District Magistrate is not permitted to direct the exclusion or removal of a person ordinarily resident in his district from that district. This is a great safeguard provided by the East Punjab Public Safety Act. The further extension of the externment order beyond three months may be for an indefinite period, but in that connection the fact that the whole Act is to remain in force only up to the 14th August 1951, cannot be overlooked. Further it is improper to start with the assumption that the Provincial Government when making the order will not perform its duty and may abuse the provisions of the section.

Under S. 4 (6) of the Act, 'may' in the expression 'the grounds **may** be communicated to the externee' has to be read as 'shall' and by doing so it would not be unduly straining the language.

The order of externment is therefore valid.

Per **Mukherjea and Mahajan, JJ.**—Under sub-S. (3) of S. 4 of the East Punjab Public Safety Act there is absolutely no limit as to the period of time during which an externment order would remain in force if the order is made by the Provincial Government. The Provincial Government has been given unlimited authority in this respect and they can keep the order in force as long as they chose to do so. As regards orders made by a District Magistrate, the period indeed has been fixed at three months, but even here the Provincial Government is competent to extend it to any length of time by means of a special order. The law does not fix any maximum period beyond which the order cannot continue; and the fact that the Act itself would expire in August, 1951, is not a relevant matter for consideration in this connection at all. Accordingly the provision of sub-S. 3 of S. 4 is manifestly unreasonable and cannot be supported on any just ground.

The right given under sub-S. (6) of S. 4 to make a representation to the Advisory Tribunal constituted under S. 3 (4), however, is purely illusory as would appear from the fact that even in cases where the order is to be operative for more than 3 months, there is no obligation on the part of the authorities to communicate to the person the grounds upon which the order was made. It is an equally unreasonable provision and neither sub-S. (3) nor sub-S. (6) of S. 4 of the Act can be said to have imposed restrictions which are reasonable in the interests of the general public. Hence, under Art. 13 (1) of the Constitution of India, these provisions of the Act become void and inoperative after the Constitution came into force and consequently the order of externment made by the District Magistrate in the present case cannot stand. 1950 A. L. J. 506=1950 A.W.R. 514=A.I.R. 1950 S.C. 211=86 C.L.J. 83=1950 M.W.N. 440=(1950) S.C. J. 328=1950 S.C.R. 519 (S.C.)

——(as made applicable to Ajmer), S. 4—Power of Magistrate to cancel order.

There is no specific provision in S. 4 of the East Punjab Public Safety Act (as made applicable to Ajmer) to enable a District Magistrate to cancel an order passed by him under that section. Though S. 21 of the General Clauses Act will not in terms apply to the case as the act in question is a local and not a central Act, yet the principle laid down in that section is of general application. There is no reason why an executive officer should not withdraw an order passed by him earlier, particularly when the second order is in favour of the liberty of the subject. A.I.R. 1950 Ajmer 57.

——S. 7 (i) (c)—Validity—Order on printer, publisher and editor of a Weekly to submit matter for pre-censorship—If infringement of freedom of speech guaranteed under Art. 19 (1) (a) of the Constitution—S. 7 (i) (c) if saved by Cl. (2) of Art. 19 of the Constitution.

On the question whether S. 7 (i) (c) of the East Punjab Public Safety Act which authorises the imposition of pre-censorship on a journal is valid and constitutional,

Held, (Fazl Ali dissenting):—There can be little doubt that the imposition of pre-censorship on a Journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Art. 19 (1) (a) of the Constitution of India. Unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under Cl. (2) of Art. 19 of the Constitution although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. Accordingly S. 7 (i) (c) of the East Punjab Public Safety Act which authorises imposition of restrictions for the wider purposes of securing public safety or the maintenance of public order falls outside the scope of authorised restrictions under Cl. (2) and is therefore void and unconstitutional.

Per **Fazl Ali, J.**—S. 7 (i)(c) of the East Punjab Public Safety Act, 1949, under which an order against a **Weekly** is made requiring the printer, publisher and editor to submit for scrutiny "all communal matter and news and views" before publication is saved by Cl. (2) of Art. 19 of the Constitution.

Anything which affects public tranquillity within the State or the Province will also affect public order and the State Legislature is therefore competent to frame laws on matters relating to public tranquillity and public order. The framers of the Constitution have used the more general and basic words "undermines the security of or tends to overthrow the State" which are apt to cover sedition as well as other matters which are as detrimental to the security of the State as sedition. Public disorders and disturbances of public tranquillity do undermine the security of the State and the East Punjab Public Safety Act aimed at preventing such disorders fulfils the requirement of the Constitution. (1950) S.C.J. 425=1950 A.L.J. 491=1950 M.W.N. 429=A.I.R. 1950 S.C. 129=63 L.W. 934=51 Cr. L.J. 1525=1950 R.L.W. 382=(1950) 2 M.L.J. 431. (S.C.).

——S. 38 (1) (i)—Scope and effect of—If affects S. 30 of the Cr. P. Code.

The provisions of S. 38 (1)(i) of the East Punjab Public Safety Act does not mean that a case that could be tried by a Magistrate invested with powers under S. 30, Cr. P.Code, must necessarily be sent for disposal to the Court of Session. S. 30 of the Cr. P. Code, in no way stands repealed by the East Punjab Public Safety Act. 51 Cr. L. J. 1240=A.I.R. 1950 Ajmer 37 (1)=4 A.I.Cr.D. 616.

——S. 43 (1)—Order of detention not in conformity with powers—Jurisdiction of High Court.

S. 43 (1), East Punjab Public Safety Act, does not oust the jurisdiction of the High Court, if the

order of detention is not in conformity with the power conferred upon the detaining authority. A.I.R. 1945 P.C. 156, applied. 52 P. L. R. 17=4 A.I.Cr.D. 35=A.I.R. 1950 E.P. 162=51 Cr.L.J. 599.

Eaves.

See Easement.

——Ecclesiastical Law.

See also Cleargy Discipline Act.

——Established Church—Jurisdiction of—Ordinary courts of law—Roman Catholic Church—Voluntary association—Rules of Branch association different from parent body—Custom—Proof of.

The Church of England is an established church and is therefore subject to the ordinary courts of law in matters temporal as well as matters of doctrine. The Roman Catholic Church is not an established Church but a voluntary association and any member who joins that church will be bound by any rules which it has framed for its internal discipline and management. If a branch of voluntary association has adopted rules which materially differ from those of the parent body, the members of that association will not be members of the parent body but will be an independent organisation with their own rules. The Canon Law recognises no distinction between the spiritual and temporal powers of the Papacy and the Episcopata, and a member of any church which is part and parcel of the Universal Catholic Church would be bound by the Cannon law. If a Church while adopting in the main the doctrine of the Catholic Church has yet framed rules different from the rules of the Catholic church in matters of discipline and management, those rules must be proved in the same way in which a custom would have to be proved in a Court of law. Questions of custom though they may, in the end, become questions of law are at the outset necessarily questions of fact. 35 M.L.J. 407=(1918) M.W.N. 842=8 L.W. 208=47 Ind. Cas. 941.

——Congregation — Right of — Pollution of church —Powers of Bishop.

According to English law, customary rights have all features in common, viz., that however large the community enjoying them and however frequent the exercise of the right, they never amount to a continuous and complete deprivation of the owner of the soil of his natural right of user and further the custom has always arisen in the close and has no other origin. The congregation has no power to select what canons to follow and what to disregard or to adopt rules for the conduct of ceremonial observances at variance to the canons of the church so long as they profess allegiance to the same. 1 Moo. P. C. 411 (N.S.); 7 A C. 484, Expl. A Bishop, with absolute right of control over his flock cannot contract himself out of his rights prospectively so as to prevent his successors from exercising the same authority. The sentiment of pollution in a Christian church indulged in by so called caste Christians is not such spiritual or temporal injury as can be recognized as a legal injury giving rise to a Civil cause of action. 39 Mad. 1056=19 M. L. T. 249=30 M.L.J. 423. =3 L.W. 348=(1916) 1 M.W.N. 307=34 Ind. Cas. 557.

——Education.

See also 1. **Criminal P. C., S. 488.**
2. **Hindu Law—Joint family.**
3. **Local Municipal Acts.**
4. **Local Primary Education Acts**

——Expulsion of student from school or College —When justified. **See** Expulsion from College or School. 48 Bom. L. R. 655. A.I.R. 1947 Bom. 193.

——Education, Expenses of.

See Hindu Law—Joint Family.

——Ejectment.

See also 1. **Co-Sharer**
2. **Evidence Act, Ss. 101—104, 114, 115.**
3. **Landlord and tenant.**
4. **Limitation Act, Arts. 142 and 144.**

Synopsis.

1. Burden of proof.
2. Co-sharers.
3. Decree — Form and effect.
4. Defence.
5. Endowed property.
6. Joinder of parties.
7. Jus tertii.
8. Landlord and tenant.
9. Plea of possession.
10. Proof of title.
11. Right to eject.
12. Suit against trespasser.
13. Title and possession.
14. Miscellaneous.

1. Burden of proof.

——Burden of proof — Service grant — Resumption — Unwillingness or inability to do service—Duty to prove.

In the absence of a notice to quit the land before the suit for ejectment for not rendering service was commenced,

Resumption could not be ordered unless and until it was clearly shown that the defendant was unwilling or incapable of doing the service required. A.I.R. 1929 Pat. 433.

——Burden of proof—Suit for possession—Defendants having no title can still put plaintiff to proof of his title.

In a suit for ejectment even though the defendant has no title, he can still put the plaintiff to the proof of his title and the plaintiff has still to show that the title deed on which he relies as having given him a title superior to that of the defendant is a valid one. 110 Ind. Cas. 554=1928 M. W. N. 336=28 M.L.W. 82=A.I.R. 1928 Mad. 840=56 M. L. J. 52.

——Burden of proof—Title.

A person suing in ejectment must establish his title. 90 Ind. Cas. 499=42 C.L.J. 221=30 C.W.N. 357=A.I.R. 1926 Cal. 460.

——Burden of proof—Proof of title—Plea of tenancy — Onus on defendant.

In a suit for declaration of title and possession, where plaintiffs establish their title to the land it is the duty of the defendant who sets up tenancy from one of the co-sharers to establish such a tenancy. If one of the plaintiffs is a purchaser from that co-sharer, defendant should show that the nature of the tenancy was such that it was binding upon the purchaser. Again, in order to make that lease binding against all the co-sharers, it is the duty of the defendant to establish satisfactorily that there was a partition between the

co-sharers, before the alleged lease to himself, under which his lessor obtained a complete title to deal with the land by way of a lease. If the defendant is successful in establishing a tenancy which would be binding against the plaintiff, the plaintiff would still be entitled to a decree declaring his title to the property and the liability of the defendant to pay rent to the plaintiff. 87 Ind. Cas. 642= A.I.R. 1926 Cal. 442.

——Burden of proof—Duty of plaintiff.

Plaintiff must prove not only title but also possession within 12 years. 96 Ind. Cas. 551 (Pat.)

——Burden of proof — Suit for possession — Proof of title.

Where plaintiff sued to recover immovable property on the ground that it formed part of the inheritance to which she succeeded,

Held, that as the defendants, though without title were in possession, the plaintiff could only recover that possession by establishing her own title as against them. 88 Ind. Cas. 114=30 C.W. N. 196=26 P L.R. 192 =52 I.A. 172=6 Lah. 117= A.I.R. 1925 P.C. 99.

——Burden of proof — Duty of plaintiff.

In a suit framed in ejectment, the plaintiffs must rely upon the strength of their own title and cannot succeed unless they prove that the legal title to the premises is vested in them, and that they have been in possession of the permises and have been ousted therefrom within 12 years before the suit was filed. 84 Ind. Cas. 91=51 Cal. 953=A.I.R. 1925 Cal. 140.

——Burden of proof.

Where a suit is one substantially in ejectment the plaintiff is bound to establish the title on which he claims properties. 88 Ind. Cas. 249=1925 M.W.N 232=A.I.R. 1925 Mad. 1005.

——Burden of proof—Pattadar—Onus to prove title in grantor.

Merely because Government have issued a Patta to somebody, there is no presumption that Government are entitled to the land of which they purported to make a grant, and it is always for the grantee to make out that the grantor, Government in this case, has any title. Unless the title of the Government at the time the grant was made is made out, the grantee cannot maintain a suit in ejectment against persons who were in possession at the time of the grant. 87 Ind. Cas. 46=A.I.R. 1925 Mad. 752=48 M.L.J. 411.

——Burden of proof—Suit by a co-owner—Onus to show unrestricted authority to eject.

When a lease is granted by one co-owner the other cannot maintain a suit for the ejectment of the lessee from the whole of the premises. In a suit by one co-owner for ejectment of a trespasser from the whole of the premises the burden of proof lies on him to show that he had unrestricted authority to eject him on the date of the suit. The mere fact that at some point of time in the past he had such authority is not sufficient to show that he continued to be clothed with that authority at the date of the suit so as to be entitled by himself to require the defendant to clear out of the entire premises notwithstanding the fact that the other co-owner has manifested his intention to the contrary by granting him a fresh lease of the entire properties. 82 Ind. Cas. 1041=A.I.R. 1925 Nag. 175.

——Burden of proof—Plea of tenancy—Failure—Onus on defendant,

Where in an action for ejectment the defendant pleads tenancy by contract but fails to prove the same, the onus is upon the defendants to show some title which will either extinguish or diminish the extent of the plaintiff's title. If the defendants fail, then the plaintiff is entitled to a decree. 86 Ind. Cas. 771=3 Pat. L.R. 50=6 P.L.T. 514= A.I.R. 1925 Pat. 739.

——Burden of proof—Plea of adverse possession—Onus on defendant.

In an action for ejectment if the defendants plead adverse possession the onus is upon them and they must show what was the date from which such possession began to run. In such a case the plaintiff's suit cannot be dismissed till the precise title acquired by adverse possession has been determined. 86 Ind.Cas. 771=3 Pat. L. R. 50=6 P.L.T. 514=A.I.R. 1925 Pat. 739.

——Burden of proof—Duty of plaintiff.

The plaintiff in a suit for ejectment must make out both that he had title to the land in suit and that he was in possession within twelve years of the date when the suit was instituted and if he fails to prove his possession then notwithstanding his title, it being admitted that the defendant is in possession at the date of the suit, his suit must fail. 81 Ind. Cas. 669=3 Pat. 258=6 P.L.T. 185= A.I.R. 1924 Pat. 629.

——Burden of proof—Evidence—Quantum of proof—Gora land.

The nature and quality of the proof required to satisfy the burden cast upon a plaintiff may vary in different classes of cases. In the case of gora lands, that is to say, lands not brought under regular cultivation but which are from time to time, once in four or five years, subject to cultivation of certain classes of crops the evidence, which might be adduced by either party of acts of user is not such as one might expect would be forthcoming in cases of lands under regular cultivation and should not therefore be rejected on that account. 81 Ind. Cas. 669=3 Pat. 258=6 P.L.T. 185=A.I.R. 1924 Pat. 629.

——Burden of proof—Suit by person failing in proceedings under S. 145 Cr. P. C.

Where plaintiff failed in Criminal Procedure Code, S. 145, proceedings to prove possession and also in survey proceedings the onus thus lay heavily on the plaintiffs to show that the defendant was not in possession of the properties by virtue of the the title he alleged in the previous proceedings. 74 Ind. Cas. 747=21 A.L.J. 554=4 P.L.T. 447=1 P.L.R. 345=3 P.L.R. 1924=2 Pat. 676=50 I. A. 183=25 Bom. L.R. 1259=28 C.W.N. 277=33 M.L.T. 233=18 M.L.W. 728=4 L. R. P. C. 123=5 L.R.P.C. 8=39 C.L.J. 318=A.I.R. 1923 P.C. 128=45 M.L.J. 578 (P.C.)

——Burden of proof—Suit on title.

It is for the plaintiff in a suit to establish his title to the land and if he has failed to do so, the failure of defendant to establish his title cannot affect the position. 67 Ind. Cas. 149=A.I.R. 1923 Cal. 166.

——Burden of proof.

In a suit for ejectment it is incumbent upon the plaintiffs not only to prove their title but also that they have been in possession within twelve years of the date of the suit. 72 Ind. Cas. 619=1 P.L.R. 322=4 P.L.T. 487=A.I.R. 1923 Pat. 558.

——Burden of proof.

A plaintiff can succeed only on the strength of his own title and not on the weakness of a defendant's title. 4 L.L.J. 173=A.I.R. 1922 Lah. 83.

——Burden of proof.

Plaintiffs in a suit for ejectment are under an obligation to establish their title to the relief which they seek in the suit, i. e., they must establish their right that they are entitled to turn the defendants out of the actual possess on of the plots in question. 65 Ind. Cas. 780=8 O.L.J. 516=A.I.R. 1921 Oudh 254.

——Burden of proof—Dispossessor's onus.

Where a person in possession of a property is dispossessed by another the onus is on the latter to show that he had better title than the former. 64 Ind. Cas. 243 (Pat.).

——Burden of proof—Per Full Bench (Jwala Prasad, J., dissenting).—The plaintiff in a suit for ejectment must prove not only his antecedent title but also his possession within 12 years of the suit. In the absence of any credible evidence on either side as to possession the plaintiff must fall and the presumption arising from title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given, and the plaintiff cannot succeed merely by proving a title and possession at some antecedent period. S. A. 728 of 1917 and 4 P.L.J. 463, Overruled. 62 Ind. Cas. 1=2 P.L.T. 487=1921 P.H.C.C. 305=6 P.L.J. 478=A.I.R. 1921 Pat. 237 (F.B.)

——Burden of proof—Duty of plaintiff.

Where the plaintiffs who are raiyats allege termination of tenancy of their under-raiyats by notice, they must not only prove that they are landlords and the defts. their tenants, but also the status, viz., that they are raiyats and the defts. their under-raiyats whose tenancy can be and is terminated by notice. 57 Ind. Cas. 833 (Cal.)

——Burden of proof—Title—Proof of.

Failing to prove his title, plaintiff could not recover the property even though the defts. were in possession without title. 24 C.W.N. 173=54 Ind. Cas. 695.

——Burden of proof—Title—Proof—Shifting of onus.

Where the plaintiff sues for ejectment on establishment of his title the onus is primarily on him to prove his title. But when he makes out a prima-facie case for establishment of his title and defts. seeks to contradict his case by establishing title of his own, it is for deft. to prove the title he sets up, whether it be Lakheraj or any other kind of title. 54 Ind. Cas. 615 (Cal.).

——Burden of proof — What plaintiff has to prove.

In a suit to recover possession on the ground of dispossession, the burden of proving possession within twelve years from the commencement of of the suit is on the plaintiff. He must succeed on his own title and must not rely on the defect in title of his adversary. 48 Ind. Cas. 70 (Nag.)

——Burden of proof—Title—Duty of plaintiff to establish.

In a suit for possession the plaintiff must establish a title superior to that of the defts. by proof of the most impeachable character. 150 P.W.R. 1917=42 Ind. Cas. 103.

——Burden of proof—Plaintiff to succeed on the strength of his own title.

It is the strength of his own title, and not the weakness of the defendant's title, that should support the plaintiff in a suit for ejectment. 37 Ind. Cas. 924 (Pat.)

——Burden of proof—Title—Proof.

If a person suing in ejectment wants to succeed, he must strictly prove his title. 1 Pat. L. J. 324=(1917) P.H.C.C. 12=2 Pat. L.W. 317=35 Ind. Cas. 687.

——Burden of proof—Plaintiff's duty.

The purchaser of an estate at a revenue sale cannot by suit oust the defendant from lands which though not included in the estate claimed by them, are equally outside the estate purchased, on the principle that the plaintiff suing in ejectment must prove his own title. 23 C. L. J. 151=34 Ind. Cas. 946.

——Burden of proof—Duty of plaintiff.

In a suit for ejectment plaintiff must prove his own title. No title can be acquired against the defendant by a waiver of rights by a third party not binding on that party, the more so, when such waiver is, to the knowledge of the Court false. 34 Ind. Cas. 827 (Pat.)

——Burden of Proof—Title of—Onus on plff.

In a suit in ejectment plaintiff has to recover on the strength of his own title and cannot rely on the weakness of the deft.'s title. 43 Cal. 103=20 C.W.N. 319=21 C.L.J. 605=30 Ind. Cas. 420.

——Burden of proof—Title—Proof of.

In a suit in ejectment the court is not concerned with the title of deft. unless plaintiff proves his own title. In a suit for recovery of temple and its properties as mahant, the plaintiff must prove his appointment. 37 All. 298=42 I.A. 115=19 C.W.N. 718=21 C.L.J. 499=17 Bom. L.R. 475=18 M.L.T. 39=29 M.L.J. 75=2 L.W. 589=(1915) M.W.N. 526=29 Ind. Cas. 724 (P.C.)

——Burden of proof—Proof of title—Onus on plaintiff.

A person not in possession ought to show a better title to the property from which he seeks to eject the person in possession. 8 Bur. L.T. 72=29 Ind. Cas. 888.

——Burden of proof—Title—Proof of—Duty of plaintiff.

In a suit in ejectment the plaintiff must succeed on the strength of his own title. 20 C.L.J. 310=27 Ind. Cas. 13.

——Burden of proof—Title.

In an ejectment suit plff. must strictly prove his title. 42 Cal. 384=41 I.A. 290=27 M.L.J. 333=18 C.W.N. 1154=1 L.W. 831=16 M.L.T. 447=(1914) M.W.N. 835=10 N.L.R. 112=16 Bom. L.R. 863=12 A.L.J. 1281=20 C.L.J. 573=25 Ind. Cas. 290. (P.C.).

——Burden of proof—Shifting of onus.

In an ejectment suit, the burden is on the plff. to prove his title, which if **prima facie** proved the onus shifts on the deft. to discredit the title deed. 23 Ind. Cas. 815 (Mad.)

——Burden of proof—Title of plaintiff.

In an ejectment suit, the plff. can succeed only on the strength of his own title. He cannot be allowed to abandon his one case and adopt that of the deft. and on that footing claim relief. 15 Bom. L. R. 209=19 Ind. Cas. 401.

——Burden of proof—Title—Onus.

In a suit for ejectment, the plff. must prove his title and possession within the statutory period. The burden of proof, may, however, be shifted to the other side if he starts with a presumption in his favour. 16 Ind. Cas. 17 (Cal.).

——Burden of proof—Suit to eject trespasser.

A plff. must prove his own title before ousting

trespasser even though the latter has no title. 30 P.W.R. 1912=22 P.L.R. 1912=13 Ind. Cas. 62.

——Burden of proof—Title of plaintiff—Strict proof of.

A plff. in an action of ejectment must recover by the strength of his own title and not of the weakness of his adversary. A plaintiff suing to recover possession on a title derived from an agreement with the owners must prove his present right to possession under the agreement. Any other right or interest that he may have in the subject-matter of the suit is irrelevant. Where the object in the plff.'s title appears on the face of the documents on which the plff.'s case rests, the court would dismiss the suit in ejectment, although the point had not been fully raised in the Court appealed from. 35 All. 273=40 I.A. 86=16 O.C. 136=25 M.L.J. 301=14 M.L.T. 64=17C.W.N. 669=(1913) M.W.N. 481=11 A.L.J. 469=17 C L.J. 566=15 Bom. L.R. 525=19 Ind. Cas. 340 (P. C.)

[An appeal from 14 O.C. 299=12 Ind. Cas. 347].

——Burden of proof—Suit by inamdar.

In an ejectment suit by an **inamdar** the onus is on him to prove title. 9 M.L.T. 213=9 Ind. Cas. 566.

2. Co-sharers.

——Co-sharers—Agreement to finance litigation—No present interest in property—No right to sue in ejectment.

A plff. suing to recover possession on a title derived from an agreement with the owners must prove his present right to possession under the agreement. The agreement in question provided that the respt. was to be a co-sharer with two plffs., that he would finance the litigation by them and that in the event of success he would be entitled to the proprietary possession of the share stipulated. **Held**, that the agreement conferred on the respt, no present right in the property in suit and that he could not join in bringing or continue a suit in ejectment in respect thereof. 35 All. 273=40 I.A. 86=16 O.C. 136=25 M.L.J. 301=14 M.L.T. 64=17 C.W.N. 669=(1913) M.W.N. 481=11 A.L.J. 469=17 C.L.J. 566=15 Bom L.R. 525=19 Ind. Cas. 340. (P.C).

[On appeal from 14 O C. 299=12 Ind. Cas. 347.]

——Co-sharers—Suit by one of several persons jointly interested.

One of several persons jointly interested is entitled to sue a trespasser where the removal of the trespasser is necessary for the enjoyment by the plff. of his rights. 10 A.L.J. 518=17 Ind. Cas. 469.

Co-sharers—Right of one to sue—Joint possession.

A person entitled to an undivided half-share of a piece of land cannot sue to eject any body from the whole of it. But he can sue for recovery of joint possession of the eight annas share and to enforce his right by a partition if he was not satisfied with the delivery of possession of an undivided half share. 18 C.W.N. 1011=27 Ind. Cas. 228.

—Co-sharers—Ejectment of tenant—Right of one co-sharer to sue.

A co-sharer land-lord cannot by himself sue to eject a tenant but he can so sue to eject a trespasser. 11 Ind. Cas. 84 (Cal.)

—Co-sharers—Right of suit of one.

An ejectment suit by one co-owner in whose sole name the lease was granted and who set up exclusive title on the basis of the lease is not maintainable although if he had not questioned the title of the other co-owners he might have been considered as holding on his own behalf as well as of the others. The consent of the others given in second appeal would not matter. 9 Ind. Cas. 487 (Cal.)

—Co-sharers—Suit by one.

In a suit in ejectment against trespassers where plff. owns a moiety of the properties and another brother equally entitled, is not heard of for more than twelve years, the plff. cannot take the whole estate. 1 Ind. Cas. 205 (Cal.)

—Co-sharers—Co-heirs — Suit by some only — Relief.

Where some only out of several heirs of a deceased proprietor bring a suit for possession of the property left by him they can recover their shares of the estate and not the whole estate. 7 P.R. 1918=44 Ind. Cas. 162.

—Co-sharers—Suit by one against trespasser.

As against a trespasser any one of the co-owners can sue for ejectment. 39 Mad. 501=2 L.W. 460=17 M. L.T. 387=28 M. L. J. 598=29 Ind. Cas. 69.

3. Decree, form and effect.

—Decree, form and effect—Decree for redemption.

In a suit for ejectment the Privy Council passed a decree for redemption of the mortgages to which the property was held to be subject on terms as to costs with a view to the shortening of litigation. 35 All. 211=40 I. A. 105=25 M. L. J. 111=(1913) M.W.N. 500=13 M.L.T. 488=11 A. L. J. 494=17 C. L. J. 555=15 Bom. L.R. 502=17 C.W.N. 853=19 Ind. Cas. 267 (P.C.)

—Decree, form and effect—Relief of joint possession.

On failure to succeed to eject, joint possession could be decreed. 34 Bom. 385=12 Bom. L.R. 386=6 Ind. Cas. 530.

—Decree, form and effect.

Where in an ejectment suit the Rev. Court decides that the plff. is an under-proprietor it simply means that he has made out a **prima facie** claim to under-proprietary rights and it does not bar the deft. from seeking in the civil court a declaration that plff. is not an under-proprietor. 3 O. L. J. 234=34 Ind. Cas. 753.

—Decree, form and effect—Tenancy not proved—Possession without title—Decree, to be passed on plff.'s title.

Plffs. sued for ejectment of the deft. as a tenant of the shop, but deft. refused to vacate it. Plffs. failed to establish the tenancy but the deft. was found to be in possession without title. **Held**, that the plffs. should get a decree on their title unless the deft. could show a better one. 25 A. 498 foll. 22 C. 752; 10 B. 451, not appl. 12 O.C. 183=3 Ind. Cas. 589.

4. Defence.

—Defence — Tenancy and adverse possession — Both are open.

In a suit for possession of land a mere assertion of tenancy does not deprive the tenant from pleading limitation. It is open to the tenant in the first place to plead that the lands were comprised in his tenancy and in the second place to assert that if the tenancy was not established as he had held possession for more than 12 years the right of the plaintiffs to recover possession was extinguished by the law of limitation; 8 C. L. J. 557 and 21 W.R. 70, Rel. on. 90 Ind. Cas. 617=A.I.R. 1926 Cal. 364.

—Defence — Plea of permanent tenancy—Court, whether bound to enquire.

In a suit in ejectment, where the deft. sets up a plea of permanent tenancy the court is bound to enquire into its truth and record a finding thereon. 9 Bur. L. T. 152=9 L.B.R. 27=33 Ind. Cas. 888.

—Defence—Grounds.

A purchaser under an unregistered sale of immovable property let into possession by the vendor, cannot

plead his possession as a defence to a suit in ejectment by one having legal title to recover. 29 Mad. 336 foll. 33 Ind. Cas. 121 (L.B.).

—Defence.

In a suit for ejectment the deft. lessee may set up her lease even though the lease was beyond the powers of the lessors, for, the effect of this plea is to put the plff. to proof of his title justifying his prayer for ejectment. 13 C.W.N. 805=3 Ind. Cas. 93.

—Defence—Effect of wrong defence.

Plff. cannot take advantage of a wrong plea put by the deft. in a case where he has to succeed on his own title. So where plff. claimed certain property by right of inheritance but defts. who were entitled to a share of the property did not ask for a share but claimed cash, **Held**, plff. was not entitled to the whole property merely because defts. claimed cash. 5 N.L.R. 161=4 Ind. Cas. 786.

—Defence—Notice—Rent—Entry—Wrong.

When there has been no enhancement of rent in fact, but simply by a clerical error the rent is shown as enhanced in the partition papers, the tenant cannot avail of the wrong entry and set up a fresh statutory period from the time of the partition, though in the notice of ejectment served on him the amount of rent entered in the partition papers is put down. 2 O. L J. 717=33 Ind. Cas. 234.

5. Endowed property.

— Endowed property — Tenants on -- Equitable relief.

In a suit for ejectment, the defts. building shops on wakf property are entitled to the value of the buildings when **Mutawalli** allowed them to remain for a long time. 36 P.W.R. 1916=32 Ind. Cas. 558.

—Endowed property—Title—Invalid alienation.

An alienee, who does not obtain any valid rights under the alienation (**i. e.**,) transfer of **debutter** property, cannot maintain a suit for possession. 17 Ind. Cas. 736 (Mad.)

—Endowed property—Ejectment suit—Proof.

The plff. in an ejectment suit for recovery of property alleged to have been appropriated by way o endowment for the upkeep of endowed property must make out as strong a case as one who wishes to set aside alienation of endowed property. 16 O.C. 76=17 Ind. Cas. 303.

6. Joinder of parties.

—Joinder of parties—Suit against lessee—Sub-lessee in actual possession—Necessary or proper party.

In a suit for ejectment against a lessee, the sub-lessee in actual possession though not a necessary party, cannot be said to be not a proper party. A.I.R. 1950 M.B. 19.

—Joinder of parties—Co-trespassers.

Co-trespassers are necessary parties. A decree against defendants in the absence of other necessary defendants illegal. A.I.R. 1928 Cal. 138, **Foll.** 33 C.W.N. 742= A.I.R. 1929 Cal. 669.

—Joinder of parties—Principle regarding.

The principles governing the rule of joinder of defendants in an action for ejectment are mainly two: first, if any of the persons in possession is left out, he remains in possession as not being affected by the decree, and the decree as one in ejectment and for possession becomes infructuous because the persons ejected as being bound by the decree can always come in under the person who remains in possession; and second, there is a certain amount of risk involved in not making the persons in actual possession defendants, for, in execution of the decree, persons may happen to be turned out who may then bring actions against the plaintiff for wrongful dispossession, not being bound by the decree. 106 Ind. Cas. 261=46 C. L. J. 433= A.I.R. 1928 Cal. 138.

—Joinder of parties—Persons in possession.

The rule that all persons in actual possession should be joined as parties has been firmly established and the principle that a suit will not be entertained where no effective decree can be passed in it is well recognised. 106 Ind. Cas. 261=46 C. L J. 433= A.I.R. 1928 Cal. 138.

—Joinder of parties—Non-Joinder.

Mere non-joinder of a party in an ejectment suit is not fatal to the trial of the case. 92 Ind. Cas. 899=A.I.R. 1926 Cal. 592.

—Joinder of parties.

Person from whom party in actual possession claims to hold is not a necessary party to a suit in ejectment. 21 Bom. 229, **Foll.** 62 Ind. Cas. 933=2 P. L. T. 471=6 P. L. J. 604=A.I.R. 1921 Pat. 260.

—Joinder of parties.

In a suit for ejectment all the parties in actual possession whom it is desired to eject, should be made defts. 22 C.W.N. 807=46 Ind. Cas. 104.

—Joinder of parties—Necessary parties.

In an ejectment suit the transferee of the tenancy right and tenants holding as transferee's sub-tenants are necessary parties. 43 Cal. 938=20 C.W.N. 547= 32 Ind. Cas. 791.

7. Jus tertii.

—Jus tertii—Good plea in defence.

The defendant is entitled in a suit for ejectment to plead the title of a third party and to show that the plaintiff is not entitled to the interest he claims. 90 Ind. Cas. 523=42 C. L. J. 200=30 C.W.N. 39= A.I.R. 1926 Cal. 240.

——Jus tertii—Failure to prove.

Where the plaintiff in an ejectment suit claims by assignment from a certain person and the defendant pleads that the plaintiff's assignor was not entitled to the property but that a third person was preferentially entitled but the defendant fails to prove his pleading, the plaintiff is entitled to decree. 92 Ind. Cas. 31= 1925 M. W. N. 738=23 M. L. W. 75=A. I. R. 1925 P.C. 234.

——Jus tertii—When avails.

A plea of **jus tertii** is no defence, unless the defendant can show that the act complained of was done by the authority of the owner. The plea of **jus tertii** cannot avail the defendant when the alleged true owner is impleaded as a party and admits the plaintiff's title to it. 91 Ind. Cas. 503=22 M.L.W. 120= A.I.R. 1925 Mad. 1021.

——Jus tertii—Onus on defendant.

Where a defence of **jus tertii** is set up, it is for the defendants to establish that the persons, in whom they allege the right to the plots to exist, have a title superior to that of the plaintiff. 61 Ind. Cas. 871= 24 O.C. 77=8 O.L.J. 160=A.I.R. 1921 Oudh 88.

——Jus tertii—Co-sharer in possession of whole.

Plea of **Jus tertii** cannot be set up by a trespasser against a lessee from one who obtained title to the property by adverse possession. 40 Ind. Cas. 157 (Cal.)

——Jus tertii—Plea of.

A person claiming as an heir to the last male owner is entitled in a suit by Crown for ejectment on the ground of escheat to plead **Jus tertii**. 18 M.L.T. 504=2 L. W. 1175=(1915) M. W. N. 962=31 Ind. Cas. 590.

——**Jus tertii—Trespass by stranger—Possession—Title—Jus tertii.**

As against a trespasser possession is title if it was obtained peacefully and **Jus tertii** could not be set up. **Quaere**:—Whether if plaintiff's possession was forcible, he could recover possession against defendant. 2 L.W. 912=18 M. L. T. 343=(1915) M. W. N. 815=31 Ind. Cas. 55.

——**Jus tertii—Title—Plaintiff must prove.**

A plaintiff seeking to oust a trespasser in possession must prove his own title and cannot rely upon the defendant's failure to plead **Jus tertii**. 37 Mad. 293=25 Ind. Cas. 901.

——**Jus tertii—Joint trespassers.**

A defendant who is sued as trespasser can rely upon the title of his co-defendant if both are alleged to have been acting in concert, even though his own derivative title is not proved. 47 Ind. Cas. 550 (Nag.)

——**Jus tertii—Third party disclaiming interest.**

Where the plaintiff sues to eject the defendant and the defendant sets up the title of a third person, the mere fact that third person disclaims his right is no ground for decreeing plaintiff's suit in the absence of proof of his title. 2 O.L.J. 388=30 Ind. Cas. 503.

8. Landlord and tenant.

——**Landlord and tenant—Notice—When invalid.**

A notice in ejectment is bad wherein the plots of land specified do not completely cover the area specified. 2 O.L.J. 712=33 Ind. Cas. 168.

——**Landlord and tenant—Notice—Necessity of—Favourable rent.**

The mere fact that low rent is paid by accident, does not deprive the landholder of his right to eject by notice. 2 O.L.J. 707=33 Ind. Cas. 141.

——**Landlord and tenant—Notice—Necessity of—Grounds.**

Tenant cannot be ejected by notice if the rent is favourable by concession. 2 O. L. J. 737=33 Ind. Cas. 257.

——**Landlord and tenant — Notice — Invalidity — Objection taken for the first time in second appeal.**

In an action for ejecment the notice of surrender was prematurely given, and objection as to want of proper notice was taken for the first time in second appeal. The objection should be deemed to have been waived. 8 M.L.T. 435=(1910) M.W.N. 826=8 Ind. Cas. 132.

——**Landlord and tenant—Notice—Necessity.**

Denial of the plaintiff's title for the first time in written statement, does not amount to waiver of notice to which tenant is entitled and hence does not absolve the plaintiff from the necessity of giving notice. 36 Cal. 927=13 C.W.N. 949=2 Ind. Cas. 656.

——**Landlord and tenant—Adverse possession by tenant—Limitation:—See** Limitation Act, Art. 139. 1 A.L.J. 201.

——**Landlord and tenant—Permanent tenancy, proof of:—See**: 8 C.W.N. 889=32 C. 41=31 I. A. 144 (P.C.).

——**Landlord and tenent—Notice to quit—Bengal Tenancy Act, S. 49:—See** Bengal Tenancy Act, S. 5.

——**Permanent occupancy rights, proof of:—See** Landlord and Tenant.

——**Permanent occupancy, plea of—Onus—See Onus.**

——**Permanent tenure, plea of — Purakudy — "Ulavadaimiras"—See** Landlord and Tenant. 8 C.W.N. 545=14 M.L.J. 200=27 M. 291=31 I.A. 83 (P.C.).

9. Plea of possession.

——**Plea of possession—Possession within 12 years—Proof of.**

In a suit for possession upon a dispossession, the plaintiff is bound to establish a subsisting title **i.e.**, within 12 years immediately preceding the commencement of the suit. 25 M.L.J. 95 (P.C.) followed. 54 Ind. Cas. 131 (Nag.).

——**Plea of possession—Payment of Government revenue.**

In a suit for possession by one trespasser on Government land against another, the one who has paid government revenue on the land is preferred. Assessment to government revenue converts the trespasser's possession into a legal one. 12 Bur. L.T. 263=56 Ind. Cas. 935.

——**Plea of possession or title—Title—Strict proof necessary.**

In an action in ejectment where the plaintiff has proved his alleged title, the Court shall not refuse him relief on a ground not only not urged by the defendant but wholly inconsistent with the defence taken by him in his written statement. 22 C. W. N. 853=29 C.L.J. 1=41 Ind. Cas. 378.

——**Plea of possession.**

Where in a suit for ejectment the title to the property is admittedly in a third party and the plaintiff's claim is based only on long possession, the plaintiff must prove that the defendant is a trespasser. 1 Pat. L.J. 47=34 Ind. Cas. 616.

——**Plea of possession — Title — Strict proof essential.**

A person in possession can resist a suit for ejectment against all but the true owner, though his possession is that of a trespasser. He can resist the suit on the ground that the assignment to the plaintiff is a sham transaction. 1 L. W. 777=(1914) M.W.N. 717=27 M.L. J. 445=25 Ind. Cas. 657.

——**Plea of possession and title—Title—Strict** proof of, essential—Confused boundaries.

In 1903 plaintiffs sued to eject defendants from certain lands as being part of their **mouzah**. Both parties claimed under leases granted by the Zemindar dated 1834 and 1838 respectively. The locality except as a beel was already unknown at the time of the **Takbust** survey in 1856, and the very name disappeared in 1880. The High Court in decreeing the plaintiff's suit determined its area not by any positive finding of its boundaries but by conjecturing the boundaries of defendant's land, the defendants being the parties in possession, **Held**, reversing the High Court's judgment that the plaintiffs could not succeed. 47 Cal. 415=24 C.W.N. 553=46 I. A. 299=76 Ind. Cas. 737. (P.C.).

——**Plea of possession—plaintiff's title.**

The person who is in possession of the trust property can successfully defend his possession against heirs of the settlor whose rights under resulting trust are barred by limitation. 37 Bom. 447=14 Bom. L.R. 987=17 Ind. Cas. 689.

——**Plea of possession—Possessory title—Government—Possession prior to suit—Presumption of title.**

Plaintiff was entitled to the same presumption of title against Government as against any one else, arising from prior possession, and notwithstanding the levy of penal assessment, the onus was on the Government to prove antecedent possession in Government or to displace the presumption of title arising from plaintiff's possession. (1912) M.W.N. 881=16 Ind. Cas. 589.

——Plea of possession—Possessory title—Decree on.

Where it appears that plaintiff in possession had been dispossessed by defendant and at the date of suit defendant had not acquired a title by prescription and neither party is found to have a good title, plaintiff as the prior possessor, has a right to recover possession from the defendant who cannot show a better title. 15 Ind. Cas. 613 (Mad.).

——Plea of possession—Possessory title—Good against all but the true owner.

In a suit for ejectment the plaintiff's possessory title, in the absence of a better title proved by the defendant holds good against all the world, except the true owner. (1912) M.W.N. 707=12 M.L.T. 183=15 Ind. Cas. 97.

——Plea of possession—Plaintiff or defendant title not proved—Defendant in possession.

No suit can lie where it is found that neither plaintiff nor defendant had title and plaintiff was not in possession at the date of suit and for some years prior thereto, to give him a title by prescription. 10 M.L.T. 432=(1917) 2 M.W.N. 460=12 Ind. Cas. 583.

——Plea of possession—Decree for possession—If assertion of title.

The reason for the rule that the plff. in an ejectment suit must prove possession within 12 years is that possession is commonly the effective assertion of title. But it is not the only one. An assertion of title made in court and established by a decree will in some cases serve equally well. That is good against those who are defts. to the suit and if the same title is established in a later suit against other parties it is good against those who are entitled to possession whether the title claimant has or has not been in possession with 12 years, unless the opponent can defeat the title by adverse possession. 35 Bom. 79=12 Bom. L. R. 956=8 Ind. Cas. 639.

——Plea of possession or title—Question of title—Who can raise.

A person who is sued in ejectment can question the validity of plff.'s title deed, though as a stranger he cannot question merely want of consideration. 5 Ind. Cas. 291 (Cal.).

——Plea of possession—Prior possession—Value of.

Prior possession, however short, is sufficient to prove **prima facie** title in ejectment against a wrong doer; but mere prior possession is not sufficient where it is shown that the title does not vest in the plff. 11 Bom. L. R. 1093=4 Ind. Cas. 246.

——Plea of possession—Trespasser.

In order to succeed in an ejectment suit the plff. must prove possession up to the date of ouster. 5 N. L. R. 33=2 Ind. Cas. 25.

——Plea of possession—Prior possession of plff. if sufficient—Suit brought more than six months after dispossession.

In an action of ejectment plff.'s prior possession is sufficient to establish title even if the suit is brought more than six months after dispossession. 1 Ind. Cas. 525 (Cal.).

——Plea of possession—Possession by defendants for over statutory period—Defendants' possession as tenants of plaintiff. 27 M. 517.

10. Proof of title.

——Proof of title—Title—Strict Proof—Heirship.

A person claiming possession of the property of a deceased Mahomedan as a distant kindred must establish by evidence that all persons having a prior or better title than him have been exhausted, or do not exist. 4 P. L. W. 130=43 Ind. Cas. 338.

——Proof of title—Possession—Suit for—Registered conveyances for over fifty years.

In a suit for possession the plff. based his title on a grant from govt. but he could not produce it. He however produced registered conveyances, mortgages and leases and other title deeds. As none of these were impugned, it was held that a clear title to property was proved. 18 C.W.N. 898=27 M. L. J. 20=20 C. L. J. 407=26 Ind. Cas. 949 (P.C.).

——Proof of title.

An ejectment suit brought by the purchasers at a revenue sale was resisted, as the defts. held the lands in dispute as holders of tenures from before the permanent settlement. Four deeds were relied upon; the latter two deeds covered portions of land and the right created was of a part—proprietor and not of a subordinate tenure holder. The two latter deeds overlapped the earlier deeds covering the **mudafats** while the latter deeds covered these and two more. The suit was declared for joint possession of a share of a disputed land. 18 C. L. J. 332=22 Ind. Cas. 247.

——Proof of title.

The plff. in a suit to recover possession, must succeed on the title as it existed at the date of suit. 9 Ind. Cas. 248 (Cal.).

11. Right to eject.

——Right to eject—Benamidar.

A **benamidar** holds the property as a trustee for the real owner. The legal title in the property vests in him and the beneficial title in the beneficiary. As a legal owner, the benamidar has the right to sue for possession against a trespasser. The **benamidar**, in order to maintain a suit for ejectment, is not required to obtain the sanction of the Court under O. 1, R. 8, Civil P. C. A.I.R. 1946 Oudh 144=1946 O.W.N. 100=222 Ind. Cas. 630.

——Right to eject—Benamidar.

Per **Phillips and Venkatasubba Rao, JJ.**—(**In the Order of Reference**). A **benamidar** can bring a suit for ejectment although he is not the real owner. The rule applies whether the transaction is supported by consideration or it is only a transfer by the owner to a **benamidar** which was not really intended to effect a transfer. 46 C. 566 (P C), **Foll.** 83 Ind. Cas. 74=35 M.L.T. 29=1924 M.W.N. 733=47 Mad. 896=A.I.R. 1925 Mad. 22=47 M. L. J. 415 (F.B.).

——Right to eject—Co-sharer.

Where a person who is entitled to a lesser share in a land, brings a suit for ejecting a trespasser, he cannot get a decree for possession of the whole of the land, but is entitled to recover possession only to the extent of his share, although he can retain possession of the whole of the joint property as against a trespasser. 115 Ind. Cas. 180=49 C. L. J. 83=A.I.R. 1929 Cal. 28.

——Right to eject—Co-sharer.

One of several co-owners can sue trespasser for ejectment without joining the other co-owners as parties to the action. 113 Ind. Cas. 886 (Nag.).

——Right to eject—Co-sharer.

One co-sharer can sue a trespasser in ejectment on behalf of himself and his other co-sharers. 90 Ind. Cas. 804=A.I.R. 1926 Oudh 144.

——Right to eject—Co-sharer—Non-transferable holding—Transfer—recognised by some joint owners—Effect.

If some of the joint landlords of a non-transferable occupancy holding recognise its transferee as their tenant, the latter cannot be treated as a mere trespasser; and no one co-sharer can sue in ejectment on the ground that since the transfer the holding fell to his share in partition. 10 C. L. J. 618=4 Ind. Cas. 740.

——**Right to eject—Different titles.**

Patkar, J.—If a landlord brings a suit for possession on a rent-note and fails to recover possession on the ground that the rent-note is not proved, he is entitled to bring a suit for ejectment on his title as owuer and on the allegation of a different legal relation between him and the defendants arising out of holding the lands and paying the rent in respect of them to the plaintiffs. 8 Bom. 174 (F.B.), **Foll.** 114 Ind. Cas. 269=30 Bom.L.R. 1583.

——**Right to eject—Grounds.**

A Criminal complaint against landlord by tenant does not render him liable to ejectment. 91 Ind. Cas. 1055=13 O. L. J. 194=A.I.R. 1926 Oudh 265.

——**Right to eject—Grounds.**

A landlord who has a mere right of reversion expectant on the determination of the tenancy and who has not as against his tenant the right to end the tenancy cannot maintain ejectment against a third person merely because that third person has no title in himself. 78 Ind. Cas. 497=28 C.W.N. 602=39 C. L. J. 356=A.I.R. 1924 Cal. 900.

——**Right to eject — Grounds — Alteration of premises.**

Where the original possession was permissive subsequent alterations of the premises cannot give rise to cause of action. 18 A. L. J. 781, **Foll.** 75 Ind. Cas. 813=A.I.R. 1924 All. 727.

——**Right to eject—Heir of person in possession.**

A heir of a person in possession is entitled to bring a suit for possession against one who has no better title. 10 A. L. J. 518=17 Ind. Cas. 469.

——**Right to eject—Landlord—Suit by.**

A landlord can proceed in ejectment against one who has been recorded long as sole rent-paying tenant, in revenue records, regardless of any co-heirs' claim. 2 O. L. J. 746=33 Ind. Cas. 264.

——**Right to eject—Lessor can sue trespasser.**

It is not open to a defendant who is sued as trespasser for ejectment by landlord and who does not hold under the tenant, to plead that the tenant has not abandoned the holding. 69 Ind. Cas. 559=A.I.R. 1923 Nag. 79.

——**Right to eject—Licensee.**

An ejectment suit can be instituted by a licensee against a trespasser. 15 O. C. 317=17 Ind. Cas. 469.

——**Right to eject—Mortgagor's right.**

An ejectment suit by mortgagor before his ruit for redemption of the mortgage was decreed is premature and unsustainable. 31 Ind. Cas. 464 (U. P, B. R.)

——**Right to eject—Owner.**

Where a plaintiff had not abandoned the land and had no intention of abandoning the land, he has a right to sue in ejectment persons who had entered into unlawful possession. 79 Ind. Cas. 817=2 Bur. L.J. 15=A.I.R. 1923 Rang. 138.

——**Right to eject—Tenant-in-common.**

A tenant-in-common can sue in the Madras presidency for his share only when the property is forfeited by the lessee. 38 M. 445 Fol. 32 Ind. Cas. 512 (U.P.B.R.)

12. Suit against trespasser.

——**Suit against trespasser—Decree for mesne profits—Conditions.**

A decree for mesne profits can only be made against the trespasser in a suit for ejectment if ejectment is decreed. If on an appeal against the decree for ejectment that decree is set aside, there cannot possibly be a decree for mesne profits. If, during the pendency of the appeal against the decree for ejectment, a decree for mesne profits has been made, that decree should be considered as a decree dependent upon the original decree for ejectment, and if that decree is set aside the subsequent decree awarding mesne profits on the basis that the plaintiff has obtained a decree for ejectment must fall; and the same should be the result if the two decrees are passed simultaneously. 114 Ind. Cas. 154=48 C.L.J. 387=A.I.R. 1929 Cal. 91.

——**Suit against trespasser—Building by trespasser—No damages.**

The principle of English Law **quicquid plantatur solo solo cedit** applies to India, but does not apply either to lessees or to trespassers.

Where therefore a trespasser erects a building on another's land without a **bona fide** belief as to the land belonging to him, the trespasser, on being evicted by the owner, cannot receive compensation for the building, but is entitled only to remove it: 2 Pat. L.J. 600; 21 All. 496 and 20 Bom. 298, **Foll.** 97 Ind. Cas. 394=A.I.R. 1926 Lah. 694.

——**Suit against trespasser—Suit by lessee.**

A permanent lease of a trust property in excess of the trustee's powers is not void but only voidable and the lessee may use the lease for the ejectment of the trespasser from the land. 43 Mad. 433=38 M.L J. 198=(1920) M.W.N. 185=11 L.W. 197=27 M.L.T. 286=55 Ind. Cas. 655.

——**Suit against trespasser—Right of—Person entitled to possession.**

The owner, or person in possession alone can sue for trespass; the beneficiary of a public charity, cannot sue without joining trustees as parties. 11. Bur. L.T. 249=50 Ind. Cas. 509.

——**Suit against trespasser—Rent Court's jurisdiction.**

A trespasser can be ejected through the rent Court 5 L.L.J. 196=46 Ind. Cas. 543.

——**Suit against trespasser—Lessor's right.**

A trespasser in actual possession for twenty years of land let out on lease by the owner can be ejected unless he has taken a **bona fide** settlement from a third person, whom he believed in fact to be the landlord. 25 C.L.J. 635=21 C.W.N. 1001=40 Ind. Cas. 271.

——**Suit against trespasser—Right of tenant in possession.**

A mere trespasser, in spite of the landlord's support, is liable to ejectment by the tenant, against whom he cannot retain possession. 1 Pat. L.J. 430=37 Ind. Cas. 1004.

——**Suit against trespasser—Landlord and tenant.**

A tenant, in possession of land is the proper plaintiff to sue for trespass on it. 20 C.W.N. 773=36 Ind. Cas. 890.

——**Suit against trespasser—Co-sharer landlords.**

The rule that all sharers (of the landlord right in the land) should unite in a suit to determine a lease is not applicable to a suit to eject a trespasser. 24 C.L.J. 40=21. C.W.N. 117=34 Ind. Cas. 833.

——**Suit against trespasser—Jurisdiction—Civil and Revenue Court.**

If a person trespasses upon a Zamindar's land for purposes other than cultivation, a suit to eject him lies only in Civil Court; whereas if the trespass is for cultivation, the suit lies only in a Rev. Court. 33 Ind. Cas. 70. (U.P.B.R.)

——**Suit against trespasser — Admission to tenancy.**

Receipt of rent, for periods subsequent to the death of a tenant, from a man who is not an heir but takes possession of the holding of the deceased tenant, amounts to his admission to tenancy, and a fresh

statutory period begins from the time he takes possession of the holding. 2 O.L.J. 730=33 Ind. Cas. 247.

——Suit against trespasser—Suit for declaration of title and for possession—Title proved—Position of defendant.

Where in a suit for a declaration of title and for recovery of possession from the defendant, the title of the plaintiff is proved, the deft. must be deemed a trespasser in occupation of the land and is liable to be ejected at the instance of the plaintiff. 24 Ind. Cas. 181 (Cal.)

——Suit against trespasser—True owner—Rigt of.

A true owner cannot at all times enter his own premises and use force and violence to eject a trespasser; such an act though not tortious, may yet give rise to Criminal liability, if attended with force or violence. (1914) M.W.N. 124=15 Cr.L.J. 225=23 Ind. Cas. 177.

——Suit against trespasser—Raiyat inducted by trespasser—Rights of.

A **raiyat** inducted by a trespasser in good faith has full rights and is an exception to the general rule that no one can confer a better title upon another than he himself has, but the exception will not extend where there is no good faith on the part of both. 13 Ind. Cas. 194 (Cal).

——Suit against trespasser—Person in possession of property can sue.

The plaintiffs seek to recover possession from a trespasser who seeks to retain it on the ground that he is the owner of the property and plaintiffs cannot sue for possession. Held that since plaintiffs were in possession for a long period with the tacit acquiescence of the true owners, they were entitled to eject the trespasser. 33 Bom. 499=11 Bom. L.R. 726=3 Ind. Cas. 770.

——Suit against Trespasser—Tenant dispossessed—Lessor's rights.

A tenant being dispossessed during the period of lease, the lessor connot sue for ejectment of the trespasser so far as the immediate possession is concerned; he should proceed under S. 42 Sp. Rel. Act. 31 All. 271=6 A.L.J. 177=2 Ind. Cas. 209.

13. Title and possession.

——Title and possession—Tenancy—Title—Relevancy.

In a suit for ejectment of tenant by a landlord question of title can only be gone into for the purpose of determining the main question in the suit about the relationship between the landlord and the tenant. 33 C.W.N. 769=57 Cal. 349=A.I.R. 1930 Cal. 42.

——Title and possession—Relative value.

Possession is prima facie proof of title; and it is well established that previous possession is a good foundation for a suit in ejectment, although the plaintiff who instituted the suit may not be able to establish any title in himself, provided that the defendant does not establish a better title to the disputed property: 6 Bom. 215, Foll.; 119 Ind. Cas. 906=8 Pat. 351=11 P.L.T. 34= A.I.R. 1929 Pat. 601.

——Title and possession—English law applies to India.

The principle of the English Law to the effect that possession is a good title against all but the true owner and entitles the possessor to maintain an action for ejectment against any other person than such owner who dispossesses him has been adopted in India. 97 Ind. Cas. 369=A.I.R. 1927 Lah. 11.

——Title and possession.

Although the plaintiff in an ejectment suit has failed to establish a case of letting, he is entitled to a decree on the basis of the title unless defendant can show a better title. 97 Ind. Cas. 248= A.I.R. 1926 Sind 98.

——Title and possession.

A person ousted from possession by another having absolutely no title is entitled to eject the latter however defective the plaintiff's title may be. 78 Ind. Cas. 722=A.I.R. 1925 Nag. 32.

——Title and possession.

Mere peaceful possession without title is sufficient for ejecting trespasser who dispossessed plaintiff. 78 Ind. Cas. 228=A.I.R. 1924 Pat. 709.

——Title and possession.

A plaintiff in a suit for possession against defendant is bound to succeed if he is able to show a better title in himself than the defendants. 68 Ind. Cas. 601=1922 P.H.C.C. 313=2 Pat. 75= 4 P.L.T. 267=A.I.R. 1923 Pat. 72.

14. Miscellaneous.

——Miscellaneous—Damages — Propriety of relief.

Where a suit for possession is in effect a suit for ejectment of the defendants after the removal of certain structures put up by them, the Court has no power to grant a decree for damages instead of granting possession to the owner of the land. A.I.R. 1950 All. 535.

——Miscellaneous—Partition — Confusion of boundaries by defendant—Right to decree.

So long as the plaintiff is unable to identify the property from which he desires to eject the defendant he is not entitled to a decree for partition and the Courts have no jurisdiction to grant the plaintiff's prayer in such a case, unless some equity is superinduced by the act of the parties or unless the defendant is shown to be a joint tenant or a tenant in common or a coparcener or an agent, trustee or one occupying a fiduciary position towards the plaintiff in respect to the land. This principle has however to be applied with reference to the special features of each case; manifest injustice will be the result if this principle is confined strictly to those cases. Where in a case of confusion of boundaries it was shown that the defendant obtained possession from the plaintiff's father and that the confusion was caused by the defendant's wrongful act, it was held the inability of the plaintiff to identify the property was no bar to his right to a decree. 32 M.L.W. 957=A.I.R. 1931 Mad. 19=60 M L. J. 85.

——Miscellaneous—Alternative plea for use and occupation.

In a suit for ejectment where plaintiff fails to prove the contract of tenancy, he is not precluded from urging his alternative claim for damages for use and occupation. 97 Ind. Cas. 564=A.I.R. 1927 Cal. 13.

——Miscellaneous—Suit for possession—Declaration of title unnecessary.

The institution of a suit for possession is sufficient to show the plaintiff's election to treat the alienation as a nullity and therefore a separate suit is unnecessary and even a separate suit for a declaration is in-operative; this rule applies even if the ejectment is sought in a revenue Court. 34 Cal. 329; 37 All. 254, Foll. 82 Ind. Cas. 238=22 A.L.J. 846=47 All. 2=A.I.R. 1924 All. 785.

——Miscellaneous.

The fact that defendants in ejectment suits are entered in the Record-of-Rights as occupancy tenants is not a sufficient reason for holding that the decrees in these suits were without jurisdiction or were wrong in law. 5 P.L.T. 535=1924 P.H.C.C. 244=A.I.R. 1924 Pat. 765.

——Miscellaneous.

When common land was partitioned according to Thullas, the land in suit was allotted to Thulla Surta and the other plot to Thulla Kanoa. The plaintiffs were in possession (cultivating) of the latter plot though they were the proprietors of Thulla Surta, and the defendants were similarly in possession of the land in suit, for the sake of convenience of enjoyment.

Held, the arrangement was only for mutual convenience and the plaintiffs will not be barred thereby from getting possession of the land in suit from defendants. 79 Ind. Cas. 494=4 P.W.R. 1923=A.I.R. 1923 Lah. 172.

——Miscellaneous—Evidence and probabilities.

It is only in cases where there is no evidence of the plaintiff as to dispossession, or, where the evidence is valueless, that the plaintiff fails to make out his case by merely proving that he had an antecedent title and possession and it must not be considered that, merely because where evidence was given by both sides and the learned Judge who had to determine the case, had a difficulty upon that evidence or even considered that evidence not altogether satisfactory, he was not entitled to give weight to the probabilities of the case or to any presumptions which might properly arise from the fact that the plaintiff had previously been in possession and had title. Merely because the Judge has some difficulty in arriving at a conclusion upon the evidence or that he does not consider the evidence altogether satisfactory, he is thereby not precluded from looking either at the probabilities of the case as disclosed by other parts of the evidence or from the presumption which might arise from the plaintiff's title. 67 Ind. Cas. 631=2 Pat. 1=3 Pat. L.T. 460=A.I.R. 1922 Pat. 432.

——Miscellaneous.

Where the defendant has been in possession of a garden in assertion of a hostile title a suit by the alleged owner of the garden for damages for appropriation of fruits cannot be maintained. But the plaintiff, if he is in time, may bring a suit either for recovery of possession or recovery of rent, as the case may be. 62 Ind. Cas. 635 (Cal).

——Miscellaneous—Findings.

In an ejectment suit, the Court must come to a finding as to the nature of tenancy and also whether the tenancy so found has been put an end to, on the date of suit. 62 Ind. Cas. 390=13 M.L.W. 397.

——Miscellaneous—Pending ejectment suit—Right to rent.

It is established as a general principle that the right to demand the rent which falls due during the pendency of a suit for ejectment is not in suspense during the pendency of the litigation. The cases in 12 M.I.A. 244 (P.C.) and 30 Cal. 1033 (P.C.) are exceptions to the general rule. 48 Cal. 65=25 C.W.N. 954=A.I.R. 1921 Cal. 525.

——Miscellaneous.

A holder in Berar is liable to eviction, if he persists in not paying the amount due, whether as rent or revenue before eviction, the court should give him an opportunity of paying the amount due from him. 6 N.L.R. 83=6 Ind. Cas. 927.

——Miscellaneous—Distinction between ejectment suit and suit for injunction.

In India distinction between common law remedy of ejectment and the equity suit for injunction should not be recognized, because it would lead to multiplicity of suits. 11 C.L.J. 189=5 Ind. Cas. 171.

——**Ejusdem Generis**—See: **Interpretation of Statutes.**

——**Ekabhogam Mirasidar**—See: **Land Tenures.**

Election.

See also (1) **Civil P.C., O. 2, R. 2.**
(2) **Elections offences and inquiries Act, 1920.**
(3) **Local Bodies.**
(4) **Local Municipal Acts.**
(5) **Penal Code Ss. 171-B—171-C.**
(6) **Religious Endowments Act, S. 8.**
(7) **Succession Act, Ss. 167—177.**
(8) **T. P. Act, S. 35.**
(9) **U.P. Court of Wards Act, S. 4.**
(10) **Will.**

——**Election - Agency—Law as to—Ordinary law** of principal and agent—Distinction.

The law of agency in election cases goes much further than the ordinary law of principal and agent. Though there may be no direct proof of an actual appointment of an agent, a man may be proved to be agent of a candidate on various facts and circumstances leading to an inference of agency. 29 Pat. 581 =A.I.R. 1951 Pat. 209.

——**Election—Duty of Polling officer.**

——All that the Polling Officer has to see when the voter presents himself to him is whether the name of the voter is on the roll. He need not wait to the end of the day in respect of every vote in order to see if any one else of the same name appears and claims that he is the voter on the Roll. 90 Ind. Cas. 771=22 M.L.W. 507=A.I.R. 1925 Mad. 1207=49 M.L.J. 381.

——**Electoral roll—Old roll continuing till new roll takes effect.**

The effect of S. 51 (4) of the Madras Local Boards Act, 1920, is that an electoral roll once prepared continues in time till a fresh roll comes into effect. Elections held under a six years old roll upheld. 1930 M. W.N. 676=32 M.L.W. 439=129 Ind. Cas. 240=A.I.R. 1930 Mad. 954=59 M.L J. 907.

——**Injunction—When to be granted.**

It is impossible to lay down an exhaustive rule but generally speaking injunctions should be confined to preserving the status **quo ante**, to preventing irremediable damage or loss to the property in the suit, or to averting substantial injury. No such conditions arise where the Court is moved not to re-instate the unseated Councillor, but to unseat the Councillor declared elected in his stead, and thus create a vacancy in the Municipal Council pending a civil litigation in respect of that matter; in such case there is ground for interference. 90 Ind. Cas. 819=A.I R. 1926 Mad. 132.

——**Jurisdiction of Supreme Court in Ceylon.**

While the Ordinance constituting the Supreme Court in Ceylon does not confer upon it original, but only appellate jurisdiction in civil cases, cognisance of election petitions is a special jurisdiction conferred upon the Supreme Court by the Ceylon States Council (Elections) Order in Council of 1931. A.I.R. 1945 P.C. 83=58 M.L.W. 371=1945 M.W.N. 536=(1945) 2 M.L.J. 314 (P.C.).

——Nomination paper—Rejection grounds.

Where the rejection of the nomination papers was on the ground that it did not give the number of the ward for which the candidates decided to stand; and in the other case on the ground that the thumb mark of the seconder of the candidate had not been attested,

Held, the rejection of the nomination papers was not in law justified. 73 Ind. Cas. 619=47 Mad. 585=17 M.L.W. 431=32 M.L.T. 178=1923 M.W.N. 266=A.I.R. 1923 Mad. 475=45 M.L.J. 23.

——Nomination papers—Voters right to sign more than one.

In respect of a single vacancy to represent a constituency on a Taluk Board, there were three candidates for election, the plaintiff and defendant 2 being two of them. After defendant 2's nomination paper was filed, three nomination papers proposing the plaintiff were filed. Out of these one was rejected as the proposer had also subscribed as seconder the earlier nomination paper of defendant 2. The second was rejected because the seconder had as proposer subscribed the earilier nomination paper of defendant 2. The third was also rejected on the ground that the same voter, who had subscribed as proposer plaintiff's second nomanation paper had also subscribed as proposer the third nomination paper the President, being of opinion that the moment the voter subscribed paper No. 2, his right became completely exhausted and he had no further right to sign his name on any subsequent nomination paper. Plaintiff sued for a declaration that he was validly nominated and for an injunction, restraining the President from holding the election.

Held, that where the rules enact that no voter shall be at liberty to nominate more candidates than there are vacancies, what is sought to be prevented is that no voter shall nominate a larger number of candidates than there are vacancies and not that a voter shall be forbidden from subscribing more than one nomination paper in favour of the same candidate. There was but one vacancy and the voter put forward but one candidate. 118 Ind. Cas. 289=30 M.L.W. 345=A.I.R. 1929 Mad. 607=57 M.L.J. 40.

——Objection petition—Amendment of—Delay.

An application for an amendment of the petition filed after the expiry of the days allowed for an objection petition may, in the discretion of the Judge, be allowed. 92 Ind. Cas 100=24 M.L.W. 213=A.I.R. 1926 Mad. 396.

——Powers of Court.

It is outside the province of an election Court to allow any candidate to examine the voters to show how the voters voted. The Court is only entitled to consider the correct reception and the correct refusal of the vote. 115 Ind. Cas. 59=1928 M.W.N. 549=A.I.R. 1928 Mad. 1077.

——Powers of Court.

The Court has jurisdiction to enquire into election matters and if necessary declare the election void as the sanctity of a nomanation paper which has been accepted by the Chairman can be questioned after the election. 92 Ind. Cas. 119=1926 M.W.N. 572=24 M.L.W. 208=A.I.R. 1926 Mad. 319.

——Recount—When to be ordered.

Where a miscount is alleged by the petitioner and his application is supported by a verified petition, and the Court is satisfied that there is a reasonable ground for the petitioner's belief that there has been a miscount, the Court has jurisdiction to grant a recount. 30 M.L.W. 949=A.I.R. 1930 Mad. 195=58 M.L.J 118.

——Returning officer—Function of—Decision is a judicial one.

The function of the Returning Officer in deciding a question as to the eligibility of a candidate for election is in the nature of judicial function and his decision is in the nature of a judicial decision. 79 Ind. Cas. 1042=51 Cal. 279=39 C.L.J. 58=A.I.R. 1924 Cal. 761.

——Revision—Procedure.

If a civil revision petition should be admitted in respect of election petitions, care should be taken for disposing of it as early as possible. 103 Ind. Cas. 821=A.I.R. 1927 Mad. 935.

——Right to nominate—Part of franchise.

The right to nominate a candidate is undoubtedly part of the franchise and a denial of that right does constitute a denial of the franchise. 99 Ind. Cas. 18=1926 M.W.N. 842=A.I.R. 1927 Mad. 22.

——Right to Vote — Deprivation — Right to damages.

If a man entitled to vote or to be a candidate at an election is wrongfully deprived of that right, an action for damages lies against the person so depriving him. 1 Smith's Leading Cases 295, **Foll.** But if the act by which the right is interfered with is an act done in a judicial capacity, no action lies unless the act is done maliciously which in this context really means dishonestly. 73 Ind. Cas. 619=47 Mad. 585=17 M.L.W. 431=32 M.L.T. 178=1923 M.W.N. 266=A.I.R. 1923 Mad. 475=45 M.L.J. 23.

——Right to vote—Deprivation of—Good ground for damages.

Where a duly qualified person entitled to be upon the electoral roll or candidates' list of a Municipality or other constituency, is wrongfully omitted therefrom or misdescribed therein, so as to be deprived of his right to vote or so as to have his nomination rejected though the nomination may have been accepted before the actual election, he is entitled to recover damages which may be made punitive where the omission is the result of malicious omission. The liability of the members including the Executive Officer and the Municipal Board itself must be decided according to the ordinary general principle of the law of principal and agent, so that it may be placed upon the right shoulders. 65 Ind. Cas. 984=44 All. 202=20 A.L.J. 1=A.I.R. 1922 All. 1.

——Secrecy of ballot.

In an election two members by previous arrangement with a candidate used blue pencils to assure him that they had voted for him and election was sought to be cancelled on the ground that the secrecy of the ballot was violated,

Held: that unless it could be proved that the use of blue pencils indicated the persons who used them, the election would not be rendered invalid: 10 C.P. 733; A.I.R. 1925 Mad. 614 and A.I.R. 1924 Mad. 766, **Foll.** 120 Ind. Cas. 851=30 M.L.W. 536=A.I.R. 1930 Mad. 97=57 M.L.J. 481.

——Setting aside—Effect—Fresh election.

Where the election to one of the seats in a constituency is set aside, it is desirable that the Court should set aside the election for the whole constituency and order a fresh election. 34 C.W.N. 741=129 Ind. Cas. 422=58 Cal. 87=A.I.R. 1931 Cal. 36.

——Setting aside—Effect—Second election.

Where a candidate, who stands next in rank and who challenges an election, claims the seat and the disqualification under which the successful candidate is ultimately found to labour was not known to all or any of the voters who cast their votes for him, a second election must be ordered and the candidate who stood next in rank cannot be declared elected. (1904) 1 K. B. 74, Foll. 90 Ind. Cas. 759=1925 M.W.N. 824=48 Mad. 509=22 M.L.W. 320=1925 M.W.N. 783=A.I.R. 1925 Mad. 1119=49 M.L.J. 606 (F.B.).

——Validity—Breach of rules.

A voter who writes the name of the candidate against the space left for the cross-mark commits a

breach of the election rules. 90 Ind. Cas. 1055=22 M.L.W. 24=A.I.R. 1925 Mad. 1173.

——Validity—Breach of rules—Effect.

The mere breach of a rule, however, whether mandatory or directory will not invalidate an election unless the result of the election has been materially affected by such breach. 72 Ind. Cas. 902=16 M.L.W. 898=1922 M.W.N. 813=46 Mad. 123=A.I.R. 1923 Mad. 254=44 M.L.J. 69.

——Validity—Bribery and Personation—Irregularities—Electing officer empowered to decide objection—Decision, questioned in a Civil Court.

At an election of a temple trustee, the agent of the successful candidate abetted the false personation of a dead voter. There was no proof that the candidate authorised or ratified the agent's act but the inclusion of his vote did not affect the result of the election: **Held**, that the false personation did not invalidate the election, though the vote included ought to be rejected. (**Per Sadasiva Aiyar, J.**) The Common Law of England relating to Parlimentary elections cannot govern the election of a temple trustee. The fact that certain voters were carried to the voting booth at the expense of a candidate does not vitiate the election. (**Per Napier, J.**) Personation by itself does not invalidate the election. The number of votes given by personation should be struck off. An election is not void because the agent of a candidate had been guilty of one or two cases of bribery. (**Per Sadasiva Aiyar J., Napier J., contra**) Where the electing officers were given the power to decide the objections as to personation and to allow or to disallow the votes at their discretion, **Held**, that the decision given by the electing officers honestly on the objections raised cannot be questioned by any proceedings in Court. 17 M.L.T. 331=(1915) W.W.N. 290=2 L.W. 383=28 Ind. Cas. 612.

——Validity—Change of place and time—Effect.

Mere change of place and time of meeting where an election is to take place does not vitiate the election when no voter is misled or prevented in any way from voting. 91 Ind. Cas. 642=A.I.R. 1926 Cal. 665.

——Validity of—Infringement of rules.

Where rules have been framed for the conduct of elections, they may be either mandatory or directory. An infringement of the former class of rules avoids the election. Where an infringement of a directory rule is proved, the burden rests upon those who maintain the validity of an election notwithstanding the infraction of the rule, to show that the result was not affected by the infringement. A provision as to the time of opening and closing the polls is considered directory. 30 C.L.J. 270=24 C.W.N. 189=53 Ind. Cas. 741.

——Validity—Inquiry into validity—Discretion of election Commissioner—Recount and scrutiny of votes—Grounds for. **See:** Mysore Representative Assembly Rules (1940), R. 187 (c). 52 Mys. H.C.R. 261.

——Validity of—Number of votes recorded exceeding maximum.

When the number of votes recorded exceeds the maximum that can be given, the election by majority of votes, in the case of any elective body is invalid and void, specially when there are no rules providing for any such contingency. 32 Cal. L.J. 124=60 Ind. Cas. 547.

——Validity — Petition challenging — Order for inspection of ballot papers—If can be made without notice to the successful candidates.

In a petition challenging the validity of the election of the successful candidates for a division of the Madras Corporation, the Chief Judge of the Court of Small Causes on the petitioner's application for production and deposit of the ballot papers, electoral rolls and other papers and for leave to inspect them, gave notice only to the Commissioner of the Corporation of Madras and ordered inspection to be given at the Corporation Office. No notice of the application was given to the successful candidates who were the other respondents. On a revision petition by one of the successful candidates,

Held: in a case of this kind the maxim **audi alteram partem** has to be applied. No order should have been passed without hearing the opposite side. Further, in such case the Court before ordering inspection must be saitisfied by evidence on oath that it is reasonably and **bona fide** necessary to have such inspection. The power of ordering inspection of the ballot papers should be exercised by the election Court with the greatest circumspection. 1949 M.W.N. 308=62 L.W. 365=A.I.R. 1949 Mad. 835=(1949) 1 M.L.J. 616.

——Validity—Rules regarding.

The name of the candidate for whom the vote was not cast being struck out on the voting papers does not invalidate the vote. The appearance of a tracing of some letters under the cross-mark made on the voting paper against the name of one of the candidates does not invalidate the vote unless the marks are such that the voter may be identified from them. Where the cross-mark is bisected by the line between the names of the candidates no clear intention of the vote having been cast in favour of one candidate or the other can be gathered; and that vote should be excluded from the votes counted. The presence of writing other than the cross-mark would invalidate the vote only if it should be found that the writing is a mark by which the voter may be afterwards identified. [**Woodward v. Sarsons**, 10 C. P. 733, **Rel. on.**] It must be either a mark which on the face of it shows or may show the person who has voted or with regard to which there is evidence on the record which shows that the mark was put in there by some pre-arrangement or conspiracy by reason whereof by looking at the mark one will be in a position to say that it is the vote of such and such a person. In other cases also if the intention that the voter should be identified could be gathered from the mere appearance of the writing the vote will be rejected. 87 Ind. Cas. 216=21 M.L.W. 654=A.I.R. 1925 Mad. 614=48 M. L. J. 268.

——Validity—Rule as to.

The rule that when the number of votes recorded exceeds the maximum that can be given at an election must be void, is perfectly sound, especially when there are no rules to meet such a contingency. 60 Ind. Cas. 547=32 C. L. J. 124.

——Validity—Supreme Council—Voting by members of local council before taking oath of allegiance—Effect.

The omission, by a member of a Local Council, to take the oath of allegiance does not make him incompetent to vote for the election of members to the Imperial Legislative Council. 41 Cal. 384=20 Ind. Cas. 676.

——Vote—Significance of.

The giving of a vote does not necessarily involve the exercise of judgment at all, it involves merely the expression or intimation of a wish or choice. That wish or choice may indeed be actuated by judgment; but it may also be actuated by mere whim or caprice. The method by which the wish or choice is arrived at is wholly immaterial, so long as the person upon whom the duty of giving the vote is cast expresses or intimates his wish or choice, however arrived at. 105 Ind. Cas. 759=29 Bom.L.R. 1430=A.I.R. 1927 Bom. 622.

——Voter's right to canvass.

A right to canvass for or against a candidate cannot be regarded as a special right of a voter and much less as part of the franchise of a voter. If indeed it be a right, it is a right which a voter enjoys perhaps with thousands of others who are non-voters and it is impossible to recognize or give effect to any such right in law. 99 Ind. Cas. 18=1926 M.W.N. 842=A.I.R. 1927 Mad. 22.

——Elections offences and inquiries Act (XXXIX of 1920) — Applicability—Elections for Legislative Assemblies under Government of India Act, 1935.

By the Government, of India (Adaptation of Indian Laws) Order, 1937, the Elections Offences and Inquiries Act, 1920, has been amended. The words "or Lieutenant-Governor" have been omitted in S. 12 and an election has been defined as the election for the legislative bodies contemplated by Government of India Act, 1935. Consequently the Elections Offences and Inquiries Act is still in force in British India and applies to the elections for the Legislative Assemblies under the Constitution Act of 1935. A.I.R. 1942 Pesh. 53=201 Ind. Cas. 331.

——S. 11—Election set aside—No order as to costs—Court cannot award.

In an election petition case an application was made before a Small Cause Court to execute the recommendation as to costs awarded by the Commissioners. At the time of the application the Governor had ordered the election to be set aside but had passed no order on the recommendation as to costs, though subsequently costs were ordered.

Held, that the Small Cause Court was bound to confine itself strictly to the order of the Governor as being the only instrument that justified execution being taken out. As the order of the Governor awarding costs did not exist at the time the application was made, the Court had no option but to dismiss the application. 112 Ind. Cas. 449=6 Rang. 470=A.I.R. 1928 Rang. 245.

——S. 12—Order for costs passed by Governor is executable in District Court.

Under S. 12 an order as to costs passed by His Excellency the Governor in connection with an election petition is executable in the Court of the District Judge in the same way as it were an order by that Judge for the payment of that amount in a suit; therefore, a separate suit for the recovery of costs does not lie. A.I.R. 1942 Pesh. 54=201 Ind. Cas. 452.

——S. 12—Order for Costs— If executable in District Court.

An order for costs passed by the Governor under S. 12 in connection with an election is executable in the District Court as a decree for payment of money made by that Court itself in a suit. An appeal lies under S. 47, Civil P. C., to the Chief Court from an order of the District Judge refusing to execute the order as to costs. A. I. R. 1942 Pesh. 53=201 Ind. Cas. 331.

——S. 12—Right of appeal.

Under S. 12, Elections Offences and Inquiries Act, the procedure for the execution of the order for costs under execution is the same as that of a decree for the payment of money made by the Court of the District Judge. Therefore, it imports that the ordinary incidents of the procedure of that Court are to attach and also that any general right of appeal from its decision attaches. A.I.R. 1937 Cal. 425=41 C.W.N. 893=67 C. L J. 129=172 Ind. Cas. 682.

——Election Rules—(Local Boards) R. 1 — Interpretation—"Having Jurisdiction" meaning of.

Certain acts complained of relating to an election i. e., that votes given for the petitioner at the election were wrongly rejected by the President of Taluk Board as invalid and that the President refused to recount the votes when requested to do so, took place at a place **P**. A petition attacking the validity of the election was presented to the Subordinate Judge at **C**, who had jurisdiction over the place where the candidates were nominated but not over the place where the alleged irregularities happened. According to Rule 1 of the Rules for the Conduct of Inquiries and Decision of Disputes relating to Elections the petition should be presented to the District or Sub-ordinate Judge "having jurisdiction".

Held, that the expression "having jurisdiction" can only mean having jurisdiction over the place of the acts or omissions complained of. 59 M. L. J. 194 =128 Ind. Cas. 146=32 M.L.W. 157=1930 M. W. N. 649=A.I.R. 1930 Mad. 832.

——Electricity Act (IX of 1910)—Scheme of the Act.

The Act is an extremely technical one and the proper performance of its requirements demands a considerable amount of technical knowledge, and the scheme of the Act is not to impose penalties upon consumers or property owners for breaches of technical requirements except after an order requiring them to comply with certain directions, and it is only the failure to obey such orders, which is made punishable. A.I.R. 1936 Bom. 327=38 Bom. L. R. 434=37 Cr.L. J. 1124=60 B. 770=165 Ind. Cas. 261.

——S. 2 (n)—Definition of 'works'.

The definition of "works" in S. 2 (**n**), Electricity Act, is not exhaustive. Nevertheless, a reference to other provisions in the Act indicates that when the expression "works" is used, it usually means works connected with the supply of energy, and not lighting installations. A.I.R. 1941 Bom. 100=43 Bom. L. R. 99=42 Cr. L. J. 588=194 Ind. Cas. 554.

——S. 2 (a)—Scope.

"Works" as defined in S. 2 (**n**) of the Act includes electric supply lines. The supply line, therefore, up to the point at which it enters the meter comes within the meaning of "works" as defined in S. 2 (**n**). A.I.R. 1939 Bom. 480=I.L.R. (1939) Bom. 496=41 Bom.L.R. 878=41 Cr. L. J. 188=185 Ind. Cas. 506.

——S. 2 (a)—"Works"—Meaning of—Supply line if included in 'works' under S. 2.

Although the supply line will be included in the word 'works', as defined in S. 2, Electricity Act, it does not follow that the works belong entirely to the licensee. There is no question of choice in the matter and the consumers are bound to pay by statute and it may well be argued that this is a favour conferred on the licensee by the statute corresponding to his obligation not to refuse to supply any consumer. A. I. R. 1935 Lah. 510=158 Ind. Cas. 124.

—S. 2 (c)—Rules under S. 37 (4), R. 106—"Consumer"—Scope of.

The definition of "consumer" in S. 2 (c), Electricity Act, includes any person who is supplied with energy by a licensee, and any person whose premises are, for the time being, connected for the purposes of a supply of energy with the works of a licensee. **Prima facie** it should be enough to prove either that energy was supplied for the use of the persons or that the persons were owners or occupiers of premises connected up with the licensee's electric system. A.I.R. 1938 Pat. 15=18 P.L.T. 986=4 B.R. 203=39 Cr. L. J. 206=172 Ind. Cas. 940.

——Ss. 3 and 4—Assignment of licence.

An assignment of a licence can be made by word of mouth and from part performance and acting on it, an inference may be raised of an assignment. No formal

document is necessary. A.I.R. 1944 All. 66=1944 A. L. J. 43=I.L.R. (1943) All. 907=1944 A.W.R. (H.C.) 41=214 Ind. Cas. 21.

—S. 4 (1)(a)—Construction—Government's opinion —In what matters conclusive and in what matters not conclusive.

There is nothing in the language of S. 4 (1) (a) of the Electricity Act or in the subject-matter to which it relates upon which to found the suggestion that the opinion of the Government is to be subject to objective tests. In terms, the relevent matter is the opinion of the Government not the grounds on which the opinion is based. The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming an opinion.

Further, the question on which the opinion of the Government is relevent is not whether a default has been wilful and unreasonably prolonged but whether there has been a wilful and unreasonably prolonged default. Upon that point the opinion is the determining matter and—If it is not for good cause displaced as a relevent opinion—it is conclusive. But there the area of opinion ends.

The question what obligations are imposed on licensees by or under the Act is a question of law. The view of the Government on law is not decisive. 76 I.A. 57= I.L.R. (1949) Bom. 274=A.I.R. 1949 P.C. 136=53 C.W.N. 469=1949 A.W.R. 249=1949 A. L. J. 143=51 Bom. L.R. 551=30 P.L.T. 28=62 L.W. 707=(1949) 2 M. L. J. 30 (P.C.).

——S. 4 (1) (a) — **Construction** — " Opinion of the Provincial Government "—Duty of Government—Power of Court to investigate or inquire into sufficiency of grounds for opinion—Executive or judicial act.

(Chagla and Coyajee—JJ., Stone, C. J. dis.):— The proper construction of S. 4 (1) (a) of the Electricity Act is that the opinion of the Provincial Government both in sub-S. (1) and (a) is absolute and unqualified and a Court of Law cannot inquire into the grounds or reasons which prompted the said authority to arrive at that opinion. The act of the Government is an executive act and not a judicial act, and the Province of Bombay has been made under this section the sole Judge, in the absence of a pleading to the effect that there was either malice or collateral purpose; the words "opinion of the Provincial Government" qualify not only the words "public interest" but also the words "wilful and unreasonably prolonged default in doing anything"; the words qualify and control the whole sub-section. Under S. 4 (1) (a), the only condition precedent is that the Provincial Government should come to a certain opinion with regard to the matters enumerated in the sub-section. If the Government form the opinion honestly, and for the purpose specified in the Act, then the law precludes the Court from substituting its own opinion for that of the Government or from inquiring into the validity of the grounds on which that opinion was formed.

Stone, C. J.:—The Provincial Government must act in a judicial and fair manner. S. 4 (1) (a) of the Act postulates a condition precedent, **viz.**, the existence of an obligation on the licensee to do something "by or under the Act," to the formation of an opinion by the licensing authority that the licensee has made a wilful and unreasonably prolonged default of the obligation in question. In arriving at factual decision not only must the Provincial Government act in a judicial manner, but the manner of its acting is open to investigation by the Court. The prolonged default mentioned in S 4 (1) (a) must be continuing default and not one which has ceased. I.L.R. (1948) Bom. 446=49 Bom. L.R. 92=A.I.R. 1947 Bom. 276 (F.B.)

——S. 4 (1) (c)—Government's power to revoke licence.

The Act nowhere prescribes the evidence for manner in which the Government would be satisfied under S. 4 (1) (c). After the supply had begun, or when the works had almost completed or when the power was exercised long after the time fixed for satisfaction, in the licence, satisfaction, in fact, was given by the licensee can be presumed. But it is also open to Government to fix any period for the satisfaction and to make the period of completion of works and of satisfaction as to qualification synchronise and then judge the qualification of the licensee with reference to his work. In such a case, no presumption can arise by the mere exercise of Powers under the licence that the Government had, in fact, received satisfaction as to qualification of the licensee and it is for the licensee if he wants not to exercise the powers under the licence before giving satisfaction to Government to insist on a condition in the licence that the work shall not begin till the satisfaction is accepted and to insist on a short term for satisfaction of qualification and a long term for the completion of works.

[The Government's decision that the licensee was not in a position to discharge its duties arrived at within 45 days of the time limit fixed in the licence, held justified.] A.I.R. 1944 All. 66=1944 A. L. J. 43 =1944 A.W.R. (H.C.) 41=I.L.R. (1943) All. 907=214 Ind. Cas. 21.

——S. 4 (1) (c)—Revoking of licence—Time limit.

The licensee can doposit security up to the last hour of the last day allowed in the licence and licence can be revoked for failure to deposit security after the time for depositing it had elapsed. Similarly the condition that satisfaction as to his qualification by the licensee shall be given before any powers are exercised and within the time fixed in the licence operates in favour of and against the licensee. So Government can revoke the licence even after powers had been exercised by the licensee and time fixed in the licence is over. A.I.R. 1944 All. 66=1944 A. L. J. 43=I.L.R. (1943) All. 907=1944 A.W.R. (H.C.) 41=214 Ind. Cas. 21.

——S. 5 (a)—"Powers and liabilities of licensee" —Meaning of.

As cl. (f) of S. 5 comes in operation only after revocation has taken effect under clause (a), there is no reason why other clauses namely (b) to (e) also should not take similar effect. The words "the powers and liabilities of the licensee" in S. 5 (a), therefore, mean "powers and liabilities" other than those specified in S. 5 of the Act. It is, therefore, open to the Government to order an electric company under S. 5 (c) to sell its undertaking to a particular person after the companys' liabilities under the Act had ceased. A.I.R. 1944 All. 66=1944 A. L. J. 43=1944 A.W.R. (H.C.) 41=I.L.R. (1943) All. 907=214 Ind. Cas. 21.

——S. 5 (b)—Lands, buildings, works, materials and plant must all co-exist and must be acquired together. Similarly incomplete undertaking cannot be compulsorily ordered to be sold, otherwise if lands, buildings etc., one or more of them are sought to be sold, there must be evidence to show that the property was suitable to, and was used for the purposes of the undertaking. A.I.R. 1944 All. 66=1944 A.L. J. 43=I.L.R. (1943) All. 907= 1944 A.W.R. (H.C.) 41=214 Ind. Cas. 21.

——S. (5) (b)—The undertaking existing on the date when the licence was revoked can be compulsorily ordered to be sold under S. 5 (b). A.I.R. 1944 All. 66=1944 A.L.J. 43=I.L.R. (1943) All. 907=1944 A.W.R. (H.C.) 41=214 Ind. Cas. 21.

——S. 5 (c)—Arbitration.

Under S. 5 (c), a sale can be ordered in favour of a third person and in case of dispute regarding

price, the matter can be referred to arbitration. A.I.R. 1944 All. 66=1944 A.L.J. 43=1944 A.W.R. (H.C.) 41=I.L.R. (1943) All. 907=214 Ind. Cas. 21.

——S. 5 (d)—Arbitration.

Section 5 (d) empowers the Government to purchase the undertaking "upon terms and conditions similar to those set forth in cl. (b)". Though there is no express arbitration clause in S. 5 (d), yet the arbitration clause in S. 5 (b) applies to S. 5 (d). A.I.R. 1944 All. 66=1944 A.L.J. 43=I.L.R. (1943) All. 907=1944 A.W.R. (H.C.) 41=214 Ind. Cas. 21.

——S. 5 (f)—Operation of.

When the licence has been revoked, the licensee has the option of disposing of all lands, buildings, works, materials and plant belonging to the undertaking in such manner as he may think fit under S. 5, Cl. (f) only. That clause comes into operation only when the earlier clauses have not come into operation. A.I.R. 1940 All. 24=1939 A.L.J. 983 =1939 A.W.R. 848=I.L.R. (1939) All. 901=186 Ind. Cas. 689.

——Ss. 5 and 52—Undertaking ordered to be sold under S. 5, Electricity Act, and sale price fixed under S. 5 read with S. 52 of the Act—Licensee refusing to complete the sale or to deliver possession of undertaking—Purchaser can sue him for declaration of title or for injunction, etc., under Specific Relief Act. A.I.R. 1944 All. 66=1944 A.L.J. 43=1944 A.W.R. (H C.) 41=I.L.R. (1943) All. 907=214 Ind. Cas. 21 (D.B.).

——S. 9 (2)—"Transfer"—If include charge.

A charge is a transfer within the meaning of S. 9 (2), Electricity Act. Accordingly mortgage debentures issued by an Electricity Distributing Company without the written consent of the provincial Government for the purpose of securing a certain sum, and secured by a debenture trust-deed, does not constitute a valid charge on the undertaking and assets of the company, as the charge upon the undertaking intended to be created in favour of the debenture-holders is void by reason of the provisions of S. 9 (2) and (3) of the Act. The debenture-holders can therefore rank only as unsecured creditors in the event of an order for the winding up of the company. 77 I.A. 137=I.L.R. (1950) All. 679=54 C.W.N. 278=63 L.W. 165=1950 A.L.J. 390=A.I.R. 1950 P.C. 85=52 Bom. L.R. 505=1950 A.W.R. 582= (1950) 1 M.L.J. 297 (P.C.).

——S. 9 (2)—"Transfer"—Charge.

A "charge" is a transfer within the meaning of S. 9 (2), Electricity Act. [A.I.R. 1940 All. 458 overruled. A.I.R. 1941 All. 345=1941 A.L.J. 518=1941 A.W.R. 269=I.L.R. (1941) All. 691=196 Ind. Cas. 425 (F.B.).

——S. 9 (2)—Transferee of licence selling electricity, whether licensee.

A person to whom a licence has been transferred with the consent of the Government and who is, in fact, under that licence selling electricity, is a person licensed under Part II, Electricity Act, to supply energy. A.I.R. 1940 All. 458=1940 A.W.R. 413=1940 A.L.J. 449=I.L.R. (1940) All. 568=192 Ind. Cas. 367.

[Overruled by A.I.R. 1941 All. 345 (F.B.)].

——S. 9 (2), (3)—"Transfer," meaning of.

Sub-section (2) of S. 9, Electricity Act is wide. The licensee may not transfer his undertaking of any part thereof by sale, mortgage, lease, exchange or otherwise and the word 'transfer' is a word of very wide meaning; that includes every transaction where by a party divests himself of his interest. The undertaking referred to would include all lands, buildings, machinery, lines of supply, goodwill, etc., in fact, everything which appertains to the supply of electricity under the licence. A.I.R. 1937 Rang. 47=167 Ind. Cas. 707.

——S. 9 (2)—Licensee taking partners and vesting licence, etc., in partners—No consent of Government — Validity—Ss. 24 and 57, Contract Act.

A licensee took in partners and the partnership deed vested the licence of electricity etc., in them without the consent of the Government. Partners agreed to pay one-tenth of the profits to the licensee and after his death, to his heirs:

Held, that the licensee transferred a part of his undertaking within the meaning of S. 9 (2) and the transaction being without the consent of the Government was void under sub-cl. (3) and that Ss. 24 and 57, Contract Act, did not apply. A.I.R. 1937 Rang. 47=167 Ind. Cas. 707.

——S. 12—Absence of permission—No interference by High Court.

A post was erected on the land of a person. Permission from the District Magistrate for erecting it was obtained not before erecting but after institution of suit by the owner of land. Lower Court dismissed the suit.

Held, that High Court would not interfere with the decision. 114 Ind Cas. 692=A.I.R. 1929 Lah. 226.

——S. 12—Jurisdiction—Questions as to fixing of bracket on private wall.

Only District Magistrate and not the Civil Courts can decide as to whether a bracket should be fixed on a particular wall or not by a licensee under the Electricity Act and whether the person whose wall is being used should be given any compensation for it and the appeal lies to the Provincial Government under S. 2 A.I.R. 1941 Pesh. 73=196 Ind. Cas. 547.

——S. 12—Powers of District Magistrate.

There is no law authorizing the District Magistrate to grant permission to an electric company to lay electric line over the land of a person. 114 Ind. Cas. 692=A.I.R. 1929 Lah. 226.

——S. 12—Right to object.

The ordinary rule of law is that whoever owns the site is the owner of everything upto the sky and down to the centre of the earth, and such owner can, therefore, object to the laying of electric wire on his land although the line may be laid more than 30 feet above land. 114 Ind. Cas. 692=A.I.R. 1929 Lah. 226.

——S. 12 (2)—Public land—Licensee, if can use without consent of authorities and without paying compensation.

A licensee cannot place any work on any private lands without the consent of the owner or occupier. This consent may be given on such terms regarding payment of rent or compensation as the parties might agree upon. In exceptional cases where the licensee can proceed without the consent of the owner, provision has been made for rent or compensation which is to be fixed by the Magistrate or the Commissioner of Police. In the case of public lands, the Legislature clearly intended that the licensee would be able to place its works without the consent of the authorities who are in charge of such lands and without paying any compensation for the same. In the interest of the

public, if it considers necessary, the Government, while granting licence might insert a term or condition in it regarding the payment of rent or compensation for the use of such lands and in such cases, undoubtedly, a duty to pay rent or compensation will arise. It depends entirely upon the Local Government to decide as to whether the licensee would have to pay for the use of lands dedicated to public use. A.I.R. 1937 Cal. 521=41 C.W.N. 1045=I.L.R. (1937) 2 Cal. 746=66 C.L.J. 544=173 Ind. Cas. 55.

——S. 14—Costs of removal.

The defendants were a corporation who had obtained a licence under the Indian Electricity Act, (Act 9 of 1910) and as licensees under the Act had put up an aerial line, etc., on a certain street within the Municipal District of the Municipality of Karachi, the plaintiffs. The Municipality having arranged with the North Western Railway Co., that the latter should effect an overbridge, the aerial line and poles had to be shifted from their position. The plaintiffs' suit was for declaration that the cost of removal should be borne by defendants.

Held: that S. 14 of the Electricity Act applied and not the Bombay District Municipal Act and that plaintiffs must bear the cost of removal. 95 Ind. Cas. 226=A.I.R. 1926 Sind 115.

——Ss. 14 and 19—Operator—Damages—Damage caused by another company.

An operator cannot claim damages for acts of his own or done on his behalf and at his expense by the owner. Where a gas company was cut off from reasonable access to its own property by acts done in the exercise of its powers by the Electric Supply company and those acts caused damage, detriment and inconvenience, held that the damage claimed to have been suffered could be compensated under S. 19 that S. 14 did not apply and the gas company could not be deprived of its remedies. 16 Bom. L.R. 964=39 Bom. 124=26 Ind. Cas. 892.

——S. 19—Applicability—Highway — Rights of members of public to user of—Rights of Shia Muslims to carry tazias in procession through public streets—Nature of—Licensee company authorised under Electricity Act to place electric wires at height of 20 feet on public streets—Shai Muslims cannot carry through streets tazias of greater height.

The members of the public have a right to take part in religious processions in the streets, subject of course to the rights of other members of the public to pass and repass along the same streets and subject to the powers of the appropriate authorities of controlling traffic and preventing disturbance. This right as a normal user of the highway does not originate in custom. The rights of the Shia Mahomedans to take out in procession tazias through the public streets therefore are no more and no less than the rights of any member of the public, and subject to questions of danger or disorder there is no reason why a member of the public should not convey along an open street as part of a normal use of the street articles of any height. But as the rights of the Shias are those of the public, so where public rights may lawfully be abridged so may the rights of the Shias. When the Electric Company has been granted a licence under the Electricity Act to supply electricity to town and has been given the right to place the electric wires at a height of 20 feet on the public streets under the statutory authority of the Electricity Act, the Electric Company must be taken to have been given the power to abridge the public right to carry through the streets objects of a greater height and the Shia Muslims would have no right to carry tazias along the public street of a height greater than 20 feet. Section 19, Electricity Act, requires the licensee to exercise the powers given to him (in this case the power to place wires 20 feet above the street)causing as little damage as may be; but it gives no right to have the lawful exercise of the power restrained even if it necessarily caused inconvenience. Section 19, Electricity Act, in no case has any reference to compensation for damage, detriment or inconvenience to public rights. A.I.R. 1944 P.C. 33=48 C.W.N. 307=57 M.L.W. 237=1944 A.L.J. 176=1944 A.W.R.(P.C.) 22=1944 O.W.N. 272=1944 M.W.N. 342=71 I.A. 25=(1944) 1 M.L.J. 474=10 B.R. 571=I.L.R. (1944) All. 191=213 Ind. Cas. 144 (P.C.).

[Reversing A.I.R. 1939 All. 280=I.L.R. (1939) All. 237=181 Ind. Cas. 964.]

——S. 20 (3)—Right of licensee to enter house of consumer.

It is not permissible for the licensee or his agent to enter the house of a consumer against his wishes. S. 20 (3) of the Electricity Act leaves no room for doubt on this point. 62 C. 886, appr. I.L.R. (1950) Nag. 453=A.I.R. 1950 Nag. 246.

——S. 21 (2)—Rule providing minimum charge to be paid by consumer, held ultra vires—S. 72, Contract Act.

Under para 8 of the licence which is published in the **N. W. F. P. Government Gazette**, dated March 31, 1932, p. 354, and according to S. 21, sub-s. (2), Electricity Act, no Rule can be enforced by the company unless or until they had previously been approved by the Government. The rule made by the Khattar Electric Engineering and General Supply Company Limited, Dera Ismail Khan, asking for a minimum charge of Rs. 25 per annum, from consumer had not ben made with the approval of the Government. The rule, therefore, is ultra vires.

Where the consumer gave the money to the company under the mistake that the company had made rules after all necessary legal preliminaries had been gone through, this is certainly not a mistake as to any law in force in British India. This is a mistake of fact and is covered by S. 72, Contract Act. Besides, if the consumer paid the money to the Electric Inspector under protest after he had been warned that he would be disconnected if he did not make the payments, this is sufficient to constitute "coercion" and the consumer would be entitled to refund under S. 72, Contract Act. A. I. R. 1939 Pesh. 8=181 Ind. Cas. 245.

——Ss. 21 and 23—Applicability and relation—Scope.

Section 21, Electricity Act, which speaks of regulating the relations with consumers does not cover the rates to be charged for electrical energy. The section which deals with that matter is S. 23 and it is, therefore, competent to an Electric Supply Company to enter into an agreement with the consumer as to charges for supply, subject to the limitation prescribed by S. 23.

An agreement for levy of charges on the basis of the actual energy supplied plus proportionate kilowatt charge is not illegal. A.I.R. 1932 Cal. 14=58 C. 1458=35 C.W.N. 933=135 Ind. Cas. 721.

——S. 22—Failure to supply—Good cause for action.

There is nothing in the Indian Electricity Act

which bars, either expressly or impliedly, a suit for damages against licensee for failure to supply energy on proper requisition. 97 Ind. Cas. 537= A.I.R. 1926 Lah. 349.

——S. 22—Substituted connection —Procedure.

Before a consumer can be supplied electric power from a new connection in substitution of an old one he must put in a fresh requisition in writing under paras. 4 and 5 of Cl. 6 of the Schedule to the Indian Electricity Act. 85 Ind. Cas. 186=49 Bom. 182=26 Bom. L.R. 1206=A.I.R. 1925 Bom. 120.

——S. 22 and para. 6 of Schedule—Failure to supply energy.

A person entitled to supply of energy under S. 22 Electricity Act, has a cause of action for a suit for damages on account of the licensee's failure to supply energy according to S. 22 and para. 6 to the Schedule. The Civil Court has jurisdiction to entertain such a suit, since the Act does not provide a remedy for the breach of S. 22. A.I.R. 1941 All. 301=1941 A.L.J. 331=1941 O.W.N. 606=1941 A.W.R. (H.C.) 198=I.L.R. (1941) All. 425=195 Ind. Cas. 659.

——S. 23 (2)—Applicability—Bona fide use of lamps for testing purposes without permission —Consumer, if guilty under S. 39.

A consumer of electricity employing electrical machinery would be entitled within his own premises to use all reasonable tests which might be necessary to discover a defect. It is not obligatory on any one, whatever machinery he may happen to use, to call in an expert on every occasion when something goes wrong. A man is entitled, if he is able, to remedy defects himself in his own plant. If in the case of electric supply, it is a reasonable test for a consumer to use an electric lamp and he bona fide uses a lamp for this purpose, there is nothing in the Electricity Act, or in law to prohibit him from doing so. It might even be an implied term of the contract between the Company and the consumer that the consumer may use any reasonable test to discover and put right any defect. A consumer bona fide using a lamp for testing purposes without permission is not guilty under S. 39, Electricity Act, as his action does not amount to dishonest abstraction of the Company's electric energy. Section 23 does not apply in such a case. A. I. R. 1934 All. 320=35 Cr. L. J. 1274=151 Ind. Cas. 19.

——S. 23 (3) (c)—"Such other method"—meaning of.

Graham, J.—Where the method of fixing charges for energy is duly approved by Government as required by S. 23 (3) (c) and incorporated in the agreement, it is not open to the parties to object to it so long as the charges do not exceed the maximum rate fixed by law.

Suhrawardy J.—"Such other method" referred to in S. 23 (3) (c) need not be totally different from the two preceding methods specified in cls. (a) and (b). A.I.R. 1932 Cal. 14=35 C.W.N. 933=58 C. 1458=135 Ind. Cas. 721.

——S. 23 (3), cl. (c) and Schedule, cl. 11 (a)—Levy of minimum charges.

Clause (c), sub-s. (3) of S. 23, Electricity Act, contemplates charges made on the basis of consumption. A minimum charge is not really a charge which has for its basis the consumption of electric energy. Consequently, the clause does not authorise a licensee to levy minimum charges without any agreement with the consumer. Clause 11 (a) of the Schedule only empowers or authorises the licensee to levy minimum charges. That clause was inserted by the amendment of 1922, to remove doubts on the authority of the licensee to enter into contracts with intending consumers with terms for payment of minimum charges. But that power can only be exercised by a licensee through a contract entered into with an intending consumer. A.I.R. 1936 Cal. 265=40 C.W.N. 789=63 C.L.J. 595=63 C. 1047= 162 Ind. Cas. 811.

——S. 24—Scope and effect—Opportunity to pay off arrears should be given immediately before cutting off connection.

Section 24 does not authorize the licensee to discontinue supply to the premises where there is no default. A clause in an agreement giving power to the licensee to discontinue supply to any other premises owned or occupied by the consumer would be inconsistent with the Act.

The power to discontinue supply to a premises is evidently a power given in addition to the rights to realize the arrears by suit. The consumer should, therefore, be given an opportunity to pay off the arrears immediately before the connection is cut off.

The provision about cutting off the supply is in the nature of a penal provision and should be resorted to last. A.I.R. 1935 Cal. 298=39 C. W.N 526=61 C. L. J. 111=62 Cal. 886=156 Ind. Cas. 727.

——S. 24 (1),—7 days' notice — Waiver.

Every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy.

In S. 24 (1), 7 days' clear notice is a provision purely for the protection of the individual so that his electrical energy will not be stopped without reasonable notice and there is no question of public policy involved. If the individual is prepared to waive the notice, there is no reason why he should not do so. A.I.R. 1937 Nag. 379 = 20 N. L.J 200.=I. L.R. 1939 Nag. 632=171 Ind. Cas. 640.

——S. 24, Sch. Cl. VI (1910).—A fuse or cut-out is necessary in service line and is kept under the licensee's seal.

The licence must bear the charge of the service line whether the consumer has paid the initial expenditure or not. The licensee can discontinue the suply of energy if the consumer's installation is defective. In case of any alleged defect, the licensee can refer the matter to an electric inspector and he is to decide the matter. If energy is supplied to the consumer knowing that the installation is defective, the consumer will not pay for a new fuse or cut-out if the old melts on account of defective installation. 79 P. W.R. 1918=85 P.R. 1918=77 P.L.R. 1918= 45 Ind. Cas. 171.

——S. 33—"Every person"—Meaning of.

The term "every person" is not confined to persons licensed under parts II and III of the Act. Nor is the section confined to cases in which the accident actually results in personal injury or death. 39 Mad. 686=18 M.L.J. 150=16 Cr.L.J. 620=30 Ind. Cas. 444.

——S. 37—Rules under—Electricity Rules, 1937 —S. 24, General Clauses Act (X of 1897),—Applicability of.

The Electricity Rules, 1937, were made applicable in supersession of the Electricity

Rules, 1922, on March 27, 1937. The Electricity Rules of 1937 came into force on March 22, 1938. The accused was charged under R. 40-A of the Electricity Rules, 1922 for an offence committed between March 27, 1937 and March 22, 1938:

Held, that neither R. 40-A of the Rules of 1922 nor its corresponding provision R. 48 of the Rules of 1937, applied to the offence and that S. 24, General Clauses Act, could not be invoked to apply R. 40-A of Rules of 1922, to the offence as that section did not apply to rules framed under the Act. A.I.R. 1941 Bom. 100=43 Bom. L. R. 99 =42 Cr..L .J. 588=194 Ind. Cas. 554.

——S. 37—Rules under —R. 40-A (1), Proviso—Notification (No. 640-27-II) by Bombay Government on November 15, 1934, under.

The word "works" in the Bombay Government Notificat on (No. 640-27-II) issued on November 15, 1934, refers to installation works and not to works connected merely with the supply of energy and the words "their own works" in the same notification mean works carried out by the exempted bodies themselves or perhaps works belonging to them and not merely the works carried out by them on their own premises. Hence the installation works which are carried out by exempted electric supply company on other's premises but at its own expense and which remain its own property fall within the notification and are, therefore, exempt. the accused, thus being exempt from the operation of R. 40-A by reason of the notification cannot be convicted under R. 46. A.I.R 1941 Bom. 100 =43 Bom. L.R. 99=42 Cr. L. J. 588=194 Ind. Cas. 554.

——S. 37—Electricity Rules of 1922, R. 41—Whether modifies common law liability.

Under R. 41, Electric Rules, an absolute obligation to maintain the electric supply lines that belong to the consumers in a safe condition was not imposed upon consumers, and under that rule, the obligations of the consumers at common law towards those to whom they owed a duty to take care was neither increased nor affected. Consumers of electric energy for domestic purposes should not be made liable to pay compensation for injuries caused by defects in their installation apart from negligence on their part, however the defects were caused. A.I.R. 1935 Rang. 401=13 Rang. 369=160 Ind. Cas. 245.

——S. 37—Rules under—R. 62 (3)(a)—Civil rights, if protect person against criminal liability.

The civil rights of a person would not in any way protect him against criminal liability for his acts and omissions under R. 62 (3) (a), Electricity Rules. He has every right to move against the Electric Supply Co. to have the wire removed from over his land; but the wire being where it is, he is not justified in law in effecting additions and alterations in his house making the aerial line running over his land accessible otherwise than by the aid of a ladder or other special appliance. A. I. R. 1934 Pat. 523=15 P. L. T. 761=1 B.R. 10=36 Cr.L. J. 21=152 Ind. Cas. 11.

——S 37—Rules under, R. 106—Consumer—Scope explained.

The definition of 'consumer' includes any person who is supplied with energy by a licensee, and any person whose premises are for the time being connected for the purpose of a supply of energy with the works of the licensee. Therefore, **prima facie** it should be enough to prove either that energy was supplied for the use of the persons or that the persons were owners or occupiers of premises connected up with the licensee's electric system. A.I.R. 1938 Pat. 15=18 P.L.T. 986=172 Ind. Cas, 940.

——S. 37, rules under, R. 106—if ultra vires—Conviction under R. 106—Sentence—Fine should be adapted to circumstances.

Rule 106 framed under S. 37, Electricity Act, is not **ultra vires**, it being a rule which the Government of India had power to make and the necessity of a rule, fixing responsibility for the integrity of the seals of the meter fixed on the consumer's premises is obvious. In case of a coviction under R. 106, although the breaking of a seal on a meter fixed on a consumer's premises is sufficient to render the consumer liable to a fine, the fine should be adapted to the circumstances of the case. A.I.R. 1934 Nag. 245=17 N.L.J. 140=36 Cr.L. J. 36=151 Ind. Cas. 1039.

——S. 37—Rules under, R. 106—Removal of seals—What amounts to.

The evidence for the prosecution showed that when the officials of a licensee company visited the premises of the accused the seals which the company had affixed to the meter placed upon the premises of the accused had been removed,

Held, that the accused must be held responsible for removing these seals and that his conviction under R. 106 read with S. 37 (4) was justified. 116 Ind. Cas. 889=30 Cr. L. J. 702=13 A. I. Cr. R. 115=1929 Cr.C. 601=A.I.R. 1929 Lah. 867.

——S. 37—Electricity Rules—Palghat Corporation Rules, Part 2 (e), R. 1 —"Commercial premises" meaning of.

"Commercial premises" mean, in the context of the classification rules, nothing more than premises used for purposes of business. A. I. R. 1941 Mad. 439=1941 M.W.N. 253=(1941) 1 M.L.J. 411=53 M.L.W. 359=200 Ind. Cas. 346.

——S. 37 (2) (f).

Section 37 (2) (f) empowers the Governnor-General-in-Council to make rules for the whole or any part of British India for the protection of persons and property from injury by reason of contact with or the proximity of or by reason of the defective or dangerous condition of any appliance or apparatus used in generation. A.I.R. 1931 Mad. 152=33 M.L.W. 224=54 Mad. 364 =1931 M.W.N. 73=60 M.L J. 551=130 Ind. Cas. 721.

——Ss. 37(4), 44—Electricity Rules of 1922, R. 106— Whether **ultra vires** of the Governor-General in Council and hence invalid.

Rule 106 of the Electricity Rules, 1922, is unreasonable, is repugnant to the general principles of law, and is in excess of the powers conferred by S. 37 (4) of the Electricty Act. It is also inconsistent with the provisions of S. 44 of the Act. Consequently, this Rule is **ultra vires** of the Governor-General in Council and is therefore, invalid. A.I.R. 1934 Rang. 178=12 Rang. 515=35 Cr.L.J. 1364=151 Ind. Cas. 632.

——S. 39—Applicability—"Theft of electricity"—Avoiding meter.

The use of the word 'mains' for the words "any electric supply-line through which energy is supplied by the licensees" in S. 39 in a notice issued by the Municipal Engineer to a person accused of theft of energy under S. 39, would operate as an admission against the Municipality and would be a good defence to a criminal charge under S 379 I. P. C. for theft, where the word "mains" is qualified by such words as "outside your meter" the accused gets full notice that he must not take current except through the meter. The word "dishonesty" is a legal expression having the same sense as that in which it is used in the Penal Code. 27 Ind. Cas. 591 (c).

—S. 39—Burden of proof—Purloining of electricity, not a trivial offence.

The burden of proof of an offence under S. 39, Electricity Act, is on the prosecution and proof has to be circumstantial in character.

Where the person charged is the lessee or owner of the house and the consumer of the electricity, (that is, the person who is officially on the company's books as the consumer of the electricity in the particular house) and where there is a large and obvious erection on the roof of the house, or in any part of the house, where it could not possibly escape the notice of the consumer and where, in addition, the person charged is the only person who would gain advantage from the theft of the electricity, the charge must be deemed to have been proved. The purloining of electricity cannot be treated as a trivial offence. A.I.R. 1934 All. 60=1933 A.L.J. 1175=35 Cr.L.J. 179=146 Ind. Cas. 814.

——S. 39—Ingredients of offence.

Abstraction is not always a necessary ingredient for on offence under S. 39. The consuming of the electricity and the regular causing of the record of that use in the shape of the figures on the dials in the meters to be altered is a dishonest user. A.I.R. 1936 Cal. 753=41 C.W.N. 225=38 Cr.L.J. 545=168 Ind. Cas. 657.

——S. 39—Offence of theft of electricity, whether offence under S. 379, Penal of Code—S. 50—Application of.

The phrase "at the instance of" means merely "at the solicitation of or at the request of," and the Legislature meant only that a prosecution should not be instituted by some independent busybody who had nothing to do with the matter. Theft of electricity is an offence under S. 379, Penal Code, because of S. 39, Electricity Act. It is an offence which was created by that section and the Legislature intended S. 50 to apply to an offence of this nature. Therefore, there could be no prosecution except at the instance of the Electric Company.

The officers of the Company discovered the theft of electricity and they reported it to the Police and asked the Police to make an investigation. The Company intended that a prosecution should follow according to the result of the investigation. They made further reports to assist the police, and their officers came into Court and gave evidence:

Held, that the prosecution was really at the instance of the Electric Company, although they may not have made the immediate complaint on which the Magistrate took cognisance of the offence. A.I.R. 1936 All. 742=1936 A.L.J. 955=1936 A.W.R. 842=38 Cr.L.J. 53=I.L.R. (1937) All. 102=165 Ind. Cas. 689.

——Ss. 39, 44—Whether separate enactments—General Clauses Act, 1897, S. 26.

For the purpose of S. 26, General Clauses Act, it must be taken that Ss. 39 and 44, Electricity Act, are to be considered as separate enactments. A.I.R. 1936 Cal. 753=41 C.W.N. 225=38 Cr.L.J. 545=168 Ind. Cas. 657.

——S. 40—Applicability—Consumer cutting supply-line in own premises and discontinuing supply to room in premises—Offence.

A consumer who cuts the electric supply line of his own premises and so discontinues a supply to himself or to a tenant of a room in the premises, cannot be convicted of an offence under S. 40 of the Electricity Act unless such Act in some way affects the Electric Supply Company adversely. S. 40 of the Act does not apply to such a case, because it cannot be said that the consumer maliciously causes energy to be wasted or diverted. 226 Ind. Cas. 469=47 Cr.L.J. 954=A.I.R. 1947 Cal. 339.

——Ss. 40 and 2 (n)—Injuring "electric supply line or works"—Severing electric connection of consumer—If offence.

S. 40 of the Electricity Act deals with interference or attempted interference with the supply of electric current by a licensee to a consumer, or more strictly by a licensee to a person to whom the licensee has contracted to supply electricity. If a tenant has his own meter and therefore his own separate contract with the licensee, the landlord who maliciously severs the electric connection of the tenant commits an offence punishable under the section. The definition of "works" given in S. 2 (**n**) of the Act is so wide that it is impossible to hold that anybody who cuts the wires or removes switches or in any way interferes with the connection between the distributing source and the meter of the consumer does not injure the "works". 51 C.W.N. 939=A.I.R. 1947 Cal. 387.

——S. 44 (b)—Installation in mandap **connected with meter in house of owner—Owner is also guilty.**

The offence under S. 44 (b) consists in connecting up any works, **e.g.**, supply-lines in the **mandap** with the meter in the house.

The expression "connects up" in S. 44 (b) includes the house-holder who gives instructions to connect up, the contractor, if any, through whom those instructions are transmitted to the workman, and the workman, who actually does the work. If the connection is made on the instructions of the owner of the house and the **mandap**, he is guilty under S. 44 (b). A.I.R. 1943 Bom. 76=44 Bom. L.R. 800=44 Cr. L. J. 365=205 Ind. Cas. 292.

—S. 44 (b),—Electricity Rules, R. 31—Removal of meter from its old position after breaking of seals, to new position by extending service line—S. 26 (5).

Section 44 (b), Electricity Act, does not require that the "works" laid or connected up with any other "works" belonging to the licensee must also be "works" belonging to the licensee.

Held, that the accused, in laying the additional line from the former position of the meter up to its new position was laying "works" within the meaning of S. 44 (b), and he laid that line for the purpose of connecting it with other works belonging to the licensee, namely, the old supply line which terminated at the original position of the meter. His act, therefore, clearly amounted to an offence within the meaning of S. 44 (b):

Held, further that as the accused broke open the seals which had been placed by the company upon the meter, his act clearly amounted to an offence under R. 31 (1) of the Electricity Rules.

Rule 31 of the Electricity Rules does not deal with cases which S. 26 (5) contemplates but deals with the tampering with the seals placed on a meter which is already working. There is, therefore, no conflict between R. 31 and S. 26, sub-s. (5). A.I.R. 1939 Bom. 480=I.L.R. (1939) Bom. 496=41 Bom. L.R. 878=41 Cr. L. J. 188=185 Ind. Cas. 506.

—S. 44 (c),—Charge, held, though defective did not prejudice accused—S. 39.

Section 44 (c), Electricity Act, does not prevent the charge being made under S. 39. Section 39 is in fact the major offence. The user of electric current without the intention of paying is all that is required under S. 39, which creates a statutory theft sufficiently established against whoever dishonestly abstracts, consumes or uses the energy. The technical rules applicable to proving the theft of a chattel do not apply to proof of this special offence.

Held, that the form of the charge was most irregular. But this objection was not one which, in the circumstances of this case, should receive effect, especially because no injustice was inflicted on the accused. The specific offences of which they were accused were satisfactorily proved by competent evidence, and corroborated in all necessary respects. There was no mis-

carriage of justice. In addition, the irregularity was such as could be, and was cured under Ss. 225 and 537, Criminal P. C., by the finding that the accused had not been prejudiced. A minor point that the charge of theft was bad as not alleging that the thefts were committed in pursuance of the conspiracy and therefore, not alleging a same transaction, was without substance. The specific charge was clearly to be read with the conspiracy charge. A.I.R. 1938 P.C. 130=1938 A.L.J. 382=19 P.L.T. 343=(1938) 1 M. L. J. 647=39 Cr. L. J. 452=42 C.W.N. 621=1938 O.W.N. 416=1938 M.W.N. 505=4 B.R. 490=67 C.L.J. 161=40 Bom. L.R. 787=32 S.L.R. 476=I.L.R. (1938) 2 Cal. 295=65 I.A. 158=174 Ind. Cas. 1 (P.C.).

——S. 44 (c)—For presumption under section, accused must be "consumer"—Electricity supplied to proprietor of mill—Manager, whether "consumer".

The presumption given in the concluding portion of S. 44, is not available to the prosecution unless the person who is accused as having prevented a meter from duly registering, is 'consumer' within the definition given in S. 2 (c).

A manager of a mill cannot be a consumer when the person supplied with energy is the owner of the mill. The fact that the papers sent with electric bills are signed by the manager, does not make any difference. A.I.R. 1938 Pat. 243=19 P.L.T. 141=39 Cr. L. J. 549=4 B.R. 563=175 Ind. Cas. 273.

—S. 44 (d)—Onus to show improper use of electrical energy.

Section 44 (**d**), Electricity Act, **inter alia,** imposes a penalty for improperly using the energy of a licensee. The onus would, therefore, lie on the prosecution to show that there had actually been improper use of the energy. The latter part of S. 44 (**d**) in so far as it relates to cl. (**d**), does not exonerate the prosecution from discharging the onus but merely provides that in case there has been such improper use, the consumer himself as defined in S. 2 (c) of the Act, will not be able to avoid the liability by saying that the energy was used by some person over whom he had no control. A.I.R. 1941 Cal. 87=42 Cr. L. J. 472=I.L.R. (1940) 2 Cal. 571=193 Ind. Cas. 746.

——S. 47—Electricity Rules of 1922, Rr. 31, 37, 107—Licensee allowing stay-wire on road in unsafe condition.

Where a licensee allows the stay-wire in the road to be in an unsafe state, he fails to perform an obligation imposed upon him under the Electricity Act and is guilty of breach of R. 31 and can be convicted under R. 107, Electricity Rules, framed under the Electricity Act. A conviction in the alternative under R. 107 and S. 47 is not in accordance with law. Where a duty is imposed upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company.

Per **Mya Bu, J.**—Rule 37 applies to all electric supply lines, and in considering whether the case is governed by this rule or not, it is unnecessary to determine whether the line in question is a service line or not. Under this rule, the licensee is responsible that all electric supply lines under his control, even if they are on a consumer's premises, are maintained in a safe condition.

The provisions of R. 31 deal with the point of commencement of supply of energy by the licensee to the consumer and not with the question of control over an electric line as a matter of fact. Rule 31 is one of the rules relating to the conditions of supply, which is a matter of concern between the licensee and the consumer rather than a matter affecting the public, whereas R. 37 is one of the rules of precaution for the safety of the public. A.I.R. 1933 Rang. 70=34 Cr. L. J. 1040=11 R. 162=145 Ind. Cas. 710.

——S. 47—Scope—Electricity Rules of 1911, Rr. 41, 105, 107—Breach of.

Section 47, Electricity Act, deals in terms with default in complying with any of the provisions of the Act, or with any order issued under it, or, in the case of a licensee, with any of the conditions of his licence, but it does not deal with a breach of any of the rules made under the Act.

Owner charged for accident to workman getting electrocuted. The accused was prosecuted under S. 41, read with R. 107, Electricity Rules, 1911. The prosecution urged that if there is no rule imposing a penalty for a breach of R. 41, then penalty can be imposed under S. 47:

Held, that no penalty could be imposed under S. 47, as that section was not intended to deal with breaches of the rules. Further, the accused was not an owner within the meaning of the Act although he might be the owner of the defective wire in question, and Rr. 105 and 107 imposed penalties on licensees and owners who were experts and hence no penalty could be imposed on the accused for breach of the rule and that there was no rule providing a penalty for breach of rules which might easily be broken by a non-expert unknowingly. A.I.R. 1936 Bom. 327=38 Bom. L.R. 434=37 Cr. L. J. 1124=60 B. 770=165 Ind. Cas. 261.

——S. 50—Construction—At the "Instance of"—Meaning:

See: Electricity Act, S. 39.

1936 A.L.J. 955=A.I.R. 1936 A. 742.

——S. 50—Construction—"At the instance of"—Prosecution by District Magistrate on the recommendation of Electric Adviser to Government—Propriety.

The expression "at the instance of" in S. 50 does not mean "on the complaint of" or "with the sanction of" but only means "at the asking" or "the suggestion of." Hence a prosecution for contravention of Rr. 49 and 57 of the Electricity Rules started with the complaint of the District Magistrate on the recommendation of the Electric Adviser to the Government is not invalid. A.I.R. 1944 Nag. 380=218 Ind. Cas. 21=I. L. R. (1944) Nag. 692=1944 N.L.J. 475.

——S. 50—'Person aggrieved'.

A licensee-company is a person aggrieved within the meaning of S. 50. 116 Ind. Cas. 889=30 Cr. L. J. 702=13 A. I. Cr. R. 115=1929 Cr. C. 601=A.I.R. 1929 Lah. 867.

——Ss. 50, and 39—Prosecution—Right to start.

Prosecution for the theft of electric energy can be instituted only by one of the persons mentioned in S. 50 of the Electricity Act. A prosecution not instituted at the instance of the Government or an Electric Inspector, but by the Executive Officer of the Cantonment Board who had no authority from the Board to institute proceedings, should be quashed. A.I.R. 1935 Lah. 191 (1)=35 P. L. R. 758=36 Cr.L.J. 736 (1)=155 Ind. Cas. 421 (1).

——Ss. 50 and 44—Offence against company.

A person who is directly in charge of the property of an electrical company comes within the description of the "person aggrieved" by any offence against the company, or by any tampering with its meters, or wrongful appropriation of electric current. A.I.R. 1938 Pat. 15=18 P.L.T. 986=39 Cr.L.J. 206=4 B.R. 203=172 Ind. Cas. 940.

——S. 52—Award under—Notice.

In case of an award under the Act as required by Arbitration Act notice and filing of an award in the Court has to be given to parties entitled

to raise objections, and if the objection succeeds, the award is liable to be set aside but if it is properly filed, it can be enforced as if it were a decree of Court. An award which has not been properly filed under the Arbitration Act, 1899, is not final and is not enforceable as a decree of Court. A.I.R. 1944 All. 66=I.L.R. (1943) All. 907=1944 A.L.J. 43=1944 A.W.R. (H.C.) 41=214 Ind. Cas. 21.

——Sch. Cl. (vi) (2)—Service line paid for by consumer — Ownership in — If vests in consumer or licensee.

The service line which is paid for by the consumer at the time the connection for the supply of electric energy is obtained from the licensee, remains the consumer's property, and there are no words in the Electricity Act vesting the property in the service line in the licensee. Sub-Cl. (2) of Cl. VI of the Schedule to the Act which provides for the maintenance of the service line by the licensee strengthens rather than weakens the claim of the consumer to the ownership of the line. I.L.R. (1950) Nag. 453=A.I.R. 1950 Nag. 246.

——Sch. Cl. 6, prov. (2) — Discontinuance of supply—Conditions.

A part of the electric apparatus namely the seals of the cut-out were not in good order and condition. As a result of this defect there had been a leakage of energy,

Held, such a state of things must certainly be deemed to be "likely to affect injuriously the use of energy by the licensee or by other persons," and accordingly the electric company were entitled upon discovering this condition of things, to discontinue the electric supply.

Where a main fuse was burnt out, in other words, where the cut-out became defective,

Held, the company was entitled to discontinue the supply of energy to the consumer. 75 Ind. Cas. 456=4 Lah. 182=6 L.L.J. 86=A.I.R. 1924 Lah. 142.

——Sch. Cl. (vi) (3)—Reference to Electric Inspector—Agreement between parties—If necessary.

Cl. 6 (3) of the Schedule to the Electricity Act not only requires that a dispute as to the cost of any service line should be referred to the Electric Inspector but it also compels him to decide the matter when it is referred. Therefore an agreement between the parties to the dispute in relation to such a reference is unnecessary. A.I.R. 1947 Lah. 309.

——Sch., para. 12—Scope of.

Paragraph 12 of the Schedule applies only to the preliminary negotiations leading up to an agreement for the supply of the electricity. Once the price to be charged and the mode of ascertaining the charges have been agreed, any dispute as to what that agreement was is not a matter of arbitration but a matter for Civil Court. The paragraph does not apply to a dispute arising as to what is due for any particular year. A.I.R. 1944 Lah. 441=46 P.L.R. 218=217 Ind. Cas. 305.

——Electricity Rules (1937)—See also Electricity Act S. 37—R. 31.

Removal of meter from its old position after breaking of seal to new position by extending service line—Offences under S. 44 (b), Electricity Act and R. 31 held, committed. A.I.R. 1939 Bom. 480=I.L.R. (1939) Bom. 496=41 Bom. L.R. 878=41 Cr.L.J. 188=185 Ind. Cas. 506.

——R. 40-A (1), Proviso:— Accused being exempt from operation of R. 40-A, cannot be convicted under R. 46, Electricity Rules, 1932. A.I.R. 1941 Bom. 100=43 Bom. L.R. 99=42 Cr.L.J. 588=194 Ind. Cas. 554.

——R. 48 (1)—Breach—what is.

It is not in every case that the prosecution is called upon to prove that a re-wiring has altered the capacity or character of old installation. It is only when there is replacement of lamps, fans, fuses, switches and other component parts of the installation that the alteration in capacity and character have to be examined. This exception, however, will not apply to electrical installation work including additions, alterations, repairs and adjustments of existing installations. Where the wires originally fixed on the surface are subsequently buried in the walls, there is certainly an alteration in the system and not a case of replacement and a breach of R. 48 (1) is committed. A.I.R. 1940 All. 5=1939 A.L.J. 1032=1939 A.W.R. 789=41 Cr.L.J. 230=I.L.R. (1940) All. 67=185 Ind. Cas. 709.

——Rr. 49, 57, 120, 124—Liability for breach.

Where death is caused by electrocution in the compound of a college on account of the insulating material of the electric pump and earthing of the wire being defective, the Principal of the College or the Secretary or and Chief Executive of the governing body of the Society running the College is liable to prosecution. A.I.R. 1944 Nag. 380=I.L.R. (1944) Nag. 692=1944 N.L.J. 475.

——Ch. VIII, R. 60—Applicability — If relate solely to main aerial lines—Service aerial lines if also governed.

It cannot be said that Ch. VIII of the Electricity Rules, which inter alia, contains Rr. 69 and 70, relates solely to main aerial lines and not to mere service lines. Having regard to their defined meaning, to the otherwise plain and ordinary meaning of the words used therein and to the clear scope and purpose of Ch. VIII of the rules, that chapter and more particularly R. 69 (1) (b) apply equally to main and service aerial lines. 25 Pat. 571=A.I.R. 1947 Pat. 339.

——R. 60 (1) (c)—Applicability — Under-ground serrvice cable—"accessible"—Meaning of R. 39.

R. 60 (1) (c) of the Electricity Rules was not intended to apply to an under-ground service cable. The requirement of R. 39, which is applicable to a service line "placed by a licensee on the premises of the consumer which is under ground or which is accessible without the aid of a ladder or other special appliance," is that it should be insulated and protected as directed in the rule. There is no specific requirement that there should be any metal covering. R. 60 (1) (c) applies to supply of medium or high pressure and it requires a conductor to be completely enclosed in a mechanically strong metal casing or metallic covering, etc. A cable which is only accessible by a considerable amout of digging is not "accessible" within the meaning of R. 60 (1) (c). 49 Cr.L.J. 452=A.I.R. 1948 Cal. 277.

——Rr. 69 and 70—Charge of contravention—Point of time to be considered—Question for consideration.

In a trial on a charge of contravention of Rules 69 and 70 of the Electricity Rules, 1937, the question is not whether any of the main aerial lines are in fact accessible from any part of the building so far as it had been constructed at the date the complaint is lodged, but whether, at any time prior to that date, the accused had commenced work upon a building which at some time in the course of its complete construction would be

accessible otherwise than by the aid of a ladder or other special appliance to any main aerial wire. 25 Pat. 571=A.I.R. 1947 Pat. 339.

——Rr. 69 (1) and 70 (3)—Scope—Contravention—If continuing offence—Offence when complete.

The offence of contravention of Rr. 69 (1) and 70 (3) of the Electricity Rules is complete when the work complained of is commenced. Having regard to the onus of remedying any dangerous accessibility to an aerial line placed by R. 70 (2) upon the Electric Supply Company, R. 30 (3) cannot be read as giving rise to a continuing offence. 25 Pat. 571=A.I.R. 1947 Pat. 339.

——R. 123—Applicability — Person actually carrying out installation—if guilty.

The person who actually carries out the installation is not guilty of an offence under R. 123, Electricity Rules; the person under whose immediate supervision the work is carried out is guilty. A.I.R. 1940 All. 5=1939 A.L.J 1032=41 Cr. L.J. 230=I.L.R. (1940) All. 67=1939 A.W.R. 789=185 Ind. Cas. 709.

——Electric Power Boards Act (New Zealand). —S. 127.

Held, upon construction of S. 127 of the Electric Power Board Act (New Zealand) that an action for damages for injuries sustained by a workman while working in the employment of a Electric Power Board is barred if brought more than 6 months after the cause of action arose whether the claim is regarded as one based on a breach of an implied term of his contract of employment or as one based on a breach of duty owed by the Board to the plaintiff as a workman in their employment. 169 Ind. Cas. 730=1937 M.W.N. 12=45 L.W. 69.

——Elephant.

See Wild Animals.

——Embezzlement.

See Penal Code, Ss. 403 to 409.

——Emblements. See T. P. Act. S. 108.

——Emergency Legislation Continuance Act (1 of 1915) — Power of Governor-General-in-Council.

The Governor General in Council is not precluded by 23 of the Indian Councils Act 1861 from passing an Act like the Emergency Legislation Continuance Act (1 of 1915) embodying provisions of Ordinance 3 and 5 of 1914. The High Court has no jurisdiction to question orders made under the above Act. 44 Cal. 459=20 C.W.N. 1327=18 Cr.L.J. 64=37 Ind. Cas. 48.

——Emergency Powers Ordinance (II of 1932) —Sentence.

——Per Beaumont, C. J.,—Where the First Class Magistrate has been empowered as a Special Magistrate under the Ordinance, a sentence of fine of over Rs. 1,000 passed by him is not illegal. A.I.R. 1933 Bom. 148=35 Bom. L.R. 185=34 Cr. L. J. 771=143 Ind. Cas. 622.

——Sentence — Fine that can be imposed—Criminal P.C., S. 32.

Where a Magistrate of the First Class tried an accused person for an offence under Emergency Powers Ordinance and sentenced him to Rs. 1.500 fine but the proceedings showed that the trial was as a Court of a First Class Magistrate though he was in fact empowered as a Special Magistrate under the Ordinance:

Held, that the sentence was ultra vires. A.I.R. 1933 Bom. 58=34 Bom. L.R. 1676=34 Cr.L.J. 162=141 Ind. Cas. 574. (S. B.)

——S. 4—Powers under.

The powers given by S. 4, Emergency Powers Ordinance, authorize an order containing directions that the person addressed shall abstain from such acts, or take such order with any property in his possession or under his control, as may be specified in the order. A.I.R. 1932 Sind 107=33 Cr.L.J. 902=139 Ind. Cas. 777.

——Ss. 4, 21, 57—Jurisdiction of District Magistrate to make order on person outside district.

The accused was arrested under the order of the District Magistrate of Sholapur on January 6, 1932, and was sent to Bijapur Jail. On February 25, an order was made by the District Magistrate of Sholapur that the accused should, within 18 hours from leaving custody, report himself to the Police Sub-Inspector at Karmala and thereafter should not leave the limits of Karmala and that he should not, without the permission of the District Magistrate, enter the area comprised in Sholapur Taluka excepting railway limits and that he should report himself daily three times at his residence or lodging to the Police Officer at Karmala. The accused was released on March 3; and with the permission of the Government he went to Bombay and stayed there a week. The accused returned to Sholapur and wrote to the District Magistrate that he expected to present himself before the City Magistrate of Sholapur instead of the Police Officer at Karmala. The District Magistrate wanted the accused to see him as soon as he arrived at Sholapur; the accused did so. He was told to go to Karmala but refused to do so and was immediately arrrested and convicted under S. 21 of the Emergency Powers Ordinance for disobedience of order. On revision;

Held, (i) the order of the District Magistrate at Sholapur was not invalid merely because the accused was not within the Sholapur District when the order was made or served;

(ii) the accused did not disobey the order not to enter the Sholapur area inasmuch as he went to District Magistrate's house with the permission of the District Magistrate;

(iii) the entry of the accused into Sholapur with permission did not become illegal when the accused refused to obey the District Magistrate's order to return to Karmala;

(iv) the accused was not guilty of leaving Karmala as he had never entered it;

(v) that the Government having allowed the accused to proceed to Bombay, the accused was not guilty of breach of the order as to reporting himself to the Police Officer, Karmala, within 18 hours of leaving the Jail. That the breach was not a continuing breach but a single one which was condoned;

(vi) that though the accused was bound to acquire a residence or lodging in order to comply with the order to report himself at his place of residence or lodging, as there was no reasonable time for doing so, the accused was not guilty of breach of this part of the order. A.I.R. 1933 Bom. 148=35 Bom. L.R. 185=34 Cr. L. J. 771=143 Ind. Cas. 622.

——S. 21—Applicability.

Person taking part in a meeting in contravention of the terms of notice served upon him under S. 4 (1), of the Ordinance is guilty of an offence under S. 21. A.I.R. 1932 Lah. 613=34 Cr.L.J. 87=34 P.L.R. 32=141 Ind. Cas. 33.

——S. 21—Scope — If ultra vires.

The provisions S. 21, authorising the Court to pass sentences of imprisonment which would continue

beyond the date of expiry of the said Ordinance are not ultra vires of S. 72 of the Government of India Act. A. I. R. 1933 Cal. 280=37 C.W.N. 363=34 Cr.L.J. 291 (2)=60 Cal. 742=142 Ind. Cas. 204.

——S. 28—Fine imposed on guardian—Legality—Ordinance I of 1932, S. 4—Conviction under.

The very fact that the Court of a Special Magistrate has passed an order convicting a peaceful picket under S. 4 of Ordinance V of 1932, shows that the Court was of opinion that the act constituting the offence was committed in furtherance of a movement prejudicial to the public safety or peace, as otherwise the Court would have had no jurisdiction. Therefore, the fact that there was no express finding to that effect, would not vitiate the imposition of a fine on the guardian of the accused under S. 28 of Ordinance II of 1932. The accused's plea of guilty to the offence charged, in such a case, involves an admission that the act was committed in furtherance of a movement prejudicial to the public sefety or peace.

The Court is entitled to take judicial notice of the fact that the 'present political movement' is a movement prejudicial to public safety or peace.

Quaere—Whether under S. 107, Government of India Act, read with S. 65, the provision that no Court shall have authority to revise any order or sentence passed under Ordinance II of 1932, is ultra vires. A.I.R. 1933 Cal. 186=60 C. 351=36 C.W.N. 1158=34 Cr.L.J. 345=142 Ind. Cas. 351 (2).

——S. 32 (2)—Scope of—Inconsistency between provisions of Ordinance and Criminal P. C.—Whether former prevails—Criminal P.C., S. 337 (2-A)—Ss. 37 (2) and 52.

Where a Special Magistrate tries a case under Ordinance II of 1932, and tenders pardon to an approver, it is not obligatory on him to commit the accused to the Sessions but he may try the case himself.

The provisions of the Criminal P.C., are to apply in the case of Special Magistrate so far as they are not inconsistent with Ordinance II of 1932 as provided for in S. 32 (2) read with Ss. 37 (2) and 52 of the Ordinance.

But where the provisions of the Code are inconsistent with those of the Ordinance, the latter prevails. A.I.R. 1933 Cal. 537=34 Cr.L.J. 1023=60 C. 652=145 Ind. Cas. 656.

——S. 34—Scope—Special Magistrate—Conviction by—Appeal—Limitation.

In dealing with the question of an appeal from a Special Judge, S. 34 of the Ordinance makes a provision to the effect that the provisions of the limitation Act are to apply as it were an appeal under the Code of Criminal Procedure from a sentence passed by a Court of Session and hence, in the case of an appeal from a Special Judge, the ordinary law of limitation is to be applied but to decide which of the provisions of ordinary law is applicable to the new tribunal, it is prescribed that the new tribunal is to be deemed as a Court of Session. A.I.R. 1933 Cal. 124=37 C.W.N. 195=60 C. 571=34 Cr.L.J. 633=143 Ind. Cas. 802.

——S. 51—Contravention—Effect.

Where, on the report of the Police, the District Magistrate transferred a case under the Emergency Powers Ordinance to a Magistrate and subsequently withdrawing the case to his own file, transferred it to another Magistrate:

Held, that action of the District Magistrate was in contravention of S. 51, Emergency Powers Ordinance and that the Magistrate to whom the case was subsequently transferred had no jurisdiction to try the case. A.I.R. 1934 Cal. 256=37 C.W.N. 1048=35 Cr.L.J. 779=148 Ind. Cas. 800.

——Ss. 51—"Court"—If includes High Court—Government of India Act, 1915, Ss. 65, 71, 72, 107—Special Courts created by Ordinance—Superintendence of High Court, if extends to Specjal Courts.

The High Court is included in the term 'Court' used in S. 51, Emergency Powers Ordinance, which section is intended to take away all powers of appeal and revision of all Courts. The section takes away the powers of the High Court derived under the Criminal P.C., and under the Letters Patent, but not the powers derived under S. 107, Government of India Act.

The right of superintendence under S. 107 includes not only superintendence on administrative points, but superintendence on the judicial side too. The Special Courts under the Ordinance are Courts subject to the appellate jurisdiction of the High Court, because under S. 39, the High Court has power to hear appeals in certain cases. A.I.R. 1933 Bom. 1=57 B. 93=34 Bom. L.R. 1523=34 Cr.L.J. 199=141 Ind. Cas. 720. (S.B.)

——S. 51—Right of Special Magistrate.

Section 51 of Ordinance II of 1932 does not take away the right of a Special Magistrate to try a case on the sole ground that the first Magistrate, for good reasons, did not wish to try the case or was unable to do so. A.I.R. 1933 Cal. 124=34 Cr.L.J. 633=60 C. 571=37 C.W.N. 195=143 Ind. Cas. 802.

——S. 51—Scope and Effect of—Conviction by Special Magistrate—Reference by Sessions Judge to High Court.

Though the Court of a Special Magistrate under Ordinance II of 1932 is a Court inferior to a Sessions Court, S. 51 of the Ordinance has the effect of depriving the Sessions Judge of the right of calling for and examining the record under S. 435, Criminal P.C., and of referring the case to the High Court under S. 438, sub-s (1), Criminal P.C., where a person has been convicted by a Special Magistrate under the Ordinance. A.I.R. 1933 Cal. 401=60 C. 851=34 Cr.L.J. 579=143 Ind. Cas. 238.

——S. 52—Jurisdiction—Sind Judicial Commissioner's Court's power to convert sentence under.

Section 52, Emergency Powers Ordinance, II of 1932, does not allow the Judicial Commissioner's Court any authority to convert a sentence of simple imprisonment passed under the Ordinance into one of rigorous imprisonment, on reference made by the District Magistrate.

Although the Ordinance, in so far as it attempts to deprive a Chartered High Court of its powers under the Government of India Act, is ultra vires the judicial Commisioner's Court is bound by it.

Per Ferrers J.C.—"We cannot help observing that extraordinary and very extensive powers have been conferred upon a large body of Magistrates. Our experience leads us to suppose that powers of this kind cannot safely be exercised without some sort of supervision. Authority to exercise such supervision has been expressly withheld from us. We must, therefore, disclaim any responsibility." A.I.R. 1932 Sind 166=26 S.L.R. 402=34 Cr.L.J. 166=141 Ind. Cas. 533 (2).

——S. 63—Applicability.

Offence under S. 63 of the Ordinance is committed where the words used lend directly or indirectly to "bring into hatred or contempt" the Government

established by law in British India or to excite disaffection towards the said Government. A.I.R. 1932 Cal. 738=56 C.L.J. 157=33 Cr.L.J. 949=37 C.W.N. 166=140 Ind. Cas. 304 (F.B.).

——**S. 63—Scope — if abrogates S. 77 of the special powers ordinance.**

Although S. 63 is reproduced in S. 77 of Special Powers Ordinance X of 1932, it does not make the latter section invalid. A.I.R. 1933 Cal. 278=34 Cr.L.J. 316=142 Ind. Cas. 225 (F.B.).

——S. 63 (d)—**Applicability**:—Where the words used are such as may be considered to impute unworthy or dishonest motive to the Government, they fall within S. 63 (d) of the Emergency Powers Ordinance. A.I.R. 1932 Cal. 745=33 Cr.L.J. 839=37 C.W.N. 104=60 Cal. 408=140 Ind. Cas. 5(F.B.).

Emigration Act (XXI of 1883).

——**S. 111—"Magistrate of the first class"—Meaning of—Act X of 1902, Ss. 6, 107 and 111.**

The term "Magistrate of the First Class" used in S. 111 of the Indian Emigration Act 1883, means a Magistrate appointed to exercise the highest magisterial powers ordinarily prescribed by the Cr. P. C. within his jurisdiction, and includes a Presidency Magistrate. Where, on information, a summons is issued to the accused and owing to its disclosing no offence, a fresh summons is issued without any fresh or supplemental information, the error, omission or irregularity in the fresh summons is not sufficient under S. 537, Cr. P. C., to upset the finding and sentence "unless it has in fact occasioned a failure of justice," that is, unless it has unfairly affected the accused's defence on the merits. Sub-S. 1 of S. 111 of the Indian Emign. Act, hints at not merely entering into an agreement but also at any attempt to enter into it. An attempt consists in some external act which shows that progress is made in the direction of it or towards maturing and effecting it, that is, something tangible and ostensible of which the law can take hold, which can be alleged and proved. When a penal statute has been infringed by servants and criminal proceedings are taken against the master, although it lies upon the prosecutor to establish the master's liability, yet the question, whether he is liable, turns necessarily upon what is the true construction to be placed upon the statute. The statute should be construed not merely with reference to its language, but also in subject-matter and object. Sub-S. I of S. 111 of the Indian Emigration Act, 1883, does not break in upon the rule of law embodied in the maxim **quiper aium facit per seipsum facere videture** (he who does an act through another is deemed in law to do it himself). The word "whoever" in the clause means whoever either by himself or through his agent. In other words, the Act leaves untouched the right of every person to enter into such agreements through an agent. It merely provides that such agreements shall not be entered into without the previous permission of the Local Government. The intention of the section is to hold the master liable for his servant's act provided the act was done by the servant so as to bind the master according to the Law of Contract. The coupling of the word "Condition" with the word "terms" in S. 107 of the Act makes out the intention of the Legislature to be that the officer authorised to grant the permission should have power to impose any reasonable terms and conditions he thinks proper as conditions precedent to the grant, whether they relate to the terms of the agreement itself or being extraneous to it, relate to the execution or other considerations which have to be taken into account in order to protect the interests of the native of India departing out of it by sea. S. 29 of the Indian Emigration Act, 1883, makes the execution of the agreement referred to in the presence of the Protector compulsory. In S. 108 of the Act, the power conferred on the Local Government, who have delegated their power to the Protector, is discretionary, and it is left to that Government to decide whether in any particular case any agreement referred to in S. 107 shall be executed or not in its presence, that is, in the presence of the Protector acting as its delegated authority. The two sections being thus distinguishable, the language of one cannot be invoked to aid the construction of the other, especially where the language of each is plain. 9 Bom. L. R. 967=31 B. 611.

——S. 107—**Artisan**:—A person engaged to drive an engine on board a steamer is an artisan within the meaning of the Emigration Act. 32 Bom. 10=9 Bom. L. R. 1059=7 Cr. L. J. 238.

——**Ss. 25 (2) (b),—"Assistance"—Meaning of—S. 30 (3)**:—'Assistance' for the offence under S. 30 (3) read with S. 25 (2) (b) of the Emigration Act, does not necessarily mean financial assistance or an agreement to work for hire. A.I.R. 1940 Mad. 587=1940-1 M.L.J. 816=1940 M.W.N. 480=51 L.W. 679=42 Cr.L.J. 26=190 Ind. Cas. 720.

——**S. 25 (2) (b)—Essentials of—Offence under.**

When a person assists or attempts to assist skilled workers for emigrating to a place outside India for working on hire at his shop, it is not necessary for convicting that person of an offence under S. 25 (2) (b) to prove that there was an agreement between the person and the workers to work for hire. Neither it is necessary to consider whether the workers were in fact engaged by such person at his shop. A.I.R. 1939 Mad. 445=49 L. W. 381=1939 M.W.N. 124=1939-1 M.L.J. 131=40 Cr.L.J. 957=184 Ind. Cas. 370.

——Ss. 30 (3), 25 (2) (b)—"Assistance" for the offence under S. 30 (3) read with S. 25 (2) (b), Emigration Act, does not necessarily mean financial assistance or an agreement to work for hire. A.I.R. 1940 Mad. 587=1940-1 M. L. J. 816=1940 M.W.N. 480=51 L.W. 679=42 Cr.L.J. 26=190 Ind. Cas. 720.

—**'Employee's Death Benefit Fund—Attachment for debts of member—Civil P.C., S. 60—Trusts Act (II of 1882), S. 5.**

The plaintiff obtained a money-decree against the defendants as executors of a deceased debtor and attached the interest of the debtor in the Times of India Employees' Death Benefit Fund. The amount was, under the rules, vested in certain trustees and was payable to the children of the deceased. The deceased himself never had, in the events which actually happened, any interest in the fund or any disposing power over it:

Held, under the circumstances, there was a valid trust under S. 5, Trusts Act, the ownership of the interest of the deceased had been transferred to the trustees and so there was nothing for the attachment to operate upon. A.I.R. 1931 Bom. 300=33 Bom. L.R. 720=134 Ind. Cas. 558.

Employers' Liability Act (XXIV of 1938).

—Ascertainment of liability under Act.

The underlying principle in ascertaining compensation for damages under the Employers' Liability Act in case of death of a workman is that the dependents of the deceased must he awarded damages equivalent to the pecuniary loss sustained by them by reason of the death of the workman. The compensation received

by the dependants of the deceased workman should be approximately equal to his earnings for a period of twenty years after certain deductions have been made if the deceased workman at the time of the accident is between 20 and 26 years of age. A.I.R. 1946 Lah. 50=221 Ind. Cas. 655.

——S. 3—Assessment of damages — Underlying principle—Workman dying as result of personal injuries.

In determining the amount of damages under the Employers' Liability Act in a case where the workman dies as a result of personal injuries caused to him, the underlying principle is that his dependants must be awarded damages equivalent to the pecuniary loss that they have sustained by his death. The damages should be calculated in such a manner as to place the dependants in such pecuniary circumstances as if the deceased workman were still alive. When the workman at the time of the accident is 20 to 26 years of age his dependants should receive compensation amounting approximately to his earnings for a period of twenty years after certain deductions have been made. 221 Ind. Cas. 655=A.I.R. 1946 Lah. 50.

——S. 3 (d) — Applicability — Personal injuiry caused to workman by negligence of co-employee engaged in normal performance of duties.

The words "or in the normal performance of his duties" in S. 3 (d) of the Employers' Liability Act, relate to the workman whose negligence has led to the accident which has resulted in personal injury to another workman. This clause, therefore, applies where personal injury resulting in death is caused to a fireman working on an engine as a result of an accident due to the negligence of a co-employee who was driving the engine in the normal performance of his duties. The defence of common employment is not available to the employer in such a case. 221 Ind. Cas. 655=A.I.R. 1946 Lah. 50.

——S. 3 (d)—Scope and effect—If makes defence of common employment inapplicable.

S. 3 (d) of the Employers' Liability Act is to be read as covering two and not three, categories of negligence—the act or omission of a fellow servant done or made (i) in obedience to any rule or bye-law of the employer; and (ii) in obedience to particular instructions given by a person either by virtue of authority delegated by the employer in that behalf or in the normal performance of such persons, duties. The words, "in the normal performance of his duties", added at the end of S. 3 (d) must be read as enlarging the class of persons in obedience to whose instructions the fellow servant has done or made the act or omission causing the injury complained of, and not as referring to the normal performance of the fellow servants' duties. If this is the correct interpretation of S. 3 (d), it does not make the defence of common employment inapplicable in a proper case. 77 I.A. 1=63 L.W. 41=1950 A. L. J. 116=A.I.R. 1950 P.C. 22 =1950 A.W.R. 194=52 Bom. L.R. 448=54 C.W.N. 173=(1950) 1 M. L. J. 176 (P.C.)

Encroachment.

See also (1) Adverse Possession.
(2) Landlord and Tenant.
(3) Limitation Act, Arts. 142 and 144.

—Encroachment—Proof—Prosecution for refusing to demolish structure on encroached land—Evidence of prior prosecution resulting in conviction for encroachment—Sufficiency—Separate and independent evidence necessary.

In a prosecution for refusing to demolish a structure built upon encroached land belonging to the Municipality evidence as to a prior prosecution in which the accused was convicted for having encroached upon that piece of land was relied upon. On a contention that it had not been proved that encroachment had in fact taken place,

Held, that the previous judgment would not operate in favour of the prosecution to show that there was an encroachment, which had to be proved by separate and independent evidence. 1948 M.W.N. 413 (1)= A.I.R. 1948 Mad. 502=61 L.W. 435 (2)=50 Cr. L. J. 21=(1948) 1 M. L. J. 403.

—Encroachment — Public land — Maximum rent— Further enhancement:— See Bombay City Land Revenue Act S. 22. 3 Bom. L.R. 621=25 B. 752.

Encumbrance.

See: 1. Bengal Patni regulation
2. Bengal Tenancy Act, S. 159
3. Madras Estates Land Act
4. T. P. Act, Ss. 58 and 100
5. U. P. Encumbered Estates Act

——Encumbrance—Execution sale, subject to.

See: 1. C. P. Code, O. 21, Rr. 62, 66.
2. Evidence Act, S. 115.

Endorsee—See Negotiable Instruments Act.

Endorsement.

See: 1. Limitation Act, Ss. 19 and 20.
2. Negotiable Instruments Act.
3. Registration Act, S. 15.

——Endorsement of warrant.—Initials — Validity of arrest:—See Penal Code, S. 224. 5 C.W.N. 447.

——No objection—U. P. Acts—Gambling Act, Ss. 5 and 6. 1908 A.W.N. 9=5 A. L. J. 59=30 A. 60.

Endowment.

See: 1. Hindu law—Religious endowment
2. Muhammadan law—Waqf
3. Religious endowment.

Enfranchisement.

See Grant—Inam.

——Enfranchisement:—of Inam:—See Inam.

Enfranchisement or enlargement of estate in the hands of Hindu widow:—Effect of:—See Hindu law—Widow.

1908 A.W.N. 222=5 A. L. J. 599=30 A. 490.

English Bankruptcy Act 1883 (46 and 47 Vict C. 52)—S. 118—Letter of request—Jurisdiction of Indian Courts.

To invest an Indian Court with the jurisdiction under S. 118, to act in aid, and be auxilliary to the High Court in England a request from the English Court asking the Indian Court to act in aid, is necessary. Such letter of request must be sent to the other Court. The order of the English Court presented by the Trustee in Bankruptcy is not sufficient to give Jurisdiction to the Indian Court. 38 Cal. 542=12 Ind. Cas. 14.

English Decisions—See **Precedents.**

English Extradition Act (33 and 34 Vict Ch. 52) Ss. 14 and 15—Records of German Courts—Admissibility—Evidence Act, if exhaustive.

Per Woodroffe J.—The Evidence Act is not exhaustive. Therefore the records of the German Court authenticated in the manner prescribed by Ss. 14 and 15 of th Act, are admissible in evidence. 39 Cal. 164=15 C. W. N. 1053=14 C. L. J. 375=12 Cr. L. J. 505=12 Ind. Cas. 273.

English law.

See also: 1. Deed—Construction
2. Equity
3. Jurisprudence
4. Precedents.

——English Law—Applicability of—Landlord and Tenant English Law—Adoption of.

In the case of an alleged forfeiture by denial of the landlord's title, where the case is not governed by S. 111 of the T. P. Act, the English law is applicable as a rule of justice equity and good conscience. 42 Mad. 589=36 M. L. J. 543=7 A.L.J. 552=29 C. L. J. 528=21 Bom. L. R. 655=(1919) M.W.N. 271=23 C.W.N. 889=26 M.L.T. 16=10 L. W. 381=50 Ind. Cas. 631. (P.C.).

—English Law—Analogies from—Applicability of.

The analogies from the English Law are not applicable if the language of the Indian Statute is clear. Assignment by way of charge of a chose in action must be in writing. 37 B. 198=40 I.A. 24=(1912) M.W.N. 1247=12 M.L.T. 652=11 A. L. J. 7=24 M.L J. 60=17 C.W.N. 209=15 Bom.L.R. 9=17 C. L. J. 162=17 Ind. Cas. 627 (P.C.).

——English Law—Law of Mortmain if applicable to India.

The English Law of Mortmain, does not extend to British India, nor does the Doctrine of superstitions usus, nor does it apply to religious and charitable trusts. 33 Bom. 122=10 Bom. L. R. 417=1 Ind. Cas 834.

English mortgage. See **T. P. Act., S. 58 (c).**

English Rules of Construction.

See Deed—Construction.

Enhancement of Rent.

See 1. Bengal Tenancy Act. Ss. 50 to 52
2. Bihar Tenancy Act, Ss. 7 and 112
3. Landlord and tenant
4. Local tenancy laws
5. Madras Estates Land Act, S. 26.

Enhancement of sentence.

See 1. Criminal P.C., Ss. 417, 423 and 439.
2. Penal Code S. 75.

Enrolment of advocates.

See 1. High Court Rules.
2. Bar Councils Act.

Enticing away married woman.

See Penal Code, Ss. 497 and 498.

Epidemic Diseases Act (III of 1897).

——S. 3—Powers of local Govt.—Delegation.

Under S. 3 the prosecution has not to prove that the accused's disobedience was likely to cause damage and where the accused plead not guilty, the prosecution has to prove the legality of the order. Under the Act, the Local Government can give power to take measures but it cannot empower them to delegate those powers to others and hence the collector has no power to delegate his own power. The power to take measures under the Act which may be granted by the local govt. to any person is different from the orders or regulations which have to be observed by the public in respect of these measures. Rule 104 of the regulations under the Act is **ultra vires**, of the local government. 38 Mad. 602 (1913) =M. W. N. 928=14 M. L. T. 443=14 Cr. L. J. 620=21 Ind. Cas. 668.

——S. 4—"Done or intended to be done"—Demolition of property—Non-payment of compensation—Personal liability of Magistrate for omitting to pay compensation—Magistrate's assessment of value of demolished premises, if final—Plague Regulation A (Calcutta Gazette, 17-1-00).

The words "done or intended to be done" in S. 4 of the Epidemic Diseases Act do not include omissions; and a Magistrate who omits to pay adequate compensation for property demolished under the provisions of the Act is personally liable, even though he is acting in his administrative capacity as Chairman of the Calcutta Corporation, L. R, 9 C. P. 62 at 72, Expl. The Magistrate's assessment of the amount of such dompensation is not final and a suit will lie to determine its adequacy. (1904) 8 C.W.N. 681=31 C. 829.

Equitable Assignment.

See 1. Assignment
2. T. P. Act, Ss. 130—137.

Equitable Estoppel.

See 1. Evidence Act, Ss. 115, 116
2. Landlord and Tenant.

Equitable Mortgage.

See Transfer of Property Act, S. 59.

Equitable Set-Off.

See C. P. Code, O. 8. R. 6.

Equity.

See also 1. C.P.C. S. 151
2. Maxims.

Synopsis.

1. **Applicability**
2. **Approbate and Reprobate**
3. **Common law**
4. **Forfeiture**
5. **Fraud**
6. **Laches**
7. **Meaning of**
8. **Part-performance**
9. **Principles**
10. **Procedure**
11. **Salvage.**

1. Applicability.

——Equity—Applicability—When steps in to grant relief in the matter of re-opening of settled accounts.

It is a well established principle of law that equity does not step in to grant relief in cases of "folly, imprudence or want of foresight" but only in cases of "victimisation", where accounts between parties like principal and agent are sought to be re-opened after a long lapse of time. I.L.R. (1947) All. 424=A.I.R. 1948 All. 138=1947 A.L. J. 402.

Equity — Applicability — Restitution of benefit obtained—Legal sale—Interest of a party not bound owing to an irregularity—Liability of that party to restore benefit derived before obtaining relief.

Where a party seeks to recover property which has been sold on the ground that his interest was not bound by the sale, if the property had been sold for a debt for which it could lawfully be sold and it is only by reason of an irregularity that the interest of the plaintiff is not bound, the plaintiff would be entitled to the relief only on his restoring the benefit which he had derived—(i.e.) by paying his share of the debt for which the property was sold. 23 Luck. 147=A.I.R. 1949 Oudh 63 =1947 O. W. N. 528=1947 O. A. (C.C.) 382=1947 A.W.R. (C.C.) 382.

——Equity—Applicability—Right to follow property or money wrongfully converted—Property obtained by abuse of confidential knowledge—Right of defrauded person to follow.

There is no authority for the proposition that a person who has been defrauded by the abuse of knowledge which one of the defendants ought to have treated as confidential has any right in equity to follow the proceeds of the abuse of that knowledge. The right of a person whose money or tangible property has been wrongfully taken to trace that money or follow that property into whatever form it may have been converted is well-established. He has, however, no right to a charge on property which never belonged to him but which is alleged to have come into existence as a result of the dishonest conduct of the defendants. 49 Bom. L. R. 425=A.I.R. 1947 Bom. 434.

—Equity—Applicability—Practice cannot override law.

Practice, however long, cannot override the law,

and if it be repugnant to statutory provisions, Courts of Law will refuse to recognize it and will not allow a breach of the law to be perpetuated. A.I.R. 1944 Bom. 107=46 Bom. L.R. 70=45 Cr. L.J. 612=I.L.R. (1944) Bom. 302=212 Ind. Cas. 396 (F. B.).

——Applicability—Analogy as a source of judicial principles.

Analogy is a source of judicial principles and can be lawfully followed only as a guide to the rules of natural justice in the absence of any statutory prohibition. A.I.R. 1942 Cal. 99=I.L.R. (1941) 2 Cal. 477=74 C.L.J. 13=45 C.W.N. 932=199 Ind.Cas. 486.

——Applicability.

Equity merely supplements the law and will not intervene where a remedy lies at law. Therefore, if an obligation can be effectively enforced contractually or as a debt by the common law Courts equity will not intervene. A.I.R. 1941 Nag. 261= 1941 N.L.J. 324=196 Ind. Cas. 201.

——Applicability.

No principles of equity can prevail where the law is clear. A.I.R. 1939 All. 260 =1939 A. L. J. 362=I. L. R. (1939) All. 313=1939 A.W.R. 164= 181 Ind. Cas. 902.

——Applicability.

Where there is a statutory provision, the Courts should follow the statutory provision and they are not entitled to extend that provision on the principles of equity. A.I.R. 1939 All. 141 =1938 A.L.J. 1199=I.L.R. (1939) All. 24=1939 A.W.R. 43=180 Ind. Cas. 699.

——Applicability.

In order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance. A.I.R. 1938 P. C. 67=I.L.R. (1938) 2 Cal. 72=40 Bom. L. R. 746=65 I. A. 66=19 P. L. T. 125=1938 A.L.J. 169=4 B. R. 374=1938 A.W.R. 52=1938-1 M. L. J. 640=67 C. L.J. 153=42 C.W.N. 985=1938 M. W. N. 646=47 M.L. W. 281=1938 O.W.N. 261=32 S.L.R. 374=173 Ind. Cas. 15 (P. C.)

——Applicability—Principles of English equity, if can be applied to Indian contracts—Contract Act.

The Contract Act does not profess to be a complete Code dealing with the law relating to contracts. Therefore, the drinciples of English equity in qase of contracts, if they do not contradict any provisions of the Contract Act, can be applied to suitable casses by Indian Courts which are Courts of Equity as well as of Law. A.I.R. 1937 Oudh 82=1937 O.W.N. 136=13 Luck. 65=166 Ind. Cas. 194.

——Applicability.

Where it is a question of legal rights, there is no scope for the application of equitable principles. A.I.R. 1935 Cal. 201=60 C.L.J. 213=155 Ind.Cas.75.

——Applicability—Equity in India.

The principles of equity, as applied to the practice of the Courts of England, should be observed in the Courts of India in cases in which there is no law extant which lays down a different procedure. A.I.R. 1935 Cal. 33= 38 C. W. N. 1054 =60 C.L.J. 14=61 Cal. 986=154 Ind. Cas. 108.

——Applicability.

It is incorrect on general principles that a person who has broken a particular provision of law should be enabled by the same provision of law to prevent the Courts of law from interfering in the matter. A.I.R. 1934 All. 1011=4 A.W.R. 208 =151 Ind. Cas. 579.

——Applicability.

—Sale of mortgaged property by widow of the mortgagor—Amount deposited in Court to pay the mortgagee—Sale deed invalid:

Held, that the purchaser of the property is entitled to the equitable relief of claiming the amount deposited before the mortgagor can take possession of the property. A.I.R. 1934 Pat. 127= 15 P.L.T. 73=13 Pat. 111=153 Ind. Cas. 602.

——Applicability — Dictum:—Equity does not mean a short cut to a result found desirable. The rules of equity are well known, and have to be applied under the rules laid down and not arbitrarily. A.I.R. 1932 All. 43=1931 A.L.J. 614= 132 Ind. Cas. 575.

——Applicability—Money had and received.

The right to maintain action for money had and received has been given to the purchaser in Court auction on equitable grounds; he must, therefore, bring his case within the rules of equity and his right to recover would be subject to any equitable defence that the decree-holder might be able to advance on the grond of laches, knowledge of the state of affairs, fraud etc., on the part of the purchaser. A.I.R. 1932 Lah. 401=13 Lah. 618=33 P.L.R. 649=138 Ind. Cas. 47.

——Applicability.

A person who has deliberately brought about a state of affairs, should not be allowed to take exception to that state of affairs and use that changed state for his own advantage.

In the Articles of Association of an Insurance Company, it was provided that the meeting of the policy-holders was to be held in the registered office of the company. The Directors of the company refused permission to hold the meeting in company's premises. The meeting was then held at another place.

Held, that the meeting was perfectly regular the change of venue in this case having been caused by the company itself: New Zealand Shipping Co. v. Societe des Ateliers, (1919) A.C. 1 and Queshel Forks Gold Mining Co., Ltd. v. Ward, (1920) A.C. 222, Foll. 114 Ind. Cas. 636=A.I.R. 1928 Mad. 1215=55 M.L.J. 385.

——Applicability—Executor and legatee.

—A bequeathed certain sum of money by way of a legacy to M, who was a minor. B was appointed an executor by A. Subsequently B had also created incomplete gifts in M's favour by crediting certain amounts in his accounts in M's name. B laid out certain sum in buying a house for M in which M resided till his death. In a suit by heirs of M to recover the amount of legacy created in M's favour,

Held, that, it should be presumed that B paid for the house out of the legacy for which he was liable and not out of inchoate gifts for which he had not yet made himself liable at all. 114 Ind. Cas. 565=1929 A.L.J. 406=49 C.L.J. 335=33 C.W.N. 493=31 Bom. L.R. 710=1929 M.W.N. 422= 30 M.L.W. 835=A.I.R. 1929 P.C. 77=57 M.L.J.581.

——Applicability—Power of Court.

It is not within the function of a Court, of equity to contravene a direct provision of a Code in order to attain an equitable result, nor can it excuse a breach of a mandatory rule on the ground that it has resulted in justice. 117 Ind. Cas. 614= A.I R. 1929 All. 437.

——Applicability—Wrong-doers.

Graham, J—Equitable considerations ought not to be invoked on behalf of the party who has put

himself in the wrong by wilfully disregarding the law. 1929 Cr. C. 525=33 C.W.N. 777=A.I.R. 1929 Cal. 781.

——Applicability.

—Where the sale was a legal and valid sale the fact that by accident or by act of God the property had since, with the exception of the site, been destroyed by fire, is not a sufficient ground for having recourse to the principles of equity, when there is a definite and specific rule of law applicable. 88 Ind. Cas. 693=A.I.R. 1926 Nag. 17.

——Applicability—Application of principles.

A remedy cannot be created in favour of a suitor on the principle on justice, equity and good conscience, when another remedy is already available to him and no case of real hardship is disclosed and when the remedy asked for practically means a declaration that the suitor need not be vigilant but may wait for a period of 12 years, if he chooses to do so, before he avails himself of the remedy. 111 Ind. Cas. 84=7 Pat. 613=9 P.L.T. 573=A.I.R. 1928 Pat. 641.

——Applicability.

The rule of justice, equity and good conscience is in general identical with the rule of English law but there are exceptions: 84 Ind. Cas. 269=22 A.L.J. 788=5 L.R.A. Civ. 571=46 All. 860=A.I.R. 1924 All. 857.

2. Approbate and reprobate.

See Evidence Act, S. 115.

——Approbate and reprobate.

Where a person is party to a decree and is bound by its terms he cannot be allowed to act in a manner so as to nullify or evade the terms of that decree. 115 Ind. Cas. 105=5 O.W.N. 873=4 Luck. 93=A.I.R. 1929 Oudh. 26.

——Approbate and reprobate—Taking benefit and repudiation.

It is an equitable principle that a man cannot enjoy a substantial benefit under an agreement and then repudiate it. 93 Ind. Cas. 959 (Lah.).

3. Common law.

——Common law.

When there is a clear statutory provision and the judgment-debtors are entitled to enforce that statutory provision, equitable considerations, assuming there be any, do not arise. A.I.R. 1943 All. 267=1943 A.L.J. 208=I.L.R. (1943) All. 510=1943 A.W.R. (H.C.) 103=208 Ind. Cas. 425.

——Common law.

Where the principles of Common Law in England are in a state of uncertainty, there is nothing to preclude the High Courts applying that view of the law which is essentially just and equitable. A.I.R. 1938 Mad. 164=46 M.L.W. 932=1937 M.W.N. 1108 =1938-2 M.L.J. 340=176 Ind. Cas. 574.

——Common law—Power of Indian Courts.

It is hardly open to an Indian Court to invent a new rule of equity for the first time contrary to the principles of the English Law. If the law in England is clear and there is no statutory enactment to the contrary in India, one should hesitate to introduce any supposed rule of equity in conflict with that law. A. I. R. 1937 All. 610=1937 A. L. J. 688=I.L.R. (1937) All. 860=1937 A.W.R. 661=170 Ind. Cas. 934 (F.B.)

——Common law.

There is in British India no common law right in a party to a proceeding to be represented by Counsel. The right, wherever it exists, will be found to be given by enactment. A.I.R. 1937 Mad. 735=1937 M.W.N. 821=(1937) 2 M.L.J. 189=46 L.W. 531=I.L.R.(1938)Mad. 127=173 Ind. Cas. 251.

——Common law.

Per Stone, C. J., Pollock, J. and Niyogi, A. J. C.; Staples A. J. C. dissenting—In India the doctrine of common employment has no application in cases which in England would come under Employers' Liability Act because the doctrine under the conditions provailing in India at present is not in accordance with justice, equity and good conscience. A.I.R. 1937 Nag. 354=I.L.R. (1938) Nag. 54=174 Ind. Cas. 401.

——Common law.

The rule of equity, justice and good conscience means rule of the common Law of England or rules of equity not as binding upon Indian Courts, but as a guidance in determining the matters which come before them, in which there is no rule of Indian Law. A.I.R. 1933 Pat. 196=14 P.L.T. 149=12 Pat. 216=146 Ind. Cas. 56.

——Common law.

The law to be applied in the Madras High Court in its Ordinary Original Civil Jurisdiction is the law that obtained in the old Major's Court but the English Common Law should only be applied as nearly as the circumstances of the place and inhabitants admit. A. I. R. 1932 Mad, 445=62 M.L.J. 608=35 L. W. 647=1932 M.W.N. 563=55 Mad. 727=140 Ind. Cas. 422.

——Common law—duty of Courts in India.

It is only where no definite law is laid down for guidance, that courts in India should decide according to justice, equity and good conscience. Equity follows the law, means that it is governed by rules of law as to the legal estates and acts in analogy with legal rules in regard to equitable estates when an analogy exists. It can never be used to defeat a law. 13 N.L.R. 130=42 Ind. Cas. 200 (F. B.).

4. Forfeiture.

——Forfeiture.

As regards the power of the Court to relieve against forfeiture, equity only interferes to do complete justice between parties. When the forfeiture is occasioned by accident, fraud, surprise or ignorance, equity will interfere and relieve against forfeiture. But the Court will refuse aid to a defaulter, if the forfeiture is wilful or is the result of gross negligence. Where the creditor agrees to accept part of the debt in full satisfaction if paid within stated time, equity will not relieve against the provision as to time. A.I.R. 1937 Pat. 542=4 B. R. 49=16 Pat. 395=18 P. L. T. 672=171 Ind. Cas. 668.

——Forfeiture — Hire purchase contract — Primary contract to be carried out.

In relieving the hirer against forfeiture occasioned by default in the actual payment of instalments as they accrue both under S. 74 and under the general principles of equity the Court has to carry out the primary contract between the parties. Any further contract, express or implied to be binding on the promisor if he breaks the primary contract is secondary or subsidiary, and may be merely intended to secure the fulfilment of the primary contract. The Court may, however, carry out the terms of the secondary contract, if such a contract is just and reasonable but is not bound to: Kilmer v. British Columbia Orchards Lands, Ltd., (1913) A. C. 319; Steedman v. Drinkle, (1916) 1 A. C. 275, Foll.; 124 Ind. Cas. 800=32 Bom. L. R. 64=A.I.R. 1930 Bom. 306.

——Forfeiture.

In the case of an instalment decree with a default clause the High Court as a Court of equity has wide powers to do what seemed to it just. There is no injustice in putting the decree-holder exactly in the same position as if no default has been committed because the decree-holder has the security of the property for the balance of the decretal amount, and interest was running on that amount. 64 Ind. Cas. 570=46 Bom. 463=23 Bom. L. R. 1238=A.I.R. 1922 Bom. 170.

5. Fraud.

——Fraud—Suit by vendee for possession—Vendor, if can plead that sale was fictitious.

Where both the plaintiff and the defendant are parties to a fraud, it is open to the defendant to plead and prove that fraud and if the fraud is proved, then the plaintiff will fail on the principle of in pari delicto potior est conditio possidentis. Hence it is open to the vendor in a suit for possession by the vendee to plead that the sale was a fictitious transaction and had been entered into in order to defeat a probable suit for pre-emption by a third party. A.I.R. 1945 Pesh. 28=220 Ind. Cas. 258.

——Fraud—Duty of party.

The litigant who prefers the charge of fraud should be compelled to place on record precise and specific details of those charges. A.I.R. 1940 Pat. 204=19 Pat. 1=6 B. R. 653=188 Ind. Cas. 337.

——Fraud—Inference from circumstances.

Where fraud is to be inferred from the circumstances, and is not directly proved, those circumstances must be such as to exclude any other reasonable possibility except that of fraud. In other words, the criterion is similar to that which is applicable to circumstantial evidence in criminal cases. A.I.R. 1940 Pat. 201=6 B. R. 262=20 P.L.T. 957=185 Ind. Cas. 816.

——Fraud.

It would certainly be inequitable to allow the plaintiff to take advantage of his own fraud. It is a general principle that fraud vitiates consent, and it is also a general principle that no party should be prejudiced by an order made behind his back. A.I.R. 1937 Nag. 87=I.L.R. (1938) Nag. 359=171 Ind. Cas. 460.

——Fraud.

If a fundamental mistake is a ground for re-opening settled accounts, fraud must also be a ground. A.I.R. 1934 Cal. 441=61 Cal. 64=151 Ind. Cas. 334.

——Fraud.

The mere suggestion that certain officials were actuated by ill-will or might have supplied false information during the course of the enquiry is inadequate to found a case of fraud upon the Act. A.I.R. 1934 Cal. 259=59 C.L.J. 185=61 Cal. 197=38 C. W. N. 299=35 Cr. L. J. 1466=151 Ind. Cas. 1028.

——Fraud on Court.

When a person brings a suit upon discharged mortgage bonds, he commits a fraud upon the Court and that fraud is extrinsic to the proceedings in the suit on the bonds. Consequently, a suit by a party aggrieved by the decree, to declare it, as far as he is concerned, null and void and to have it set aside, is maintainable. A.I.R. 1934 Rang. 286=152 Ind. Cas. 486.

——Fraud—Circumstantial evidence, importance of.

In the great majority of cases, fraud is not capable of being established by positive and tangible proofs. It is, by its very nature, secret in its movements. It is, therefore, sufficient if the evidence given is such as may lead to the inference that fraud must have been committed and in the generality of cases, circumstantial evidence is the only recourse in dealing with questions of fraud. A.I.R. 1931 Oudh 333=7 Luck. 131=8 O. W. N. 593=132 Ind. Cas. 51.

——Fraud—Circumstantial evidence, value of.

Circumstantial evidence is not only sufficient but in many cases, is the only proof that can be adduced to establish fraud. Charges of fraud and collusion must, no doubt, be proved by those who make them by established facts or inference legitimately taken from those facts taken together as a whole. Suspicions and surmises and conjectures are not permissible substitutes for those facts or those inferences, but that, by no means, requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. A.I.R. 1931 Oudh 256=8 O.W.N. 131=15 R.D. 80=6 Luck. 546=132 Ind. Cas. 532.

——Fraud—Mala fide purchaser—Right of.

—There can be no equity in favour of a purchaser in fraud of creditors who acts without bona fides. The vendee from the purchaser has no right to be paid what his vendor paid under a speculative and fraudulent purchase. 95 Ind. Cas. 262=1926 M.W.N. 293=23 M.L.W. 760=A.I.R. 1926 Mad. 624.

6. Laches.

——Laches—Effect of.

When a person intermeddles with outstanding disputes, he does so at his peril and if he chooses to stand by and let his rights slide, he cannot afterwards claim to be given the benefit of his laches and placed in a better position than his transferor to the detriment of others who acquired right in pending legal proceedings. A.I.R. 1937 Nag. 161=168 Ind. Cas. 1003.

——Laches—Question of limitation.

No equity arises from mere delay to enforce a legal demand, and unless other circumstances create an equity, the only question which can arise from the delay is whether the legal demand is barred by the law of limitation or not. A.I.R. 1937 Pat. 9=17 P.L.T. 644=15 Pat. 716=3 B.R. 167=166 Ind. Cas. 451.

——Laches—Delay in seeking remedy.

Long delay and negligence or "Laches" will disentitle a claimant to come in and establish his claim, even though that claim is not disputed. A.I.R. 1936 Bom. 423=38 Bom. L.R. 864=167 Ind. Cas. 529.

7. Meaning of.

——Meaning of.

The right to an injunction being a right which forms part of the old Chancery jurisdiction is an equitable right. A.I.R. 1941 Mad. 91=(1940) 2 M.L.J. 655=52 M.L.W. 610=1940 M.W.N. 1062=I.L.R. (1941) Mad. 157=195 Ind. Cas. 439.

——Meaning of.

"Equity" means 'a claim to the interposition of the Court of Chancery' and it is no less an equity because the aid of Chancery is sought to protect a legal right. A.I.R. 1941 Mad. 91=(1940) 2 M.L.J. 655=52 M.L.W. 610=1940 M.W.N. 1062=I.L.R. (1941) Mad. 157=195 Ind. Cas. 439.

8. Part-performance.

See also T.P. ACT, S. 53A.

—Part-performance—No relief where contract has become time-barred.

The equitable doctrine of part performance is not applicable to India and no equitable relief can be given even on the lines set forth in **Walsh v. Lonsdale** (1882) 21 Ch. D. 9 where the contract set up in defence to a claim for ejectment is time-barred under Art. 113, Limitation Act. A.I.R. 1934 Mad. 583 (1)=40 M.L.W. 667=1934 M.W.N. 1329=153 Ind. Cas. 16.

——Part-performance.

An equitable doctrine like part-performance cannot operate so as to nullify the statutory requirement of a registered instrument. A.I.R. 1934 Pat. 546=1 B.R. 61=152 Ind. Cas. 498.

——Part-performance — Essentials of the doctrine.

The doctrine of part-performance applies to a suit for possession against a defendant who has got possession or retained with the acquiescence of the plaintiff, possession under an agreement, and if it is pleaded as a defence merely for the purpose of non suiting the plaintiff, no question of limitation can arise.

The doctrine can be valid defence only where possession was obtained in pursuance of the agreement and not de hors the agreements. A.I.R. 1932 Sind 42=25 S.L.R. 433=139 Ind. Cas. 388.

——Part-performance.

Equity may hold people bound by a contract which, though deficient in some requirement as to form, is nevertheless an existing contract. Equity does this in the case of a verbal contract for the sale of land which has been partly performed. But equity will not hold people bound as if a contract existed where no contract was in fact made, nor can equity override the provisions of a statute and (where no registered document exists and no registrable document can be procured) confer upon a person a right which the statute enacts shall be conferred only by a registered instrument.

Maddison v. Alderson (1883) 49 L.T. 303=47 J.P. 821 is only one of the many cases which deal with the English equitable doctrine by which part performance of verbal contracts concerning land, will dispense with the necessity of producing the memorandum of the terms of the contract signed by the party to be charged which is required by S. 4 of Statute of Frauds. It did not decide any new principle.

The true ground of the doctrine of part performance is that if the Court found a man in occupation of land, or doing such acts with regard to it as would prima facie make him liable at law for an action of trespass, the Court would hold that there was strong evidence that a contract existed, and would, therefore, allow verbal evidence to be given to show the real circumstances under which possession was taken. A.I.R. 1 31 P.C. 79=60 M.L.J. 538=33 M.L.W. 586=53 C.L.J. 359=35 C.W.N. 550=15 R.D. 354=8 O.W.N. 739=58 I.A. 91=1931 M.W.N. 480=58 Cal. 1235=33 Bom. L.R. 913=10 Rang. 530 Note=131 Ind. Cas. 762 (P.C.)

[Reverses G.H.C. Ariff v. Jadunath, A.I.R. (Vol. 16) 1929 Cal. 101=112 Ind. Cas. 865].

——Part-performance.

The doctrine of part-performance has no application where the non-observance of the statutory provision makes the transaction ineffective. A.I.R. 1931 Oudh 288=8 O.W.N. 279=7 Luck. 16=132 Ind. Cas. 66.

9. Principles.

——Principles—"One seeking equity should come with clean hands."

In a registered partition deed between G and K of joint property, there was a clause to the effect that if one party purchased a raiyati or under-raiyati holding allotted to the other, either in his own name or benami, such other person in whose share the holding came, could treat the purchase as void. Both the parties had violated this term. In a suit by K for a declaration that such purchase by G was void and for possession of the holding, G contended that as K also had violated the term. he could not claim any relief as "one who seeks equity must come with clean hands.

Held, that if K had purchased raiyati or under-raiyati holding, G could sue him, if in time, but that was no defence to this action of K claiming under a right derived from the partition deed:

Held, further that the clause did not create any right in property in favour of the co-sharers or any of them. The raiyats and under-raiyats holding under them could transfer their interest to anybody, only rights were reserved to a quondum co-sharer to disregard purchase of such rights by his other co-sharers who got allotments elsewhere. A.I.R. 1935 Cal. 779=160 Ind. Cas. 250.

——Principles.

In the absence of any positive law or established local usage, it is not permissible to confiscate or destroy private property either wholly or partially on general principles of equity and justice. A.I.R. 1935 Cal. 711=40 C.W.N. 345=159 Ind. Cas. 756.

——Principles.

A plaintiff is however, not entitled to equitable relief unless he is prepared to behave in an equitable manner himself. A.I.R. 1935 Pat. 59=16 P. L.T. 12=1 B.R. 307=154 Ind. Cas. 393.

——Principles—Relief granted on condition amounting to concession to pay smaller sum.

If there is an agreement to pay a sum of money by a particular date with a condition that if the money is not paid on that date a larger sum shall be paid, that condition is in the nature of a penalty against which a Court of Equity can grant relief and award to the party seeking payment only such damages as he has suffered by the non-performance of the contract. But if, on the other hand, there is an agreement to pay a particular sum followed by a condition allowing to the debtor a concession, for example, the payment of a lesser sum, or payment by instalments, by a particular date or dates, then the party seeking to take advantage of that concession must carry out strictly the conditions on which it was granted, and there is no power in the Court to relieve him from the obligation of so doing. 1934 Bom. 370=36 Bom. L.R. 798=58 Bom. 610=152 Ind. Cas. 575.

——Principles.

If equity is to be invoked, it should be only in favour of persons shown to have acted disinterestedly and in good faith with no intention of securing any unfair advantage for themselves. A.I.R. 1934 Pat. 681=1 B.R. 506=155 Ind. Cas. 870.

——Principles—Liability for loss to others.

Wherever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it: **Commonwealth Trust Ltd. v. Akotey**, (1925) App. Cas. 72, Foll.

To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent

with law and with the principles so frequently affirmed: Lickbarrow v. Mason, (1787) 2 Term. Rep. 63, Foll. 95 Ind. Cas. 867=1926 P. H. C. C. 183=7 P.L.T. 801=A.I.R. 1926 Pat. 353.

——Principles.

He who seeks equity must do equity. The plaintiff's conduct in equity must have been perfectly proper. His claim to equitable relief will be negatived by his fraud or misrepresentation or such other considerations. But merely abating a nuisance of which he complains, without the Court's intervention, is not any impropriety on the plaintiff's part, disqualifying him for equitable relief. 82 Ind. Cas. 309=A.I.R. 1925 Cal. 288.

——Principles—Voidable transaction.

A person avoiding avoidable transaction must return the benefit derived thereunder. 13 C.L.J. 447 =10 Ind. Cas. 269.

10. Procedure.

——Procedure.

Rules of procedure are not made for the purpose of hindering, but for the purpose of adminsitering justice. 80 Ind. Cas. 931=A.I.R. 1925 Cal. 157.

11. Salvage.

——Salvage.

There is an equity only in favour of a person who is in possession of the estate in good faith under a claim which may afterwards turn out to be unfounded provided he has saved the estate from destruction and has preserved it upon the principle of salvage. But this principle can have no application in favour of a person who has never been in possession of an estate under any claim whatsoever and who is no more than a mere volunteer a mere lender. A.I.R. 1939 Pat. 559=5 B.R. 621=181 Ind. Cas. 591.

——Salvage — Transference with and without value.

There are no equities in favour of an alienee taking under a voluntary settlement as there are in favour of transferees for valuable consideration. The creation of a trust in favour of deity cannot be treated as one on an equal footing with a transfer for valuable consideration as the securing of merit by dedication of property to the service of God cannot be treated as forming good valuable consideration. 101 Ind. Cas. 839=A.I.R. 1927 Nag. 214.

Equity of Redemption.

See T. P. Act, Ss. 60 and 91.

Escape from Lawful Custody.

See Penal Code, Ss. 223—226.

Escheat.

See (1) Crown.
(2) Grant.
(3) Hindu Law—Succession.
(4) Landlord and tenant.

——Escheat—Basis of the right — Succession Act, Ss. 214, 381.

Where there is a vacant inheritance, the property lapses to the Crown by the rule of escheat but the escheat to the Crown is not due to any rule of succession; it is a prerogative of the Crown. Upon the death of a person without leaving heirs his estate devolves upon the Crown under its general prerogative and not by reason of any rule of succession. A.I.R. 1932 All. 220=1932 A. L. J. 150=54 All. 226=136 Ind. Cas. 565.

——Escheat — Burden of proof.

In a suit by the Government for ejectment of the defendant on the ground of escheat, it lies upon the Crown to prove at least prima facie that the deceased died without heirs, and it cannot rely upon the want of title of the party in possession.

The number of heirs, who are entitled to succeed to the property of the deceased Hindu, is indeed very large. The statements made by a deceased in the course of a conversation with his wife that in his family, there is no person alive whether near or remote, cannot in these circumstances possibly be construed as statements ascribed to showing that he intended to mean that he had considered the entire list of bandhus who might be entitled to succeed to his inheritance and that he did not find any heir in his family:

Held, that the Crown failed to discharge the onus of showing that the deceased died without leaving any heirs. A. I. R. 1941 Oudh 337=1941 O.W.N. 33=1941 A. W. R. (C. C.) 37=16 Luck. 551=192 Ind. Cas. 131.

——Escheat—Evidence.

Government's suit claiming property by escheat—No relations claiming property for six years after last owner's death—Nor anybody putting forward claim on notice of escheat published in local Gazette at place to which last owner did not originally belong—Facts are not enough to discharge onus probandi lying on plaintiff to prove non-existence of heirs. A.I.R. 1943 Mad. 15=55 M.L.W. 578=(1942) 2 M. L. J. 431=208 Ind. Cas.. 38.

——Escheat—Fixed rate tenancy—No escheat to Government:— See U. P. Acts, Tanancy Act, S. 5. 7 A. L. J. 1011. (F. B.)=33 All. 111=7 Ind. Cas. 231.

——Escheat — Kadim hak—Government—Rent charges—Land—Corporate body—Dissolution —Fluctuating communities—Court's duty to find a legal origin to existing facts.

To establish the title of the Government to Kadim hak (e. g., dusnami sanyasi gosavi jandiwalli) by virtue of an escheat, it must be established. (1) that there was a heritable grant to individuals; (2) that the heirs of those individuals have failed; and (3) that on the happening of these two conditions the haks would escheat to the Government. Where a corporate body is dissolved by the total loss of all its members, there is no escheat to the Crown either of its lands or its rent charges. The effect of the dissolution is that the rent charges become extinguished. Thus, where the grantee of an annual payment out of land to last during the term of his life, dies, the payment sinks into the land: and, similarly, if the grantee is a community, and the grant is to last during the term of its existence,on its dissolution a similar result follows. The law of the country recognises fluctuating communities (e. g.,) the caste, the village as legal personae capable of owning property. Where there has been a well-established user extending over a long series of years, it is the duty of the court, if possible, to find a legal origin of the existing facts. (1903) 6 Bom. L. R. 43=28 B. 276.

Essential Drugs Census Order (1941) Cl. 10 —Order of forfeiture by trial Court—Revision—Interference by High Court. I.L.R. (1945) 2 Cal. 629 =222 Ind. Cas. 459=47 Cr. L. J. 465=A.I.R. 1949 Cal. 1.

Essential Services (Maintenance) Ordinance (XI of 1941.)

——S. 3—Scope.

It is quite sufficient for Government to declare that all services under the Municipality came within the description referred to in Ordinance XI of 1941 as being of an essential nature. A.I.R. 1943

Bom. 314=45 Bom. L. R. 572=45 Cr. L. J. 361=211 Ind. Cas. 273.

——Ss. 5, 7.—An order requiring employees to work properly and carefully and to dispose expeditiously of all tasks assigned to them, without specifying the nature of the work to be done is not too vague. A.I.R. 1943 Bom. 314=45 Bom. L. R. 572=45 Cr.L.J. 361=211 Ind. Cas. 273.

——S. 5 (a) and 7—Scope of.

Section 5 (a) provides that any person engaged in any employment or class of employment to which the Ordinance applies who disobeys any lawful order given to him in the course of such employment is guilty of an offence under the Ordinance. Section 7 provides penalties. A.I.R. 1943 Bom. 314=45 Bom. L. R. 572=45 Cr.L.J. 361=211 Ind. Cas. 273.

——S. 5 (b)—Applicability.

Section 5 (b) is applicable in cases of individual cessation and not collective stoppage of work. A.I.R. 1944 Bom. 248=46 Bom. L. R. 444=I. L. R. (1944) Bom. 437=46 Cr.L.J. 354=217 Ind. Cas. 167.

——Ss. 5 (b) and 7—Excuse for abandoning employment.

The ascused was recruited as First Aider in the A. R. P. and after completing his training, was posted to the A. R. P. depot. He reported himself for duty on the evening of 3rd March, and on the same day, he had an anti-cholera vaccine injection. As he happened to suffer from varicose veins, there was a re-action to the injection and he had high fever. On the 4th,he signed the declaration and a certificate of identity. He was late for physical training and was excused. On the 5th morning he was sent for physical training and after that was over, he complained to his depot-superintendent that he was ill and was suffering from varicose veins. He also made other complaints to the depot-superintendent about his inability to get liquid food and other comforts in his then state of ill-health. The superintendent did not give any reply. The accused, unable to bear the effect of his illness, went away leaving a letter of resignation. Subsequently he was prosecuted under S. 5 (b) of Ordinance XI of 1941:

Held, that fever as a result of anti-cholera injection followed by swelling in the legs could not be said to be a reasonable excuse for abandoning the employment, though it may be a justification for applying for leave or for absenting himself for a few days. A.I.R. 1944 Mad. 20=56 L. W. 565=(1943) 2 M. L. J. 380=1943 M.W.N. 586=45 Cr.L.J. 262=210 Ind. Cas. 493.

——Ss. 5 (b), 7 (1) — (Amendment by Ordinance XXVI of 1942)—Accused, held abandoned his employment.

The accused was appointed as an Assistant Public Prosecutor in East Godavari and had to conduct the prosecution of political offences. On 18th November 1942, he sent in his resignation. He did nothing in connection with his office after the date on which he sent in his resignation till he was arrested. He was not in his district in which he was employed after 21st November till he was arrested on the 30th of that month. The letter of resignation showed that he wanted to be relieved at once and his object in asking for relief was that he may take active part in the civil disobedience movement. The Collector did not pass orders accepting the resignation:

Held, that the express statements made in the letter of resignation as to the purpose of his resignation and the anxiety exhibited by him to go to Coconada in spite of his ill-health to ascertain what became of the letter, coupled with the fact that he did not wait in the district to receive orders on his application, indicated that he wanted to abandon his employment immediately. The mere fact that he was relieved from the work of conducting a few pending cases could not indicate that his resignation was accepted. A.I.R. 1944 Mad. 132=56 L.W. 729=1943 M.W.N. 805=(1943) 2 M.L. J. 658=45 Cr. L. J. 531=212 Ind. Cas. 113.

——S. 7—Applicability.

On 21st August 1942, the Bombay Government superseded the Ahmedabad Municipality and appointed the Collector of the place as its Administrator. One W took over the charge of the Administrator from the Collector on 7th September 1942. On 12th September 1942, the Government issued three Notifications (1) applying the provisions of the Essential Services (Maintenance) Ordinance (XI of 1941) to the Ahmedabad Municipal Service, (2) authorising the Administrator to pass orders under S. 4 and S. 3 authorizing the administrators to file complaints under S. 7. W, on 15th September 1942, passed an order calling upon the Municipal employees "to work properly and carefully and to dispose expeditiously of all tasks which have been or may be lawfully assigned to them." The accused disobeyed the order by refusing to do the work. A complaint was thereupon lodged by W under S. 7. The Government, on 5th October 1942, issued a Notification directing that the powers and duties which were assigned to the Collector of Ahmedabad were to be exercised and performed by W with effect from 7th September 1942:

Held, that W, not having been properly appointed on 15th September, was not the man who could issue orders to the employees and hence he was not authorised to file a complaint. The accused could not, therefore, be convicted under S. 7 of the Ordinance. The Notification of 5th October 1942, seeking to give retrospective effect on the appointment of W could have no effect on the complaint filed by him in his capacity as Administrator before 5th October 1942. A.I.R. 1942 Bom. 314=45 Bom. L.R. 572=45 Cr. L. J. 361=211 Ind. Cas. 273.

——S. 7 (3)—Complaint, by whom to be made.

The jurisdiction of the Court to take cognizance of the offence is conferred only by the complaint by the person authorised in this behalf. Where the commissioner of Police is authorised under S. 7 (3) to file complaints, the Court has no jurisdiction to take cognizance of the offence under the Ordinance on a charge-sheet laid by a Sub-Inspector of Police. A.I.R. 1944 Mad. 20=56 M.L.W. 565=(1943) 2 M.L.J. 380=1943 M.W.N. 586=45 Cr.L.J. 272=210 Ind. Cas. 493.

——Ss. 7 and 8 — Applicability — Resignation of post by member of essential service—Direction to surrender equipment and omission to assign work by superior to member—Offence of abandonment of post—If committed.

Where a member of an essential service submits his resignation to his immediate superior, who asks that person to surrender his uniform and equipment and assigns no duties to him whatever on the ground that the letter of resignation is pending decision by the authorities, it cannot be said that the member in question is guilty of the offence of abandoning his employment without reasonable cause or absenting himself from work. 48 Cr.L.J. 476=229 Ind. Cas. 624.

Essential Supplies (Temporary Powers) Act (XXIV of 1946).

—Proof of orders or their publication — Necessity —Court, if bound to take judicial notice of such orders —Discretion of Court—Interference in appeal—Evidence Act, S. 57 (1).

The respondents (accused) were charged under Ss. 7 and 8 of the Essential Supplies (Temporary

Powers) Act, for having contravened various orders passed by the Government. The first Court convicted all the accused but in appeal the convictions were set aside mainly on the ground that there was no proof of the orders or their publication. On a contention in appeal to the High Court that such proof was not necessary and that the lower Court should have taken judicial notice of the same under S. 57 (1) of the Evidence Act,

Held, the various orders in contravention where of the accused acted were orders made by a competent authority or person in British India within the meaning of S. 3 (27-a) of the General Clauses Act and therefore they are part of Indian Law attracting the provisions of S. 57 of the Evidence Act. But the lower appellate Court in its discretion having refused to take judicial notice as neither the orders nor the document showing the publication of such orders were placed before it, it is impossible to say that the discretion exercised by it is either preverse or illegal. I.L.R. (1949), Mad. 371=1949 M.W.N. 103=A.I.R. 1949 Mad. 459=50 Cr. L. J. 641=63 L. W. 270=(1948) 2 M. L. J. 649.

——Operation of till 31st March, 1950—Resolutions passed by Constituent Assembly on 25th February, 1948 and 23rd March, 1949—Effect of.

The resolutions passed by the Constituent Assembly functioning as the Dominion Legislature on 25th February, 1948, and again on 23rd March, 1949, did not require for their validity the assent of the Governor-General. These resolutions approved of the extension of the period mentioned in Ss. 2 and 3, India (Central Government and Legislature) Act, 1946. The necessary consequence under the proviso to S. 4 of the same Act, is that the period mentioned in that section was extended for a period of twelve months from 31st March, 1948, by the first resolution, and for another period of twelve months from 31st March, 1949, by the second resolution. Act XXIV of 1946, did not therefore cease to be of effect after 31st March, 1948, but stood extended to 31st March, 1950. As regards acts omitted or committed before 31st March, 1950, Act XXIV of 1946, will continue to operate indefinitely after 31st March, 1950. 51 Cr. L. J. 879=A.I.R. 1950 Cal. 202.

——Ss. 2 (c) and 3—Scope—"Foodstuffs"—Milk— Bombay Government Notification dated 24—1—1947, prohibiting use of milk and products in ice-cream—If **ultra vires.**

Milk is food and will therefore come within the term "foodstuffs," as defined in S. 2 (**c**) of the Essential Supplies (Temporary Powers) Act, 1946; and therefore Bombay Government Notification No. MC./M. 5, dated 24—1—1947, issued under S. 3 of the Act, prohibiting the use of milk and milk-products, etc., in the preparation of ice-cream for distribution to the public or for sale, is not **ultra vires,** but, is within the competence of that Government. 52 Bom.L.R. 684=A.I.R. 1951 Bom. 203.

——S. 3—Essentials of offence—Mens rea—**Proof of—Necessity**—C. P. and Berar Food Grains Control Order, 1945—Contravention by partner of firm—Other partners—Liability of.

Proof of **mens rea** is an essential ingredient of an offence created by S. 3 of the Essential Supplies (Temporary Powers) Act, 1946. The penalty attached to a contravention of Cl. 3 (1) of C. P. and Berar Food Grains Control Order (1945) is very severe and the Legislature must be taken to have clearly intended that no one would be made criminally liable for any contravention unless he had a guilty mind. Hence one partner cannot be held liable for act of another, without **mens rea.** 51 C.W.N. 900 (P.C.); 52 C.W.N. 617, appl. I.L.R. (1949) Nag. 488=A.I.R. 1949 Nag. 401=3 A.I.Cr.D. 433=1949 N. L. J. 419.

——S. 3 (1) and (2) (f) and (j)—Scope—Power to issue **ad hoc** order for search of premises—Order for search—Obstruction to execution — Offence — Penal Code, S. 186.

There is no warrant for the contention that sub-Ss. (1) and (2) of S. 3 of the Esssential Supplies (Temporary Powers) Act, 1946, contemplate only publication of orders containing rules to be framed for the carrying out of the various provisions of the Act. There is no doubt that under S. 3 (1) and (2) (**f**) read with Ss. 7 and 15 of the Act, **ad hoc** orders for search of named premises, for search of essential commodities (such as sugar) and for their seizure and can be legally and validly passed by the Provincial Government. The omission to specify S. 3 (1) of the Act in the said order does not render the order legal, when the Act and S. 3 (2) (j) are mentioned in the order. If execution of such an order is obstructed, the person causing the obstruction is liable to conviction under S. 186, I. P. Code. 4 A. I. Cr. D. 405=A.I.R. 1950 Pat. 436.

——S. 3 (2)(c)—"Official Gazette"—Notification by Collector in District Gazette without its being also published in the **Fort St. George Gazette**—Validity—Sale in contravention of such notification—If an offence.

Under section 3 (2) (**c**) of the Essential Supplies (Temporary Powers) Act the fair price has to be fixed by a notified order, which expression is defined in the Act as an order notified in the Official Gazette. According to the General Clauses Act, Official Gazette means the **Gazette of India** or the Gazette of a Province. Hence where a "notification" fixing the price of salt is made by a Collector in a District Gazette but it is not published in the **Fort St. George Gazette** also, the notification is invalid and it follows that a person cannot be convicted for selling salt at a price higher than that fixed in such an invalid notification. 63 L. W. 26 (1)=1950 M. W. N. 221 (1)=A.I.R. 1950 Mad. 308 (2)=51 Cr. L. J. 723=(1950) 1 M. L. J. 35.

——Ss. 3, 4 and 7—Scope and effect of—Order by Sub-divisional Magistrate—Absence of delegation by notified order or "direction" by Central Government to any officer or authority under Provincial Government—Contravention of order—Offence.

An order of which contravention can attract penalty under the Essential Supplies Act, 1946, must be a legally good order under S. 3 of the Act. The power to make an order under S. 3 can never be exercised by any one without a delegation effected in the manner contemplated in the section. In order to enable any officer or authority subordinate to a Provincial Government to make an order under S. 3, requiring any person holding stock of an essential commodity (**e. g.,** paddy) to sell the whole or a specified part of the stock at such prices and to such persons or class of such persons or in such circumstances as may be specified in the order, the officer, either by name or by designation of his office must have been specified in the "direction" by notified order of the Central Government under S. 4. Where the Central Government has not, by any notified order, directed that the power to make orders under S. 3 shall be exercisable by a Sub-divisional Officer or any other authority subordinate to the Provincial Government the order made by such an officer or authority does not profess to derive its sanction or validity from a direction of the Central Government. In such circumstances an order by a Sub-divisional Magistrate is not a valid or legal order, and contravention thereof is no offence punishable under S. 7. I.L.R. (1949) Cut. 627=16 Cut. L. T. 166.

——**Ss. 3 and 7—Applicability—Transport of cloth from one place to another in same province——Offence—Conviction—Legality.**

By the notification, dated 16th February, 1946, issued by the Textile Commissioner under Cl. 6 of the Cotton Textile (Control of Movement) Order, 1946, the transport of cloth from one place in a province to another in the province is not prohibited. Under S. 5 of Ordinance No. XVIII of 1946 [the Essential Supplies (Temporary Powers) Act of 1946], this Textiles (Control of Movement) Order of 1946, shall be deemed to have been made under the Ordinance and under S. 17 of Act XXIV of 1946 [Essential Supplies (Temporary Powers) Act, 1946] the same order shall continue to be deemed to have been made under S. 3 of Act XXIV of 1946. As the transport of cloth from one place to another in the same province is not a breach of the Textiles (Control of Movement) Order of 1946, it cannot be said to be any breach of any order under S. 3 of Act XXIV of 1946 and so a conviction under S. 7 of Act XXIV of 1946, cannot be sustained. A.I.R. 1949 All. 622=50 Cr. L. J. 947.

——**Ss. 3 and 7—Applicability**—Collector's order promulgated under Defence of India Rules prior to the enactment of Act XXIV of 1946—Contravention of—Whether punishable under S. 7.

The Defence of India Rules expired on 30th September, 1946, and were replaced by the Ordinance XVIII of 1946 by which certain provisions of the Defence of India Rules were continued. This Ordinance again was substituted by Central Act XXIV of 1946, passed in November of that year. By order No. 467, dated 15th June, 1946, promulgated under the Defence of India Rules, then in force, the Collector of Coimbatore had prohibited the sale of paddy to any person other than an authorised dealer or himself. S. 7 (1) of the Central Act XXIV of 1946, provided for penalties for contravention of an order made under S. 3 of the Act and sale of paddy is one of the subjects contemplated by S. 3. The petitioners were a seller and purchasers of paddy and the purchasers were not authorised dealers. The transaction took place on 5th February, 1947. On the question whether a contravention of an order made prior to the enactment of the Central Act XXIV of 1946 is an offence on the ground that S. 7 (1) makes punishable only an order made under S. 3 and not an order deemed to be made under S. 3:

Held, that the intention of the Legislature in the enactment of Act XXIV of 1946, was quite clear it wanted to penalise the contravention of all orders which were the subject-matter of S. 3 of the Act and it comprised within that category not only the orders which were specifically to be made under S. 3 of the Act but also the orders which were deemed to be made under the Act by virtue of S. 17 of the Act, and that the petitioners were therefore guilty of the offence under S. 7 (1) of the Act. 1948 M.W.N. 678=61 L.W. 704=A.I.R. 1949 Mad. 355=50 Cr. L. J. 457=(1948) 2 M. L. J. 400.

——**S. 7—Applicability—Contravention of Bihar Kerosene Oil Control Order on 25th April, 1948—Offence—Act, if in force on such date.**

The Essential Supplies (Temporary Powers) Act, 1946, would have spent its force by 1st April, 1947, in view of S. 1 (3) of the Act, as the period of emergency expired on 1st April, 1947, but for the India (Central Government and Legislature) Act, 1946. But the Notification of the Governor-General, No. 7, W.L. (1), 47, published in Gazette of India, dated 8th March, 1947, had the effect of prolonging the operation of the Act (XXIV of 1946), up to 1st April 1948. The Act was further exteneded up to 1st April, 1949, and again to 1st April, 1950, by resolutions of the Constituent Assembly passed in 1948 and 1949. Hence a contravention of the Bihar Kerosene Oil Control Order committed on 25th April, 1948, would be an offence and is punishable, and it cannot be said that the contravention is not punishable because the Act ceased to have operation before that date. 51 Cr. L. J. 808=A.I.R. 1950 Pat. 200=4 A.I.Cr.D. 110.

——**S. 7—Applicability** — Order by Sub-divisional Magistrate—Absence of delegation by "direction" by notified order to Officer of Provincial Government—Contravention of Order — Offence. See **Essential Supplies (Temporary Powers) Act (1946), Ss. 3, 4 and 7.** I.L.R. (1949) Cut. 627.

——**S. 7—Applicability — Notification prohibiting** export of paper or article manufactured wholly or mainly from paper, etc.—Exercise books—Export of—Offence.

Where a notification issued under S. 3 of the Essential Supplies Act of 1946, prohibits the export of paper or article manufactured wholly or mainly from paper, the export of exercise books is a contravention of the Essential Supplies Act (1946), because exercise books are self-evidently articles manufactured mainly from paper. All that is not paper in an exercise look is infinitesimal. Hence the person exporting exercise books without a permit is guilty of an offence punishable under S. 7. An order of forfeiture of the exercise books exported is perfectly legal. A.I.R. 1948 Cal. 289=49 Cr. L. J. 516.

——**S. 7—Construction—If the "order so provides"** —Forfeiture of vehicle used in commission of offence—Power of Court—Cr. P. Code, S. 517.

It is plain from the language of S. 7 of Act XXIV of 1946, that the order of forfeiture must be directed against any property in respect of which the Court is satisfied that the order made under S. 3 of the Act has been contravened. The vehicle in which the articles in respect of which the order has been contravened were carried, is not one of the items of property in respect of which an order made under the Act has been contravened, and cannot, therefore, be confiscated by the Court.

The words "if the order so provides" in S. 7 of the Act mean that although an order of confiscation can be made by the Court in its discretion under S. 517, Cr. P. Code, that discretion is not to be exercised in those cases in which the appropriate authority issuing the order did not think it desirable that such discretion should be used. A.I.R. 1944 Bom. 292 (F. B.) and A.I.R. 1945 Lah. 149, Foll. 51 Cr. L. J. 1182=A.I.R. 1950 Assam 132.

——**S. 7—Essentials of offence—Failure to make** necessary entries in counterfoils of sale receipts—**Mens rea** — Proof of — What would amount to — Proof of corrupt motive—Necessity.

A licensee was convicted under S. 7 of the Essential Supplies (Temporary Powers) Act, for his failure to note the addresses of the persons to whom he sold rice and the licence number of his shop in the counterfoil of the receipt kept by him. On a contention that there was no proof of **mens rea,**

Held: Assuming that proof of **mens rea** is necessary, it cannot be said that there is no such proof. What is meant by saying that **mens rea** should be established is really that it should be proved that the accused had a guilty mind in doing the act. If he knew that the law and the conditions of the licence given to him required that he should comply with certain formalities and with that knowledge he delibes rately omitted to make the necessary entries in the receipt which were required for checking purposes he did it consciously knowing that what he wa, doing was a violation of what the law required. It is certainly proof of **mens rea.** Proof of some ulterior

corrupt motive of profit-making or anything analogous to it is not essential. 1943 M.W.N. 898=63 L.W. 998=(1950) 2 M.L.J. 334=A.I.R. 1951 Mad. 261.

——**S. 7—Evidence—Article manufactured wholly** or mainly from paper—Price-list of stationary published by Stationary Office—Relevancy.

In considering the question whether exercise books are articles manufactured wholly or mainly from paper, falling within a Notification prohibiting the export of articles manufactured wholly or mainly from paper, a price-list of the Controller Stationary Office containing a list of classes of papers, etc., required for office use is wholly irrelevant. The price-list is not part of the law of the land, and further a classification of papers ordinarily required for office use has nothing to do with the question whether exercise books or articles manufactured wholly or mainly from paper. A.I.R. 1948 Cal. 289=49 Cr. L. J. 516.

——**S. 7—Scope and effect—Orders deemed to be** made under Act by virtue of S. 17 (2)—Contravention—Offence.

S. 7 of the Essential Supplies (Temporary Powers) Act (XXIV of 1946), makes punishable the contravention of orders deemed to be orders under the Act by virtue of the provisions of S. 17 (2) of that Act. It cannot be held S. 7 only makes penal the contravention of an order made under S. 3 of the Act. The whole object of S. 17 is to put orders deemed to be made on the footing as orders made under S. 3 of the Act, to give those orders the same force and the same efficacy, and to make the contravention, of those orders as much penal as the contravention of orders made under S. 3. I.L.R. (1948) Bom. 391=50 Bom. L.R. 295=A.I.R. 1948 Bom. 370=49 Cr. L. J. 677 (F.B.).

——**S. 7—Transport—Meaning—Consignment by owner of goods to carrier for transport out of a district—Offence.**

When a person consigns bags of charcoal to a carrier intending them to be taken from one place to another, he does "transport" the charcoal within the meaning of the notification issued by the Government under the powers vested in them by the Defence of India Rules which is punishable under S. 7 of the Essential Supplies (Temporary Powers) Act, though the physical act of carrying is done by the carrier. Though the expression "transport" is not defined either in the notification or in the Defence of India Rules or any where in Act XXIV of 1946, it is clear from the notification in question that what was intended was prohibition of movement of charcoal from one district to another without the requisite permits. The ban was not intended to be imposed only on the person who actually carried the charcoal. It cannot be said that the term "transport" in the notification excludes "consignment for transport". 1949 M.W.N. 756=62 L.W. 652=(1949) 2 M.L.J. 389.

——**S. 7 (1)—Offence under—Proof of** mens rea—If necessary—West Bengal Cotton Cloth and Yarn Movements Control Order, 1947.

Although in the West Bengal Cotton Cloth and Yarn Movements Control Order the movement of yarn from one area to another without a permit is an offence, it is well established that a person cannot be convicted of moving such yarn unless the prosecution establishes, **mens rea** on his part.

If a person was merely acting for his master on his master's instructions and moving the yarn without knowing that such movement was illegal, he would not be committing any offence at all, and his plea could not be regarded as a plea of guilty unless he realised that he was doing something which was wrong. 51 C.W.N. 900 (P.C.) relied on. 53 C.W.N. 300=3 A.I.Cr.D. 327=A.I.R. 1949 Cal. 348=50 Cr.L.J. 590.

——**S. 7 (1), Proviso (as amended)—Order for confiscation**—When may be made—Accidental movement of foodgrains—Absence of **mens rea**—Goods, if may be confiscated—Bengal Foodgrains Movement Control Order.

It is clear from the terms of the proviso to S. 7 (1) of the Essential Supplies Act, 1946, as amended by the Essential Supplies (Temporary Powers) (Amendment) Act, 1948, that confiscation can only be ordered when a particular order has been contravened and where there has been no contravention no order for confiscation can be made.

The Bengal Foodgrains Movement Control Order does not make it an offence accidentally to move food grains in a manner prohibited by the Act. Before there can be a contravention or an offence there must be a degree of **mens rea** which would make the movement a criminal offence. If no **mens rea** is established, there is no contravention of the order and therefore no order for confiscation of the goods can be made. 54 C.W.N. 829=A. I. R. 1951 Cal. 303.

——**Ss. 7 and 8—Applicability** — Mens rea—Necessity—Motor Spirit Rationing Order, 1941, Cls. 5 and 22—Sale of petrol by servant without coupons and at rates in excess of controlled rate—Offence—Liability of master.

The provisions of Cls. 5 and 22 of the Motor Spirit Rationing Order, 1941, constitute an absolute prohibition against the supply of motor spirit otherwise than by the methods laid down in that order. An obligation is also cast upon the supplier to supply petrol in the manner indicated in the order. But it does not follow that a breach of the order, without any **mens rea**, would amount to a contravention of the order rendering a person liable to punishment, although he is morally innocent.

It is not in every case of an absolute prohibition that no question of **mens rea** arises. It is only a limited and exceptional class of offence, which can be held to be committed without a guilty mind. The Court should always bear in mind that unless the statute, either clearly or by necessary implication, rules out **mens rea** as a constituent part of a crime, an accused should not be found guilty of an offence against the criminal law unless he has got a guilty mind. There are no words in the Essential Supplies Act introducing the principle of vicarious liability, nor has the Legislature by necessary implication introduced that principle. Hence the supply of petrol to a bogus customer without coupons as required by law, and at rates higher than the controlled rates by the servant of an owner and licensee of a petrol pump, cannot render the latter liable to punishment under Ss. 7 and 8 of the Act, read with Cls. 5 and 22 of the Motor Spirit Rationing Order, in the absence of **mens rea**. I.L.R. (1948) Bom. 329=A.I.R. 1948 Bom. 364=49 Cr.L.J. 551=50 Bom. L.R. 190.

——**Ss. 7 and 8—Conviction for attempt to** contravene an order—Order for forfeiture—Legality.

As S. 8 of the Essential Supplies (Temporary Powers) Act, lays down that a person attempting to contravene an order is deemed to have contravened it, an order for forfeiture under S. 7 would be justified when the person is convicted for attempting to contravene an order. 1950 A.L.J. 16=1950 A.W.R. 80.

——**Ss. 7 and 8—Conviction under, of hawker of cloth**—Mens rea—**Position of hawker and that of servant.**

The accused who was a hawker was taking cloths from Calcutta to Howrah in a rickshaw without a forwarding note or permit authorising the transport at 11-30 P.M., when he was caught by the police. He was

convicted by a Magistrate under S. 7 read with S. 8 of the Essential Supplies Act. Upholding the conviction,

Held, that as for **mens rea**, the position of a hawker, that is, an independent contractor, was different from that of a mere servant and that as he was trading for his own benefit, although on a commission basis, he could not be heard to say that he did not know what his intention was, and that further the fact that he was caught at 11-30 P.M., was a strong indication of **mens rea**. 53 C.W.N. 503.

——Ss. 7 and 17—Applicability—Order deemed to be made under Act—If punishable—Breach of Cotton Cloth and Yarn (Control) Order, 1945.

S. 7 of the Essential Supplies Temporary Powers) Act provides punishment not only for an order actually made under S. 3 but also for an order deemed to have been made under the Act. The Cotton Cloth and Yarn (Control) Order, 1945, is by operation of S. 17 (2) of the Act "deemed to be an order under this Act" and a breach of that order is, therefore, an offence under the Act. 51 Cr.L.J. 712=A.I.R. 1950 Lah. 101.

——Ss. 7 and 17—Applicability—Accused boarding at Cuttack train bound for Howrah with ticket for Howrah and with 42 lbs. of handloom cloth—Offence—Conviction—Sustainability.

The accused was found boarding a train bound for Howrah at Cuttack. He had with him a ticket from Cuttack to Howrah, and had also with him 42 lbs. of handloom cloth, without a permit as required by the Orissa Government Notification, dated 3rd June, 1946. The luggage was not booked and there was nothing to show as to where the cloth was going to be transported.

Held, that being no evidence for the prosecution to connect the luggage with the destination, it did not follow that, because the accused had a ticket for Howrah, the luggage he was carrying was also destined for Howrah; that the accused was not therefore liable under the circumstances guilty or liable to conviction under Ss. 7/17 of the Essential Supplies (Temporary Powers) Act, 1946. I.L.R. (1949) Cut. 620=A.I.R. 1950 Orissa 88=51 Cr.L.J. 853.

——S. 7 and Cr. P. Code (V of 1898), S. 517—Order of forfeiture on conviction for contravention of order under Essential Supplies (Temporary Powers) Act—If part of sentence—Applicability of S. 517, Cr. P. Code to such on order.

An order for forfeiture of the goods under S. 7 of the Essential Supplies (Temporary Powers) Act on a conviction for a contravention of an order under that enactment, is an order which follows conviction and is not part of the sentence but is a part of the function of the Court under S. 517, Cr. P. Code to direct how the property in respect of which a crime has been committed shall be disposed of. I.L.R. (1950) All. 280.

——S. 8—Applicability—Attempt to export foodgrains—Offence.

An attempt to export foodgrains is an offence under S. 8 of the Essential Supplies (Temporary Powers) Act. 52 P.L.R. 149=A.I.R. 1950 E.P. 268=51 Cr.L.J. 1326.

——S. 12—Application for summary trial—Necessity.

S. 12 of Central Act XXIV of 1946 requires that an application should be made for the trial of a case summarily. Where the records do not disclose the existence of such an application having been made and the Court has acted **suo motu** in trying a case summarily, the trial is illegal. A.I.R. 1947 Oudh 93; A.I.R. 1949 All. 84, rel. on.=4 A.I.Cr.D. 164=A.I.R. 1950 Ajmer 20=51 Cr.L.J. 890.

——S. 17 (2)—Applicability and scope—"By whatever authority"—Meaning—Bihar Paper Dealers Licensing Order, 1945—If to be deemed to be continued in 1947.

The effect of S. 17 (2) of the Essential Supplies (Temporary Powers) Act of 1946 is to continue in force any order the operation of which had been continued by Ordinance XVIII of 1946. S. 5 of that Ordinance continues in force any order made by whatever authority under R. 81 (2) of the Defence of India Rules, 1939, and declares that such order shall be deemed to be an order made under S. 3 of that Ordinance. The words "by whatever authority" cannot be construed as excluding a Provincial Government. They are wide enough to cover a Provincial Government. The Bihar Paper Dealers Licensing Order, 1945 was not rescinded but only lapsed on 30—9—1946 on the lapsing of the Defence of India Rules. It cannot be deemed to have been rescinded. The Licensing Order must therefore be deemed to be an order under S. 3 of Ordinance XVIII of 1946, and its operation was preserved at first by S. 5 of that Ordinance and then by S. 17 (2) of Act XXIV of 1946. Hence a conviction for breach of that order committed in 1947, is perfectly legal and cannot be challenged on the ground that the licensing Order had lapsed before the date of the offence. 26 Pat. 688=A.I.R. 1948 Pat. 309=49 Cr.L.J. 462.

Estates Partition Act (V of 1897).

See **also:—Bengal Estates Partition Act.**

S. 99—Applicability:—S. 99 does not apply to a transfer by a co-sharer of certain definite specific lands marked by metes and bounds. 11 C. L. J. 136=5 Ind. Cas. 130.

Estoppel.

See also
1. Evidence Act, Ss. 115 and 116
2. Landlord and tenant
3. Part-Performance
4. T. P. Act, Ss. 43 and 54.

Estoppel.

Synopsis.

1. Acquiescence
2. Approbate and reprobate
3. Conduct
4. Consent decree
5. Election of remedies
6. Equitable estoppel
7. Essentials
8. Evidence
9. None against statute
10. Pleadings
11. Point of law
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1. Acquiescence.

——Estoppel—Acquiescence—Building on land of another—Right to compensation—Equity.

If a person builds on the land of another, knowing it to be that of another, there is a principle of equity which would prevent the latter from claiming the land with the benefit of all the expenditure made on it. There would be nothing in the conduct of the owner, active or passive, making it inequitable in him to assert his legal rights. However, a party building on the land of another without the acquiescence of the latter may be allowed to remove the structure, but he cannot be granted compensation. A.I.R. 1950 M.B. 41.

2. Approbate and reprobate.

—Estoppel—Approbate and reprobate—Application of doctrine—Defendant in suit not contesting valuation of plaintiff and accepting same in his appeal—Placing higher valuation in application for leave to appeal to Privy Council—Estoppel.

The plaintiff in a suit gave a mere notional value for purposes of stamp duty at a figure lower than Rs. 10,000. No objection was taken to that valuation by the defendant in his written statement and there

was no issue on the question of valuation before the trial Court. The defendant also accepted that valuation in the appeal to the High Court. But in his application for leave to appeal to the Privy Council the defendant urged that the value of the subject-matter in dispute at the time of the suit and at the time of the appeal was over Rs. 10,000.

Held, that there having been no representation, far less a decision, as to the true value of the properties in suit, there was no room for the application of the doctrine that a party cannot be allowed to approbate and reprobate and the defendant was not estopped from proving the real value of the properties in dispute.

A party should not be shut out of his right to appeal to the Privy Council merely because of an erroneous valuation in the plaint, when he has not been in the position of approbating and reprobating and when he has not led the opposite party to act upon such valuation, and when the Court has not considered or decided the question of valuation at an earlier stage. 26 Pat. 614=A. I. R. 1949 Pat. 91.

—Estoppel—Approbate and reprobate—Order for restoration of application under O. 9, R. 13, C. P. Code, dismissed for default on payment of costs—Payment of costs and acceptance by opposite party—Right to challenge order in revision or appeal—Estoppel.

Where an application under S. 151, C. P. Code, for the restoration of an application under O. 9, R. 13, which had been dismissed for default, the Court orders restoration on condition of the applicant paying a sum of money to the opposite party as costs, and such amount is paid as ordered and accepted by the opposite party, the latter is thereafter estopped from challenging the legality or propriety of the order restoring the application, in revision or appeal. 27 Pat. 187=A.I.R. 1949 Pat. 491.

——Estoppel—Approbate and reprobate—Party accepting benefit under order of Court—Right to challenge order in appeal.

Where an application for amendment of plaint is allowed after contest subject to payment by the plaintiff of costs to the defendant, and the latter accepts, the costs paid without protest or reservation of any right to challenge the order of amendments, the defendant is thereafter precluded from challenging the order allowing amendment in appeal or otherwise. I.L.R. (1948) Nag. 913=A.I.R. 1949 Nag. 5.

——Estoppel—Approbate and reprobate—Representation by widow that she was competent to adopt—Evidence Act. S. 115—Adoption—Adopted son borrowing money and incurring other expenses on faith of representation——Subsequent denial of authority to adopt:—See 30 All. 549=(1908) A.W.N. 231=5 A.L. J. 568.

——Estoppel—Approbate and reprobate—Mortgage—Suit for sale—Pleading that suit was premature—Suit, subsequent-Suit decreed in part by confession of third parties against them—Plea of bar by prior suit:— See C.P.C., S. 43. 1904 A.W.N. 236=1 A.L. J. 649=27 A. 254.

——Estoppel—Approbate and reprobate—Deposit by puisne mortgagee—Acceptance by prior mortgagee—Equities:—See T.P.A., S. 83. 1 A.L. J. 590.

——Estoppel—Approbate and reprobate—Administration suit—Advocate General added as party by consent—Right to question validity of lagacies:—See 29 B. 133=6 Bom. L.R. 601 at (142.)

——Estoppel—Approbate and reprobate—Agreement appointing minors agents—Person appointing precluded from questioning their capacity to act:—See Contract Act, S. 183. 4 Bom. L.R. 627.

3. Conduct.

——Estoppel—Conduct—creation of under-proprietary title.

An under-proprietary title cannot be created by estoppel. 51 I. A. 326, followed. I.L.R. (1949) All. 337.

——Estoppel—Conduct—Representation—If necessary.

It is one of the essential elements of estoppel by conduct that the party against whom it is pleaded should have made some representation intended to induce a course of conduct by the party to whom it was made. 52 C.W.N. 719=A.I.R. 1948 P.C. 207=62 L.W. 21 (P.C.).

——Estoppel — Conduct — Dismissed Municipal servant suing and recovering his Provident Fund money—Dismissal set aside by Government—If estopped from contending in a subsequent suit that he was still in service.

A Municipal servant was dismissed from service. He preferred an appeal to the Government. During the pendency of the appeal, he recovered his Provident Fund money by suit on the ground that as his services had come to an end he was entitled to it. Subsequently the Government set aside his dismissal. In a suit brought thereafter by the Municipal servant for a declaration and other reliefs, he contended that he was still in service. On a contention that he was estopped from so contending,

Held, that in the prior suit the municipal servant was not making a representation as the result of which the Board was induced to alter its position and as such he was not estopped from raising his contentions. 1948 O.W.N. 1=A.I.R. 1948 Oudh 282=1948 A.W.R. (C.C.) 93.

—Estoppel—Conduct—Execution of a decree by sale of property by a Muuicipality—Subsisting charge in its favour not notified—Municipality estopped from asserting any claim to bring that property to sale under the subsequent charge as against the auction-purchaser in execution of the first decree.

A party who obtains a decree against a property and brings it to sale when on the same property there is a subsisting charge in his favour, is bound to notify the existence of the charge for the benefit of intending purchasers. The law is the same for Municipalities as for private persons. A Municipality does not cease to be a decree-holder because it is Municipality.

Where at the time of bringing a property to sale in execution of a decree in a suit to enforce the statutory charge in respect of the arrears of property tax, the Municipality fails to notify the existence of another similar decree where it had in the meantime obtained in respect of arrears of taxes for the subsequent years, the Municipality by its failure is estopped as against the auction-purchaser in execution of the earlier decree from asserting any claim to bring the property to sale in enforcement of the charge for the subsequent years. An auction purchaser in execution of the later decree cannot resist the claim for possession of the auction-purchaser in execution of the earlier decree. 60 L.W. 435=A.I.R. 1948 Mad. 120=(1947) 1 M.L. J. 390.

——Estoppel—Conduct—Mortgage pending a perior mortgage suit—Prayer by puisne mortgagee to redeem:—See **Mortgage—Sale.** 17 M.L. J. 263=4 A.L. J. 344=5 C.L. J. 563=11 C.W.N. 561=29 A. 339=34 I. A. 102 P.C.=9 Bom. L.R. 656=2 M.L.T. 191.

——Estoppel—Conduct—Mandatory injunction—Building, demolition of—Discretion—See (In-

junction, Mandatory.) (1904) A.W.N. 68=26 A. 389=1 A.L.J. 209.

——Estoppel—Conduct—Mortgage—Mortgagee taking a mortgage from a person having no interest, a co-mortgagor allowing him to add a remark that he had no objection to the mortgage; effect of:—See Mortgage. 4 Bom. L. R. 25.

—Estoppel—Conduct—Deed not set aside within time—May yet be pleaded in defence:—See Limitation Act, Art. 91. 17 M.L.J. 19=30 M. 169 =2 M.L.T. 4. also 9 C.L.I. 464.

4. Consent decree.

——Estoppel—Consent decree—If operates as estoppel. See C. P. Code, S. 11-A. 1946 A.W.R. (C. C.) 254.

5. Election of remedies.

——Estoppel—Election of remedies—Rule—Application to review judgment—Dismissal—Subsequent suit to set aside decree on same ground of fraud—Maintainability. See Mys. C. P. Code, S. 11. 53 Mys. H. C. R. 111.

6. Equitable estoppel.

——Estoppel—Equitable estoppel — Purchase for the benefit of one in the name of another who had advanced the money—Construction of buildings on that land by the person intended to be benefitted—Acquiescence and standing by of the nominal owner—Rights of parties.

The first defendant sought the help of the plaintiffs' vendor, one **D**, to pay the price of land purchased for him and agreed that the sale may be in the name of **D**. He was always under the **bona fide** belief that the property belonged to him and that the only obligation he had was to pay the price of the land paid by **D** with interest thereon from the date of the sale deed and that he could enjoy the property, on the fulfilment of such a condition, as his own. Further, he was encouraged in the belief by the acquiescence and conduct of **D**. When he later on built upon the land a substantial structure, **D** kept quiet and did not assert any title or right.

On the question whether the defendant had no legal title to the property in the circumstances, held, that applying the well-known dicta contained in various English cases, the principle of equitable estoppel applied and therefore the plaintiffs' vendor could not say that the defendant had no legal title, and if he could not say so, his alienees could have no higher claim, particularly when they were not bona fide transferees for value without notice.

Held, further, (1) that there was no implied contract that the plaintiffs should pay the defendant the value of the structure on the defendant surrendering the property. The utmost the plaintiffs were entitled to was that the defendant should pay the costs of the site with interest accruing up-to-date.

(2) That if the defendant did not pay the same, the value of the structure has to be assessed and on payment of the amount so assessed by the plaintiffs into Court, the defendant should surrender the land with the building upon it. Case-law discussed. 1949 M.W.N. 601=A.I.R. 1950 Mad. 53=62 L. W. 741=(1949) 2 M.L.J. 406.

7. Essentials.

——Estoppel—Essentials of—When can arise.

There can be no estoppel unless one party intentionally caused or permitted the other party to believe a thing to be true and to act upon such belief. 1948 R.D. 415.

——Estoppel—Essentials:—See 6 Bom.L.R. 417 =28 B. 393=28 B. 399=6 Bom. L. R. 428; 6 Bom. L.R. 494.

8. Evidence.

——Estoppel—Evidence—Evidence as to:—The evidence as to estoppel must be unequivocal and clear.—(1905) 7 Bom. L. R. 836.

9. None against statute.

——Estoppel—None against statute. See Bihar Buildings (Lease, Rent and Eviction) Control Act, S. 11. A.I.R. 1950 Pat. 354.

10. Pleadings.

——Estoppel—Pleading of—Duty of Court to construe pleadings liberally, and to give liberty to amplify same—Allegation of specific facts—Necessity.

A plea of estoppel should not ordinarily be ruled out if there is material on the record sufficient to sustain the plea. A liberal view of the pleadings ought to be taken, and the plea, if warranted by the facts proved or admitted, can always be raised even if the facts have not been specifically pleaded. The Court must allow a party to amplify his pleadings so as to embrace all aspects of estoppel, by judgment and in pais, and should not allow the other side to take advantage of technicalities to perpetrate an abuse of the process of Court. I.L R. (1948) Nag. 747=A.I.R. 1948 Nag. 358.

11. Point of law.

——Estoppel—Point of law.

There can be no question on a point of law and an admission on a point of law would not estop a party from subsequently agitating it. 1948 R. D. 401=1948 A.W.R. (Rev.) 292.

12. Waiver.

——Estoppel — Waiver — Execution petition—Amount claimed less than actully due to mistake in calculation or clerical error—If waiver and bars subsequent claim for balance.

No party can waive a right the existence of which he is not aware of at the time the demand is made. Where through a mistake or miscalculation or through any clerical error a lesser amount than is actually then due happens to be made in an execution application, that is a case of an unconscious omission, and cannot be held to operate as a waiver of the applicant's claim for the amount actually due to him; and a subsequent application by him for the portion left out is therefore not barred. 1950 K.L.T. 133.

——Estoppel—Waiver—Execution proceedings —Objection to execution waived:—See Execution. 8 C.W.N. 672=31 C. 822.

13. Miscellaneous.

——Estoppel — Miscellaneous — Estoppel and 'Res judicata'; difference between:—See: 10 Bom. L.R. 210.

——Estoppel—Miscellaneous—Estoppel by circumstances:—See Hindu law—widow—Alienation by. 25 B. 129=2 Bom. L. R. 820.

——Estoppel—Miscellaneous—Dedication, implied:—See Dedication. 10 C.W.N. 1044=4 C.L.J. 343=33 Cal. 1290.

European British Subject.

See **Cr.P. Code**, Ss. 29-A, 34-A, 111, 275, 336, 451, 455, 528-A to 528-D.

Eviction.

See 1. Ejectment
2. Landlord and tenant
3. Limitation Act, Arts. 142 and 144.

EVIDENCE.

see also (1) CRIMINAL TRIAL—EVIDENCE.
(2) EVIDENCE ACT.

Synopsis.

1. Access.
2. Accomplice.
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5. Admissibility.
6. Admissions.
7. Admission in evidence.
8. Affidavit.
9. Alibi.
10. Ambiguous document.
11. Ancient documents.
12. Appellate Court.
13. Appreciation of.
14. Burden of proof.
15. Certified copies.
16. Character.
17. Child witness.
18. Circumstantial evidence.
19. Co-defendants.
20. Common intention.
21. Competency of witnesses.
22. Conclusive proof.
23. Confidential communication.
24. Confession.
25. Construction of document.
26. Contradiction.
27. Corroboration.
28. Credibility.
29. Criminal trial.
30. Criminating question.
31. Cross-examination.
32. Custom.
33. Documents.
34. Dumb witness.
35. Duty of Court.
36. Duty of Judge.
37. Dying declaration.
38. Estoppel.
39. Examination-in-chief.
40. Exclusion of.
41. Expert evidence.
42. Handwriting.
43. Hearsay.
44. Hostile witness.
45. Identification.
46. Impeaching credit.
47. Improper admission and rejection.
48. Judgment.
49. Judicial notice.
50. Legitimacy.
51. 'May presume.'
52. Minors.
53. Motive.
54. Objection to,
55. Official documents.
56. Opinions.
57. Oral.
58. Pedigree.
59. Personal knowledge.
60. Photograph.
61. Practice and procedure.
62. Presumption.
63. Previous conviction.
64. Previous depositions.
65. Privileged communications.
66. Public documents and records.
67. Rebuttable presumptions of fact.
68. Rebuttable presumptions of law.
69. Recitals.
70. Refreshing memory.
71. Relationship.
72. Res gestae.
73. Secondary.
74. State of mind.
75. Sufficiency.
76. Suspicion.
77. Trial.
78. Value of.
79. Miscellaneous.

1. Access.

See EVIDENCE ACT, S. 112.

2. Accomplice.

See EVIDENCE ACT, (1) S. 30.
(2) S. 114—ACCOMPLICE.
(3) S. 133.

3. Account books.

See EVIDENCE ACT, SS. 21, 34.

4. Additional evidence.

See CIVIL P. C., S. 100, O. 41, RR. 27 AND 28.

5. Admissibility.

(a) Admission.
(b) Document.
(c) Decrees and Judgments.
(d) Intention.
(e) Irrelevant facts.
(f) Objections to.
  I. Duty of Judge.
  II. Mode of proof.
  III. When allowed in appeal.
  IV. When not permitted in appeal.
(g) Question of.
(h) Records.
(i) Statements.
(j) Unstamped instrumentss.
(k) Miscellaneous.

5. (a) Admission of Party.

——Admissibility—Admission of a Party.

Before a previous admission can be used against a Party it must be put to him and an opportunity afforded to him to explain if it is capable of explanation. 11 Lah. 410=12 L. L. J. 161=123 Ind. Cas. 278=A. I. R. 1930 Lah. 991=31 Punj. L.R. 243.

——Admissions by party are evidence against him. Evidence that such admissions were mistaken or untrue admissible—Estoppel—Case of adoption

See PRACTICE—PLEADINGS. 11 C. W. N. 321=17 M.L.J. 103=9 Bom. L.R. 267=4 A.L.J. 102=5 C.L.J. 115=29 A. 184=2 M.L.T. 109=34 I. A. 27 (P.C.).

5. (b) Documents.

——Admissibility—Documents not inter partes—Recitals in.

Recitals in a document, which is not **inter partes** are not admissible in evidence. I. L. R. (1946) Nag. 518=1946 Nag. L.J. 511=A.I.R. 1946 Nag. 401.

——Admissibility—Intercepted correspondence between respondents in divorce case—Evidence against the writer not against addressee.

Any intercepted correspondence between the respondents in divorce cases cannot be considered as evidence against the person to whom it is addressed for any purpose whatever.

A letter written by a respondent to a co-respondent is, however, evidence against the respondent.

In the present case, in the absence of other reliable evidence against the respondent, a letter written by her to the co-respondent was held to be but poor evidence and not sufficient to bring home to her the charge of adultery or to prove that guilty affection existed between her and the co-respondent. A. I. R. 1946 Oudh 78=1945 O.W.N. 384=21 Luck. 130.

——Admissibility—Document—Test of.

In considering the question of admissibility of a document, the Courts must construe it on its own terms and not according to how the parties themselves understand it. A. I. R. 1945 Pat. 67=23 Pat. 693=218 Ind. Cas. 255=11 B.R. 270.

——Admissibility—Document called from witness.—Demand for document not describing it fully.

Where a certain document had been called from the witness, and the witness produced it, if it is the very document required, it makes no difference whether the demand for the document did not describe it as fully as it might and the witness should be allowed to prove it, so that it could be admitted in evidence. A.I.R. 1941 Pat. 202=7 B.R. 317=22 P.L.T. 656=192 Ind. Cas. 67.

——Admissibility—Document in possession of ladies but produced by their husbands.

Normally, the husbands would appear in the Court to produce documents summoned from their wives. Such documents cannot be rejected on the ground that they are produced by the husbands of the ladies. A.I.R. 1941 Pat. 202=7 B.R. 317=22 P.L.T. 656=192 Ind. Cas. 67.

——Admissibility—Document, admissible—Exclusion on ground of public policy.

Per **Wadsworth, J.** (in order of reference).—The ground or public policy is not a sufficient reason for excluding from evidence any document which is legally admisssble under the Evidence Act and is not excluded by any statutory prohibition. A. I. R. 1940 Mad. 768=52 L.W. 159=(1940) 2 M. L. J. 257=1940 M.W.N. 787=I.L.R. (1940) Mad. 969=192 Ind. Cas. 548.

——Admissibility—Document—One part admissible, the other not.

Where a document consists of two separate parts, one of which is admissible and the other inadmissible, the document cannot be rejected as a whole. A.I.R. 1936 Lah. 81=162 Ind. Cas. 404.

——Admissibility—Evidence found in illegal search.

Even if a search warrant is illegal, then what is found as a result of that search can be put in evidence in a criminal case. 93 Ind. Cas. 967=50 Bom. 344=28 Bom. L.R. 272=27 Cr. L.J. 503=A. I. R. 1926 Bom. 195.

——Admissibility—Document—No date.

Where a document bears no date and there is nothing to show how and under what circumstances it was prepared it should not be admitted in evidence. 92 Ind. Cas. 601.=A.I.R. 1926 Cal. 684.

——Admissibility—Document—Inadmissible in evidence—No objection taken.

That no objection was taken in the trial Court as to admissibility is no ground for allowing a document to be proved if the evidence is not admissible. 91 Ind. Cas. 449 (Cal.).

——Admissibility—Invoice.

Where the plaintiff sought to prove by producing the invoices sent to him by the consignors showing that the value of the goods amounted to Rs. 204.

Held, it is **prima facie** evidence of what the plaintiff was charged for the goods and what presumably he would have to pay for them and in the absence of cross-examination it is perfectly admissible evidence and it would not be necessary to call consignors and put them into the box to prove what was the actual value of the goods sent. 73 Ind. Cas. 440=4 L.R.A. Civ. 48=A.I.R. 1923 All. 145.

——Admissibility—Road-cess return—Document signed by landlords.

Where the Road Cess Return was signed by the landlords it would be admissible as against them. 68 Ind. Cas. 676=A.I.R. 1923 Pat. 163.

——Admissibility—Document not acted upon.

A document is obviously inadmissible, If it is not given effect to and the object for which it was executed, namely, the proposed compromise in a suit, fell through, as then the document has not the force of a decree. A.I.R. 1923 Pat. 37.

——Admissibility—Pro-note payable to bearer on demand.

Pro-note payable to bearer on demand is unenforceable but is admissible in evidence to prove acknowledgment of prior debts. 69 Ind. Cas. 939=1922 M.W.N. 450=16 M.L.W. 705=45 Mad. 778=A.I.R. 1922 Mad. 181=43 M.L.J. 695.

——Admissibility—Fresh evidence—Appeal.

Plaintiff sued for mortgage-debt relying on certified copies on the ground that the mortgage-deeds were lost. The defendant pleaded that the deeds were included in a compromise decree and torn. The trial Court decided in favour of the defendant. The defendant, on appeal by the plaintiff, produced torn pieces of the bonds in the appellate instead of in the

trial Court. On the plaintiff taking objection to their admissibility,

Held, fresh evidence should not have been admitted in order to enable the Court to decide the case in favour of the defendants, who claimed the benefit of the alleged compromise. 67 Ind. Cas. 237=A. I. R. 1922 Nag. 119.

——Admissibility—Two railway companies agreeing to work jointly—Suit against one for compensation for death by employee's negligence—Agreement between the companies.

Where two railway companies enter into an agreement for the joint working of a certain line, and one of them is sued for compensation for death caused by the negligenee of an employee, the agreement between the companies will be **res inter se alios acta** in so far as it covenants as to liability **inter se** but in so far as it determines the position of the servants who perform their functions on the joint line, it is admissible as the best evidence. A.I.R. 1921 P.C. 221.

——Admissibility of documents not 'inter partes. **See** EVIDENCE ACT, SS. 11 (b) AND 13. 5 C.L.J. 55.

——Admissibility—Document not a lease—Only showing intention of the executant.

Held, admissible for what it is worth. (1904) A.W.N. 212=27 A. 190.

——Admissibility—Attesting witness not called, effect of. **See** EVIDENCE ACT, S. 68. 17 M.L.J. 213=30 M. 251 =2 M.L.T. 175.

——Admissibility—Unregistered deed.

In a suit for specific performance of a contract to grant a lease an unregistered deed containing the alleged agreement is admissible in evidence for the purpose of proving the contract for the breach of which the suit is brought. 17 M. 456, Foll. 17 M.L.J. 218.

——Admissibility of unregistered document—Purpose.

An unregistered document inadmissible in evidence for the purpose of affecting immoveable property or of any transaction affecting such property may yet be looked to, not in any way as creating a title or as showing a transaction that affected the property, but merely as containing a clear and exhaustive statement of the adverse possession set up by a person whose claims were admittedly limited to the rights enumerated in such document. (1903) 5 Bom. L. R. 274=27 B. 515.

5. (c) Decrees and Judgments.

——Admissibility—Decree not inter partes—**See** BENGAL ACTS—ROAD CESS ACT. 6 C.L.J. 22.

——Admissibility—Decree for rent obtained by co-sharer—Rate of rent.

A decree by a co-sharer landlord is not admissible in evidence as to the rate of rent in a suit brought by another co-sharer. 10 C.W.N. 1084.

——Admissibility—Judgment 'inter partes'—**See** EVIDENCE ACT, Ss. 13, 43. 9 Bom. L. R. 65= 31 B. 143.

——Amin's plan attached to decree in prior suit not between the parties, but about the same subject matter.

An Amin's map attached to the decree in a prior suit between the plaintiff and a stranger regarding the same subject-matter is admissible in evidence in a new suit between the plaintiff and Government (a fresh party) only for the purpose of showing the nature of the claim and the decree made in the prior suit. 3 C. L. J. 260.

——Admissibility in evidence of judgment not inter partes.

For a judgment to be admissible, it is not in all cases necessary that it should be either a judgment not **inter partes** or judgment **in rem.** A judgment not **inter partes** may not be proof of facts therein stated : yet it is admissible for the purpose of explaining the character in which possession of an estate has been enjoyed and matters of that class. 5 Bom. L.R. 230.

5. (d) Intention.

——Admissibility—Document signed only by one of parties—Oral evidence showing real intention of parties—Admissibility.

A document which is signed only by one of the parties is not a written agreement, and oral evidence is admissible to show the real intention of the parties. 230 Ind. Cas. 80=13 B.R. 459=A. I. R. 1947 P.C. 32 (P.C.).

——Admissibility—Intention of parties—Evidence as to.

Evidence cannot be admitted about intention of parties when that intention is clearly expressed in deed. 114 Ind. Cas. 81=A.I.R. 1928 Cal. 825.

5. (e) Irrelevant Facts

——Admissibility—Irrelevant evidence—Not objected to.

An erroneous omission to object to evidence which would in no case be placed on the record cannot prevent the appellate Court from rejecting it. A case where relevant evidence has been brought on record in a wrong manner can be cured and defect removed if objection is taken at the time when evidence is tendered. But the failure to object to the reception of evidence which is irrelevant cannot make it relevant. 119 Ind. Cas. 734=A.I. R. 1929 Lah. 583.

——Admissibility—Evidence of trial of other persons for same offence and their acquittal.

Where accused were being tried for having taken part in a certain dacoity, the fact that certain other persons were previously tried for complicity in that dacoity and acquitted is absolutely irrelevant and immaterial. 106 Ind. Cas. 721=2 Luck. 631=8 A. I. Cr. R. 449=A.I.R. 1927 Oudh 369.

——Admissibility—Evidence to contradict possible evidence of opponent.

There is no provision of law which makes evidence, contradicting possible evidence of a possible defence witness, admissible against the accused. 92 Ind Cas. 174= 30 C.W.N. 142=27 Cr. L.J. 222=A.I.R. 1926 Cal. 550.

5. (f) Objections to.

(i) **Duty of Judge**
(ii) **Mode of proof**
(iii) **When allowed in appeal**
(iv) **When not permitted.**

5. (f) (i) Duty of judge.

——Admissibility—Objection to—Duty of Judge.

Per **Tyabji, J.**—Where objection is taken to admissibility of evidence, it is incumbent upon the Judge to exercise his judgment and to take the responsibility for its decision. He may allow evidence to be placed on the record provisionally, and subject to objection, in cases where that course would ultimately save time; the Court is entitled to expect a loyal acceptance of its ruling on the part of the counsel, without any attempt to get behind the ruling, or to raise the question again and again, after it has once been decided. A.I.R. 1932 Bom. 136=34 Bom. L. R. 55=56 Bom. 36=137 Ind .Cas. 717.

——Admissibility—Objections to duty of Judge to decide.

When at a trial, admissibility of evidence is objected to, it is the duty of the trial Judge to decide at once whether it is admissible. If he holds it is inadmissible the document should not find a place on the record and assessors or jurors should be warned not to rely on it. 98 P.L.R. 1918=20 Cr. L.J. 305 =50 Ind. Cas. 481.

5. (f) (ii) Mode of proof.

——Admissibility—Objection to—Mode of proof.

When a fact relevant in itself has been wrongly allowed to be proved in a manner not permitted by law unless the opposite party objects to the evidence at the time when it is offered, he cannot object afterwards. 94 Ind Cas. 75=27 P.L.R. 260=A.I.R. 1926 Lah. 415.

——Admissibility—Objection in appellate Court—Mode of proof.

If no objection be taken in the first Court to the admissibility of evidence on the ground of improper proof, such objection cannot be raised in appeal 31 Cal. 1059 at p. 1074 (P.C.). Foll. 78 Ind. Cas. 34=A.I.R. 1924 Nag. 358.

——Admissibility—Mode of proof—Waiver of.

The question of the mode of proof is a question of procedure and is capable of being waived by a party. Where the question of the admissibility of documents was not raised before the Trial Court, it must be assumed that the party waived his objection to the mode of proof adopted by the opponent. 72 Ind. Cas. 748=A. I.R. 1924 Pat. 284.

——Admissibility — Mode of proof — Appellate Court.

When the lower Court has given a finding that the document is legally proved the Appellate Court should sparingly interfere with the finding when no objection was taken at the hearing. 32 Ind. Cas. 760 (Mad.).

——Admissibility—Objection as to mode of proof—Appellate Court.

If a document is inadmissible in evidence objection can be taken to its admissibility at any stage of the case, even if it has been duly proved. But an objection as to the mode of proof of a document is one which should be taken at the time when the document is attempted to be put in. 9 C. W. N. 111.

5. (f) (iii) Objection to, when allowed in appeal.

——Admissibility—Objection not taken at trial—Evidence irrelevant—Raising at late stage.

No doubt the proper time to take objection as to the admissibility of a document is when it is tendered in evidence : but the omission to object to a document which is not in itself admissible will not constitute such document evidence. It is the duty of court to exclude all irrelevant evidence even if no objection is taken to its admissibility by the parties. The question of relevancy is a question of law and can be taken at any stage. (1946) 1 Cal. 149=49 C. W. N. 791=A. I. R. 1945 C. 492.

——Admissibility—Objection as irrelevant—Any time.

A document can be objected to as irrelevant at any time ; a document can be objected to as inadmissible as opposed to irrelevant at the first hearing only. 109 Ind. Cas. 728=10 L. L. J. 370=A. I. R. 1928 Lah. 428.

——Admissibility—No objection taken—Inadmissible (hearsay) evidence.

The failure of an advocate to object to the admission of evidence cannot so alter the character of testimony as to convert into corroborative evidence that which the law regards as merely fit for rejection as hearsay. 107 Ind. Cas. 457=47 C. L. J. 288=30 Bom. L. R. 757=29 M. L. W. 520=A. I. R. 1928 P. C. 127=56 M. L. J. 88 (P. C.).

——Admissibility—Document exhibited mechanically in Trial Court—Case remanded.

Where a copy of a registered sale-deed was put in by the defendants in the suit. with a list, and it was never afterwards referred to in the Trial Court which exhibited the document mechanically and without any reason and objection was taken to its admissibility in second appeal.

Held, that the appeal should be accepted and in the interests of justice the whole case sent back for re-trial **de novo** under R. 23. 99 Ind. Cas. 920=8 L. L. J. 537=A.I.R. 1927 Lah. 45.

——Admissibility—No objection in Trial Court—Evidence otherwise not admissible—Objection at a later stage.

Where evidence is admitted in the first Court without any objection being taken to its reception and the evidence is admissible as relevant no party will be allowed to object to the reception of such evidence at any later stage of the litigation. A.I.R. 1925 Cal. 1034 and 19 All 76 (P. C.), Foll. But an omission to take objection to the reception of a document which is irrelevant or inadmissible in evidence in the case does not make it admissible. 19 All. 76 (P. C.), Foll. 94 Ind. Cas. 279=43 C. L. J. 274.

——Admissibility—Objection, want of—Nature of evidence—Mode of proof—Distinction.

Neither an omission by an advocate to object to the giving of irrelevant and inadmissible evidence, nor the failure of the tribunal to exclude it of its own motion will validate a decree based on material which the Evidence Act declares to be inherently and in substance irrelevant to the issue. But a wholly different question arises where the objection is not as to the nature and quality of the evidence in itself, but merely as to the mode of proof put forward. 43 Mad. 609 (F.B.), Rel. on. 92 Ind. Cas. 594= 22 M.L.W. 752=1926 M.W.N. 38=A.I.R. 1926 Mad. 282.

——Admissibility—Objection to—Omission—Effect of.

An erroneous omission to object to evidence which is not admissible under the provisions of the Evidence Act does not make it admissible. 78 Ind. Cas. 219=40 C. L. J. 39=A.I.R. 1924 Cal. 1042.

——Admissibility—Objection to—Want of proper proof—Evidence inadmissible.

Where a piece of evidence not proved in the proper manner has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence has been received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel does not apply as none of them is available against a positive legislative enactment. 8 C. W. N. 101, Foll. 68 Ind. Cas. 86=27 C.W.N. 134=35 C. L. J. 473 =A.I.R. 1922 Cal. 160.

——Admissibility—Objection to—Omission—Effect of—Duty of Judge.

The mere omission to object to a document which is not in itself admissible as evidence does not constitute that document evidence so as to be available to either party at the trial. It is clearly the duty of the Judge, apart altogether from any objection by the parties or their pleaders, to exclude irrelevant evidence. 1 P.L.J. 702=5 P.L.J. 410=57 Ind. Cas. 561=1921 P. H. C. C. 17=A.I.R. 1921 Pat. 61.

——Admissibility—Objection to—When to be taken—Appeal.

An erroneous omission to object to evidence which is irrelevant and consequently inadmissible under any circumstances, does not make it admissible. But the Court will not entertain for the first time in appeal an objection that a document which per see is not inadmissible in evidence has been improperly admitted. 45 Cal. 159=21 C.W.N. 996=25 C.L.J. 619=41 Ind. Cas. 116.

——Admissibility—Objection—Waiver.

The omission by a party to prevent irrelevant evidence from being admitted will not in the absence of a deliberate consent amount to waive objection, cure the defect. 19 A. 76, Foll. 36 Ind. Cas. 906 (Mad.).

——Admissibility—No objection in Trial Court—Appellate Court.

Evidence admitted by the Trial Court without any objection at the time when it was offered should not be excluded from consideration by the appellate Court though it may not be legally admissible. 7 M.I.A. 128; 13 M.I.A 519; 11 B. 320, Foll. 69 Ind. Cas. 331=A.I.R. 1924 Lah. 265.

——Admissibility—Objection—In appeal.

Evidence which is irrelevant under any circumstances whatsoever must be distinguished from evidence which is admissible if certain conditions were fulfilled. In the latter case objection should be taken at the earliest possible stage before the court of first instance and if no such objection is taken the appellate Court will not entertain it. 13 C.L.J. 18=9 Ind. Cas. 211.

5. (f) (iv) Objection to, when not permitted in appeal.

——Admissibility—Objection to—Omission to take—Privy Council if should consider.

Where no objection was taken to the admissibility of a document, Privy Council did not think it necessary to consider whether the document was admissible under the Evidence Law of the country. 116 Ind. Cas. 394=A.I.R. 1929 P.C. 110.

——Admissibility—Objection to—Appellate Court.

Where certain documents were received by the trial Court without proof and the objection as to their reception was for the first time raised in appeal, held that the objection could not be entertained. 30 P.L.R. 693.

——Admissibility—Objection to Commissioner's report—Not taken in lower Court—Appellate Court—C. P. Code, O. 26, R. 12 (2).

When a party does not raise the objections before the Commissioner appointed for partition, and does not object to the Commissioner's report in the lower court, he is not entitled to come up to the High Court and object to the recommendations made by the Commissioner, although the High Court is not precluded from considering whether the Commissioner acted within his jurisdiction or not. 114 Ind. Cas. 232=A.I.R. 1929 Mad. 492.

——Admissibility—Objection as to—Raising in second appeal.

It is unfair to allow a party in second appeal for the first time to object to the reception of evidence with the possible necessity of the case being sent back for rehearing. 99 Ind. Cas. 189=31 C.W.N. 32 =A.I.R. 1927 Cal. 1.

——Admissibility—Objection to—Proper time to take.

The proper time for the raising and the determination of all questions as to the admissibility of documentary evidence is the time when such documents are tendered in evidence. 89 Ind. Cas. 849= A.I.R. 1926 All. 103.

——Admissibility—Objection to—Appellate Court.

A certified copy of a written statement was put in the Lower Court in the presence of plaintiff's counsel and without objection by him.

Held he cannot be permitted in High Court to object that only the original could have been received as proof. 79 Ind. Cas. 221=A.I.R. 1923 Lah. 138.

——Admissibility—No objection in Trial Court—Objection in appeal.

Evidence admitted in Trial Court without objection cannot be attacked in appeal. 62 Ind. Cas. 647= 25 C.W.N. 881=A.I.R. 1921 Cal. 71.

——Admissibility—Objection—Appellate Court—When can question.

An appellate Court cannot reject a copy of the document exhibited in the Court below with the consent of both the parties, at any rate without giving the parties an opportunity of producing the original. 35 M.L.J. 11=48 Ind. Cas. 615.

——Admissibility—Objection on appeal.

Where a document is admitted without proof but without objection in the trial Court, no objection

to its admissibility on the ground of want of formal proof can be taken in appeal. 4 Pat. L.W. 213=(1918) P.H.C.C. 145=3 Pat. L.J. 306=44 Ind. Cas. 422.

——Admissibility—Objection—On appeal.

Where on objection by a party, certain documents were excluded in appeal as being inadmissible and no application was made by the other party for other evidence as regards its admissibility, **held** that the procedure of the Lower Court was not illegal. 28 M.L.J. 115=28 Ind. Cas. 378.

——Admissibility—Objection—Not raised, not permitted in appeal.

Documentary evidence relevant to the case and admitted without objection cannot be objected to in appeal on the ground that it is not admissible for the purposes for which it has been used. 40 Ind. Cas. 553 (Cal.).

——Admissibility—Objection to—For the first time an appeal.

If a document is once admitted in the Lower Court without objection, no party can take objection to its being referred to by the Court. 10 S.L.R. 4=36 Ind. Cas. 96.

——Admissibility—Objection to—When to be taken.

Where the trial Court had ordered a Commissioner to inspect any report or books in the presence of the parties and their Counsel, which was done and the deft's Counsel after inspection furnished the Commissioner with a set of questions none of which suggested that the books were irregular, or unreliable. **Held** that the books must be taken to have been adequately proved. 58 P.R. 1917=58 P.R. 1916=74 P.W.R. 1916=32 Ind. Cas. 454.

——Admissibility—Objection to Secondary evidence—Raising in appeal.

A party who did not object to the admissibility of secondary evidence of a registered will even in his appeal memo. cannot be allowed to urge it. 184 P.W.R. 1915 =31 Ind. Cas. 600.

——Objection not taken at the trial—Certified copy of old document—Genuineness—

Held: That it was too late for the respondent in the case to take an objection in the Privy Council to the admissibility of a document which was received without objection at the trial. **Held also** that a deed of exchange, a certified copy of which was produced from the custody of one of the appellants and found to be written on paper bearing the stamp and watermark as the other contemporary documents in the record, was admissible in evidence and genuine. (1907) 6 C.L.J. 678=9 Bom. L.R. 1192=34 Cal. 1059=2 M.L.T. 439=34 I.A. 194 (P.C.)

——Admissibility—Appellate Court's Powers.

When a document has been received and acted upon in the court of first instance the court of appeal ought to be very slow to interfere with the exercise of the discretion by the original court. 6 C.L.J. 621.

——Admissibility—Not objected to in the lower Court.

Where no objection was taken as to the admissibility of a document in the court of first instance, it is not allowable to take the objection in appeal. 6 C.L.J. 22.

——Admissibility—Objection to irrelevant evidence not taken in first Court, but only on appeal —Objector actually relied on it in Court below.

Where a party did not object to irrelevant documentary evidence in the first court, but in his written statement actually relied on such evidence. **Held**, that he could not object to its relevancy in appeal. (1900) 28 C. 142.

5. (g) Question of.

——Admissibility—Question of—Matter for trial Court.

The time to decide what is, or is not, evidence is when the trial takes place. A.I.R. 1946 Nag. 99=I.L.R. (1945) Nag. 809=1945 N.L.J. 491.

——Admissibility or cogency — Question of — Matter for trial Court.

Question as to the admissibility or cogency of the evidence of any part of the evidence of any of the witnesses in the case are clearly matters for the trial Court. A.I.R. 1946 Sind 1=I.L.R. (1945) Kar. 275.

——Admissibility—Question of — Matter at the trial.

Questions regarding the admissibility of evidence should ordinarily be raised at the time when such evidence is tendered. 77 Ind. Cas. 961=21 A.L.J. 42 =45 All. 226=4 L.R.A. Cr. 19=25 Cr. L. J. 497= A.I.R. 1923 All. 91.

5. (h) Records.

——Admissibility—Records.

Map prepared in previous suit between defendant and another person—Maker not examined—(Evidence Act, Ss. 11, 13 and 43.) I.L.R. (1946) 1 Cal. 149=49 C.W.N. 791=A.I.R. 1945 Cal. 492.

——Admissibility—Records of another case produced for particular purpose.

In arguing their case, legal practitioners must confine themselves to such documents as were produced by them and exhibited in the case. If the record of another case happens to be before the Court for a specific purpose, such record as a whole and its contents cannot be treated as evidence in the case for any purpose other than the one for which it has been summoned. A.I.R. 1931 All. 600=131 Ind. Cas. 513.

——Admissibility—Records—Department map—Admission in Appellate Court.

Where the lower Appellate Court asked the Superintendent of Land Records to send a map from his department in the presence of the parties and subsequently the map was inspected by the Court and admitted in evidence.

Held, that the lower Appellate Court was not wrong in admitting the map in question in evidence and basing its decree thereon. 104 Ind. Cas. 671=6 Bur. L.J. 112=A.I.R. 1927 Rang. 330.

——Admissibility — Records of previous case—Contents of.

Contends of record in a previous case are not admissible unless admitted or proved. 95 Ind. Cas. 137.

——Admissibility—Record of evidence in a prior case inter partes.

Evidence recorded in a previous judicial proceeding between the same parties can be made admissible in a subsequent proceeding by the consent of both parties. 43 Mad. 669, Foll. 90 Ind. Cas. 743=22 M.L.W. 230 =A.I.R. 1925 Mad. 1160.

——Admissibility—Report of sale.

Where the fact of sale was reported to a Revenue Officer but the sale itself was not registered, the report to the Revenue Officer is admissible as evidence as to what was reported, though the report cannot be, or take the place of a sale-deed. 72 Ind. Cas. 6=11 L.B.R. 462=A.I.R. 1923 Rang. 125.

——Admissibility—Cr. P. Code, S. 110—Proceedings under—Result of.

In a trial for an offence under S. 396 of the Penal Code, the result of proceedings taken against the accused under S. 110 of the Cr. P. Code is not admissible. 59 Ind. Cas. 204=22 Cr. L. J. 60=32 C.L.J. 89.

5. (i) Statements.

——Admissibility—Statements—Usual course of business.

A statement made in the usual course of business by respectable companies concerned with shipping showing the amount of goods omitted to be delivered to various consignees is admissible in a suit by a consignee against shipowner for damages for short delivery. 108 Ind. Cas. 196=1927 M.W.N. 728=27 M. L. W. 439=A.I.R. 1928 Mad. 239=54 M.L.J. 636.

——Admissibility—Statement of—Witness before Coroner.

At the trial of the accused in the Court of Sessions a statement made by a witness in a proceeding before the Coroner is admissible in evidence for impugning the credit and treating witness as hostile. 97 Ind. Cas. 37=28 Bom. L.R. 775=27 Cr. L. J. 1061=A. I. R. 1926 Bom. 404.

——Admissibility—Statement of accused in custody.

In an excise case statements of the accused taken after the accused were taken to the excise barracks and while they were in custody, were held to be not voluntary statements and hence inadmissible. 98 Ind. Cas. 401=53 Cal. 706=30 C.W.N. 854=27 Cr. L. J. 1329=A.I.R. 1926 Cal. 1163.

——Admissibility — Abstract of statements of witness in judgment.

The statement of a witness abstracted in a judgment can be made use of only in one of two ways either under S. 145 of the Evidence Act to contradict the witness or as an admission under S. 21. It cannot be used in lieu of the original statement itself. 1930 M.W.N. 601=53 Mad. 952=60 M.L.J. 13=33 M.L.W. 20=129 Ind. Cas. 463=A.I.R. 1931 Mad. 207.

——Admissibility—Statements of persons not examined in Court.

Statements made by persons, who have not been examined in Court about the absence of the accused, when search was made for accused, are inadmissible. 92 Ind. Cas. 439=42 C.L.J. 524=27 Cr. L.J. 263=A.I.R. 1926 Cal. 320.

——Admissibility—Conflicting testimony of a witness.

Statement made by a witness at the trial should be altogether rejected when it is in hopeless conflict with his previous statements. 92 Ind. Cas. 577=7 L.L.J. 371=26 P.L.R. 659=27 Cr. L.J. 289=A.I.R. 1925 Lah. 483.

——Admissibility—Inadmissible statements.

Statements which are not admissible in evidence cannot be rendered admissible by consent of parties. 80 Ind. Cas. 235=A.I.R. 1923 Lah. 630.

——Admissibility—Police file—Thanedar's statement in other case.

In order to prove an alleged theft of an account book in a Civil Court from the plantiff's house the police file and a copy of the statement made by the Thanedar in other case are inadmissible. 69 Ind. Cas. 1008=4 L.L.J. 418=A.I.R. 1921 Lah. 332.

——Admissibility—Previous deposition—Proof of.

Where the deposition given by the petitioner in a previous case was sought to be proved in a subsequent case:—**Held**, that the mere putting in of the previous deposition will not be sufficient proof of the same, but that it was necessary to prove that the present petitioner was the person who was examined in the previous suit. The fact that the document was not objected to when it was made an exhibit made no difference. 13 C.W.N. 409=1 Ind. Cas. 320.

——Admissibility—Statement by witness to Police taken down in writing by Police Officer. **See** CR. P.CODE, S. 162. 9 Bom. L.R. 789=32 B. 111.

——Admissibility—Statement by testator as to revocation of will—If evidence.

Evidence of the declaration of a testator that he had revoked a certain will by destruction connot be received, and certainly not, when it is not corroborated by other circumstances leading to the same conclusion. 3 A.L.J. 747=1906 A.W.N. 295=29 A. 82.

——Admissibility of statement by accused before Magistrate when conducting inquiry under Ss. 202, 164 and 364, Cr. P.C.

A statement made in the course of an inquiry by a Magistrate under S. 202, Cr. P.C. is not admissible in evidence as proving itself. 32 C. 1085=10 C.W.N. 51.

——Admissibility of statement by accused to Sub-Deputy Magistrate deputed to make local inquiry.

Statements made by the accused to the Sub-Deputy Magistrate, deputed to make local inquiry, are inadmissible in evidence. 9 M. 224; 2 C.W.N. 207 Foll. 8 C.W.N. 22=1 Cr. L.J. 10.

——Admissibility of statement under S. 164, Cr. P. C. **See** CR. P. CODE, S. 164. 2 A.L.J. 100.

——Admissibility — Against accused—Statements made on oath subsequently withdrawn—Evidence Act, S. 155 (3).

Statements made by prosecution witnesses against the accused not on oath before trial but withdrawn at the trial on oath are not legal evidence against the accused, but can be only used for the purpose of discrediting them under Cl. 3 of S. 155, Evidence Act, (1902) 26 M. 191.

5. (j) Unstamped instruments.

——Admissibility—Unstamped instrument—Determination of—Stamp Act, S. 2 (11).

The Court, in determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, will look at the document

itself as it stands, and not at any collateral circumstances which may be shown in evidence. 16 Cal. 432 and 6 Bom. L. R. 699, Foll. 90 Ind. Cas. 685=27 Bom. L. R. 1122=A.I.R. 1925 Bom. 527.

——Admissibility—Evidence as to cancellation of Stamps on document—Stamp Act, S. 12.

Where the stamp upon a hundi is cancelled at a later date and not at the time of executing the hundi the cancellation is not valid and the hundi should be treated as unstamped and so inadmissible in evidence. 90 Ind. Cas. 689=27 Bom. L. R. 1118=A.I.R. 1925 Bom. 520.

——Admissibility of impounded instrument in evidence on payment of penalty—Court bound to accept the instrument—Stamp Act, S. 35. 9 Bom. L.R. 122.

——Admissibility—Extrinsic evidence as to being properly stamped—If admissible.

In determining whether a document is sufficiently stamped with reference to admissibility in evidence, we must look at the document itself as it stands without having recourse to collateral circumstances to be proved by extraneous evidence. (1900) 24 M. 259.

5. (k) Miscellaneous.

——Admissibility—Witness not tendered for cross-examination—Admissibility of evidence.

The evidence of a witness which is incomplete cannot be accepted in evidence, unless the examination is complete, **i.e.**, unless the witness has been also cross-examined and re-examined or the cross-examination or re-examination has been declined, his evidence cannot be considered, except in the circumstances mentioned in S. 33, Evidence Act. When the witness has not been tendered for cross-examination, the evidence of such witness cannot be considered to be complete and cannot be taken into account. 3 A.I. Cr. D. 449.

——Admissibility—Oral evidence of contents of document—Original shown to have not been preserved.

Oral evidence of the contents of an original document is competent where it is admitted by the party who had it in his control, that it has not been preserved and where the oral evidence is the best evidence that it is in the party in power to tender. 1948 A.L.J. 231=61 L.W. 437=52 C.W.N. 785=A.I.R. 1948 P. C. 108=50 Bom. L.R. 643 (P.C.).

——Judge refusing to admit documents in first instance—Whether has jurisdiction to take it into consideration again.

Where a Court refuses to accept certain documents in evidence in the first instance, it has no jurisdiction to take them again into consideration unless some explanation or reason could be given by the party producing such evidence. A.I.R. 1939 Pat. 530=5 B. R. 736=182 Ind. Cas. 407.

——Admissibility—Extracts of Suit Register.

Where a judgment or decree in a suit cannot be produced at it had been destroyed, the extract from the suit register is admissible. 112 Ind. Cas. 651.

——Admissibility and credibility.

Admissibility is a question of law and credibility of evidence is one of fact. 80 Ind. Cas. 939=22 A. L. J. 864=5 L. R. A. Civ. 720=47 All. 13=A. I. R. 1924 All. 792.

——Admissibility—Maps. **See** S. 36. 9 C.L.J. 415=11 C.W.N. 230.

——Admissibility—Evidence to prove custom at variance with the Mahomedan Law. **See** BENGAL ACTS—CIVIL COURTS ACT, S. 37. (1908) A.W.N. 7=4 A.L.J. 792.

——Admissibility—Evidence in connected case—Different issues.

When evidence has been given in one case upon the issues raised in that case, that evidence ought not be taken and applied in another case where other issues arise. It is unsafe to rely upon inferences from such evidence as bearing upon the issues raised in the second case. (1905) 15 M.L.J. 432=2 A. L. J. 800=7 Bom. L. R. 894=2 C.L.J. 421=1 M.L.T. 17=10 C.W.N. 57 =33 C. 151=32 I. A. 217 (P.C.).

——Co-accused, evidence of—When admissible.

An accomplice. if he is not an accused under trial in the same case, is a competent witness and may be examined on oath. So, if the prosecution be withdrawn and the accused discharged under S. 494, Cr. P. C., he would be a competent witness. Where, however, the court, purporting to act under S. 494, Cr. P.C., sanctioned the withdrawal of the prosecution but omitted to record an order of discharge and, moreover, the accused continued to be kept in custody.

Held, that his position was in no way changed from that of an accused.

Quaere :—Whether the fact that the accused who was examined on oath was not actually tried along with the other accused made his evidence admissible. (1906) 10 C.W.N. 962=33 Cal. 1353.

——Admissibility—Evidence as to nature of debt (Suit by creditor). **See** HINDU LAW—JOINT FAMILY. 26 M. 28.

——Admissibility.

Evidence received otherwise than as provided by law. (1904) 6 Bom. L.R. 789.

——Admissibility of post-dated cheque. **See** STAMP ACT. 6 Bom. L. R. 699.

6. ADMISSIONS.

See also EVIDENCE ACT, SS, 17—23, 30 AND 115.

——Admission by witness—Matter outside his knowledge—Value of.

An admission by a witness put forward by one side as a witness of truth is not to be entirely disregarded as evidence against that side merely because, the matter in question being outside his personal knowledge, his statement (if to the opposite effect) would not be evidence in its favour. I. L. R. (1945) 1 Cal. 565=80 C. L. J. 297.

——Admission—Effect of—If operates as estoppel—Sale deed—Recital in registered deed that consideration was paid—If conclusive—Parties unequivocally

stating that vendee was unable to raise money and that sale deed remained ineffective—Effect of. SEE T. P. ACT, S. 54. A. I. R. 1950 Pat. 85.

——Admissions—Presumption of truth.

What a party himself admits to be true must necessarily be presumed to be so, and it is for him to establish by evidence that the admission was made under circumstances which do not make it binding on him. 1947 Mar. L. R. 80 (Civ.).

——Admission—Binding nature and value of.

When a statement is admitted as an admission it is only a piece of evidence and it is open to the party who has made the admission to show that it was made in circumstances which did not make the admission binding on him or her as the case may be. A. I. R. 1919 P.C. 79, Rel. on. 126 Ind. Cas. 715=A.I.R. 1930 Cal. 559.

7. Admission in evidence.

See alse ADMISSIBILITY—OBJECTION TO

——Admission in evidence — Evidence for all purposes.

Evidence properly admitted for one purpose must be admissible for all purposes in the cause. 37 Bom. 122=40 I. A. 1=12 M. L. T. 646=(1913) M. W. N. 29=15 Bom. L. R. 1=24 M. L. J. 176=17 C. L. J. 146=17 C.W.N. 358=17 Ind. Cas. 663 (P.C.). (O. A. from 12 Bom. L.R. 316=5 Ind. Cas. 457. **See also** 11 Bom. L.R. 926=4 Ind. Cas. 652.

——Admission—Unmarked document.

Where a document has been properly proved and discussed in the trial Court, it is admissible in evidence, though not marked as an exhibit. 111 Ind. Cas. 381=A. I. R. 1929 Lah. 82.

——Admission by Court—No reasons recorded—If rendered inadmissible.

Where at the time of the admission of the evidence the parties did not take an objection that they had no opportunity to argue on it, the fact that the Judge who admitted the evidence neglected to state his reasons for admitting it, does not render the evidence inadmissible. 90 Ind. Cas. 756=A. I. R. 1926 Cal. 369.

——Admission in evidence—Order for.

Where the only order passed on an application asking a document to be admitted in evidence was "file with record,"

Held, that it is not proper admission of evidence. 92 Ind. Cas. 601=A.I.R. 1926 Cal. 684.

——Admission without objection—Effect.

Where a document is admitted without objection in the trial Court, it cannot be objected to afterwards. (3 P.L.J. 306; 34 Cal. 1059; 11 Bom. 320 and 31 Cal. 155, Foll.) 79 Ind. Cas. 1029=5 L.R.A. Civ. 398=A.I.R. 1924 All. 918.

——Admission without objection — Irrelevant evidence.

Omission to object to the reception of evidence does not make irrelevant evidence relevant and the objection can be taken on second appeal. 44 Bom. 192=22 Bom. L.R. 57=55 Ind. Cas. 316.

——Admission without objection—Effect of—Document not proved.

A document can be treated as duly admitted where its admission in evidence without being proved is not objected to by the party affected by it. 37 Bom. 518=16 Bom. L.R. 533=20 Ind. Cas. 162.

——Admission of document — If decides the genuineness or otherwise of documents.

Per **Heaton, J.**—Admitting in evidence is a mechanical and formal proceeding. When all the evidence is recorded and when it is all considered it is in the judgment that the judge decides whether a document is or is not genuine. (1906) 8 Bom. L.R. 973.

8. Affidavit.

——Affidavit evidence—Admissibility.

Affidavit evidence is not permitted except (**a**) when there is an agreement between parties that evidence may be taken by affidavit or (**b**) under O. 19, R. 1 of the Code there is an order of Court that particular facts may be proved by an affidavit or that the affidavit of any witness may be read at the hearing. Such evidence can be acted upon as admissible evidence only if it is relevant. Though there may be waiver of an objection as to admissibility, the relevancy of the evidence would still be matter for the consideration of Courts. 62 L.W. 256=A.I.R. 1949 Mad. 689=(1949) 1 M.L.J. 434.

——Affidavit—Whether can be received as evidence of age of insured.

Quaere.—Whether in the ordinary course an affidavit would necessarily be receivable in a judicial proceeding as evidence to prove the age of the insured. A.I.R. 1939 Cal. 657=43 C.W.N. 1033=41 Cr. L.J. 21=I.L.R. (1939) 2 Cal. 459=184 Ind. Cas. 468.

——Affidavit evidence—Matrimonial cases.

Evidence on affidavit in matrimonial cases is undesirable. Its acceptance is contrary to established practice. 62 C.L.J. 264=62 C. 541.

9. Alibi.

See EVIDENCE ACT, S. 11.

10. Ambiguous documet.

See EVIDENCE ACT, SS. 93 TO 98.

11. Ancient documents.

See EVIDENCE ACT, S. 90.

12. Appellate Court.

See CIVIL P.C., O. 41, RR. 27—29.

13. Appreciation of.

See also (1) CIVIL P.C., S. 107 AND O. 20, R. 4.

(2) CRIMINAL P.C., S. 367.

13. Appreciation of.

- **(a) Appellate Court.**
- **(b) Conflicting evidence.**
- **(c) Discrepancies.**
- **(d) Oral evidence.**
- **(e) Presumption.**
- **(f) Probabilities.**
- **(g) Proof.**
- **(h) Relevant evidence.**

(i) Reliability.
(j) Witness.
(k) Miscellaneous.

13. (a) Appellate Court.

—Appreciation—Oral evidence—Appellate Court.

Ordinarily a finding of the trial Court which has recorded evidence and is in a position to appreciate it at its proper value is entitled to great weight.

Where, however, the entire evidence, except that of one witness has been recorded by the predecessor of the Judge who has delivered the judgment, the appellate Court is in as good a position as the lower Court to arrive at a finding of fact. Particularly so when the case does not depend so much on the credibility or the demeanour of the witness but depends on the appreciation of evidence tested in the light of probability. A.I.R. 1946 Nag. 84=I.L.R. (1945) Nag. 892.

——Appreciation — Credibility — Interference in appeal.

Evidence of eye witnesses to adoption, mistaken in cross-examination was accepted by trial Court. On appeal the High Court dismissed the evidence as none of them was a kinsman or invitee.

Held, that the criticism of the High Court was small matter in view of the mistaken testimony in the witness box. I.L.R. (1945) Kar (P.C.) 191=A.I.R. 1945 P.C. 79=1945 A.L.J. 262=219 Ind. Cas. 136 (P.C.).

——Appreciation—Credibility—Opinion of judge hearing evidence.

On the question of the credibility of the evidence, the opinion of the Judge who heard the evidence deserves great weight. A.I.R. 1943 Pesh. 29=207 Ind. Cas. 342.

——Appreciation—Credibility of witness—Opinion of trial Judge.

A Court of Appeal always attaches a great weight to the opinion of the trial Judge on the credibility of the witnesses called before him. A.I.R. 1941 Bom. 129=43 Bom. L.R. 35=I.L.R. (1941) Bom. 211=196 Ind. Cas. 858.

——Appreciation of—Findings—Observations by trial Judge open to criticism—Effect of.

Per **Pandrang Row, J.**—The fact that the trial Judge has made a few observations here and there which are open to criticism is not by itself sufficient to justify the displacing of the finding arrived at by him after observing the demeanour of the witnesses. A.I.R. 1941 Mad. 513=I.L.R. (1941) Mad. 989=(1941) 1 M.L.J. 724=53 L.W. 693=1941 M.W.N. 464=199 Ind. Cas. 882.

——Appreciation of—Evidence equally balanced—Appellate Court.

When the evidence is equally balanced, the easiest course for the Appellate Court to adopt is to endorse the conclusion of the Court which has recorded the evidence. 42 P.L.R. 374.

——Appreciation with reference to pleas, previous statements and conduct of parties.

The evidence on record has to be appreciated with reference to the pleas and previous statements and conduct of parties and not in ignorance of the same and when the final Appellate Court has failed to do this, it cannot be said that it has arrived at a finding of fact binding on second appellate Court. This duty of appreciation of evidence is of utmost importance and should be carried out with advertence to the law of contract found in S. 12, Contract Act in a case where the effect of a registered gift deed is sought to be avoided by the party on ground of the alleged insanity of the executant at the time of the execution. Where the trial Court and the Appellate Court have failed to bear this in mind while coming to their conclusions the decision of the final Court of fact on the issue of insanity will not be binding in second appeal. A.I.R. 1938 Nag. 204=177 Ind. Cas. 80.

——Appreciation of—Findings of trial Court—Appellate Court.

Where there is a direct confiict of evidence, the opinion of the Judge who saw the witnesses, heard them and noticed their demeanour should be given special regard. If the Court of Appeal cannot be satisfied that the Judge with those privileges was plainly wrong, then it is its duty to defer to his judgment. A.I.R. 1936 Rang. 5=14 Rang. 11=161 Ind. Cas. 387.

——Appreciation of—Privy Council.

Where the trial Court, who had seen the witnesses, disbelieved the evidence of the preparation and execution of the will, the Privy Council refused to dissent from him in his estimate of the evidence of the witnesses on those points. 121 Ind. Cas. 230=51 C.L.J. 150=34 C.W.N. 206=31 M.L.W. 185=1930 M.W.N. 394=32 Bom. L.R. 511=57 I. A. 96=8 Rang. 179=A. I. R. 1930 P.C. 24=58 M.L.J. 114 (P.C.).

——Appreciation of—Credibility—Opinion of trial Judge.

The lower Court is the proper and, in general, the final Judge of the credibility of evidence. 1930 Cr. C. 88=1929 M.W.N. 696=2 M. Cr. C. 275=A.I.R. 1930 Mad. 194=126 Ind. Cas. 613.

——Appreciation—Oral evidence—Finding of fact.

The finding of fact of Trial Court on the oral evidence should not be lightly interfered with as that Court is in a much better position to guage the truth and value of the oral evidence than the appellate Court. 107 Ind. Cas. 349=A.I.R. 1927 P. C. 266.

——Appreciation—Contradictory evidence—Credibility—Finding of trial Court.

It is doubtless true that on appeal the whole case, including the facts, are within the jurisdiction of the appeal Court. But generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses, and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses.

When the appellate Court finds witnesses for plaintiff deposing to facts absolutely contrary to the facts to which the witnesses for defendant depose; when witnesses on one side are **prima facie** as deserving of credit as the witnesses on the other side, when the witnesses on neither side have been shaken in cross-examination and when trial Court has applied its mind intelligently as to the witnesses whom it should believe and the witnesses whom it should not believe, the finding of the trial Court as to the credibility of the witnesses should be accepted. A.I.R. 1915 P. C. 1, Foll. 4 O. W. N. 1179=A.I.R. 1927 Oudh 618.

——Appreciation of—Appellate Court.

In every case that comes before an appellate Court the lower Court has the advantage of seeing and hearing the witnesses and the appellate Court has not, but it cannot be said that an appellate Court can never hope to make a diagnosis as to the truth of the case as good as that made by the lower Court. No doubt it is an advantage to see and hear the witnesses, but it is an advantage which may be counter-acted and more than counter-acted by the greater experience and knowledge of the appellate Court. 103 Ind. Cas. 416=8 A. I. Cr. R. 379=28 Cr. L. J. 688=A. I. R. 1927 Oudh 611.

——Appreciation of—Trial Court's opinion.

The Court of appeal ought to give sufficient weight to the opinion of the trial Judge on the demeanour, intelligence, position and character of the witnesses who were brought before him before reviewing the findings of the trial Judge, who, upon such matters, is in a position to form a much better judgment than could be formed by Judges who had not had the advantage of seeing the witnesses. 20 S. L. R. 220=A. I. R. 1927 Sind 219.

——Appreciation of—Finding of fact—Appeal Court.

When the District Court had not examined the witnesses nor had it had an opportunity of observing those witnesses' demeanour, and in fact it was in no better position than the High Court to judge of the reliability of the witnesses' evidence.

Held, that though as a rule very great value would be attached by the High Court to the finding of the District Court on facts, yet, in this case, its finding could be upset. 88 Ind. Cas. 167=2 Rang. 495=A.I.R. 1925 Rang. 71.

——Appreciation of—Appellate tribunal—Knowledge of life and business—Use of.

An appellate tribunal may bring their knowledge of life and business to bear even in cases where in the Lower Court contemporary communications and course of business are used, and it can say that evidence given about them at the trial cannot be true. 34 Ind. Cas. 273=A.I.R. 1915 P.C. 50. (P.C.)

——Appreciation of—Trial judge.

In a matter of appreciation of evidence and the credibility of witnesses the opinion of the trial judge should not be lightly disturbed on appeal. 39 Bom. 386=19 C.W.N. 617=17 M.L.T. 408=28 M.L.J. 593=21 C.L.J. 528=17 Bom. L.R. 455=2 L.W. 521=(1915) M.W.N. 788=42 I.A. 110=29 Ind. Cas. 229 (P.C.). **See also** 43 Cal. 707=33 Ind. Cas. 583 (P.C.); 28 C.L.J. 306=48 Ind. Cas. 561; 39 All. 426=39 Ind. Cas. 666; 20 C.L.J. 50=27 Ind. Cas. 276.

——Appreciation of—Opinion of trial Judge—Question of fact.

In a dispute of facts, great weight naturally attaches to the finding of the trial Judge. 15 C. W. N. 717=10 M. L. T. 216=10 Ind. Cas. 963 (P.C.)

——Appreciation of oral evidence—Rule of.

Where witnesses, who cannot be regarded as independent witnesses, are not shaken in cross-examination and are believed by the judge before whom they are examined as witnesses, their evidence should not be rejected on mere suspicion, especially when the story told by them is not in itself improbable. (1903) 8 C. W. N. 241=6 Bom. L. R. 233=26 A. 108=31 I. A. 38 (P. C.).

13. (b) Conflicting evidence.

——Conflicting evidence—Duty of Court.

There is no better criterion for the truth, no safer rule for investigating cases of conflicting evidence where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute and to examine which of the two cases best accords with those facts according to the ordinary course of human affairs and the usual habits of life. 103 Ind. Cas. 870=A. I. R. 1927 Sind 209.

——Appreciation—Contradictory evidence—Medical opinion—Eye-witness.

Where there is the testimony of a considerable body of trustworthy witnesses of good position and undoubted respectability who were able to observe facts and draw inferences therefrom, who acted not in secrecy but with the utmost publicity in the midst of a large assembly and who had no intelligible motive to engage in a conspiracy for setting up a false testamentary instrument, the opinion of medical man as to what should have been the probable state of the testator should not outweigh and prevail over the testimony of such eye-witnesses. 69 Ind. Cas. 48=50 Cal. 100=35 C. L.J. 569=A. I. R. 1923 Cal. 116.

——Appreciation of—Conflict between oral and documentary evidence.

Where some of the verbal evidence was untrustworthy whilst the documents record a state of affairs which was often hard to reconcile with probabilities: **Held,** that unless the facts evidenced by documentary and oral testimony were so much at variance with known conditions, as to be incapable of reasonable explanation, it was to those facts and those facts alone that the court must trust to reach a safe conclusion upon the matter in controversy. 28 C. L. J. 173=20 Bom. L. R. 790=24 M. L. T. 86=(1918) M.W. N. 394=21 O. C. 86=5 O. L. J. 197=22 C. W. N. 530=46 Ind. Cas. 217 (P.C.)

——Appreciation of—Genuineness of signature—Broad probabilities.

Where the parties to a suit are at issue on a vital question, such as the genuineness of defendant's signature to the document sued on, the safe principles to consider which story fits in with the admitted circumstances and resulting probabilities. The Privy Council upheld the finding of the Chief Court as to the genuineness of the signature, in reversal of the decision of the first court. 38 Cal. 805=15 C.W.N. 934=13 Bom. L.R. 704=(1911) 2 M.W.N. 79=14 C. L. J. 250=4 Bur. L.T. 229=8 A.L.J. 1193=10 M.L.T. 455=21 M. L. J. 1127=38 I.A. 155=11 Ind. Cas. 801 (P. C.)

——Conflicting evidence.

Where the evidence given in a case is conflicting and it is impossible to reconcile the conflicting statements on any theory of defective memory, or failing powers of observation, of the several witnesses who thus contradict each other, the only safe guide to follow is that afforded by the action and conduct of the principal parties concerned and the contents of the documents produced. (1908) 9 C.L.J. 172=11 Bom. L. R. 196=13 C.W.N. 370=31 A. 116=36 I. A. 9=5 M.L.T. 58=19 M.L.J. 186 (P.C.).

——Appreciation—Sifting of evidence—Dividing witnesses into classes—Accepting evidence of one class and rejecting that of another—Presumption of innocence—Probabilities, consideration of—

Duty of prosecution to examine all important witnesses and produce all available evidence.

An elementary principle of sifting evidence is to test it in the light of probabilities. The piecemeal examination of the testimony of individual witnesses without a broad view of the facts, circumstances and probabilities of a case generally leads to a failure of justice especially in a case where most of the witnesses are drawn from a class of persons whose testimony is frequently unconvincing and not unfrequently unreliable. Even if witnesses in a case do not break down in cross-examination or contradict each other, yet, if their testimony is opposed to the ordinary course of human conduct and to the natural order of things such testimony must be accepted with the greatest caution. The method of the Sessions Judge, in dealing with the testimony of the witnesses by dividing them into two classes Hindus and Mahomedans and accepting the evidence of one class and rejecting that of the other was open to serious objection. The withholding of important witnesses who were in one way or other intimately connected with the transaction or the occurrence and the state of things immediately after, gives rise to the irresistible inference that if they were examined they would not have corroborated the prosecution story. (1907) 11 C.W.N. 1085.

13. (c) Discrepancies.

——Appreciation—Discrepancies, minor.

It is not fair to rely upon discrepancies upon minor points when the witnesses are giving evidence fourteen years after the event. A. I. R. 1943 All. 310=1943 A. W. R. (H. C.) 148=1943 A.L.J. 445=I.L.R. (1943) All. 703=210 Ind. Cas. 464.

——Appreciation of—Discrepancies—Date.

Where the discrepancies between witnesses as to dates is not unnatural, it far from being necessarily a badge of fraud, is an indication of **bona fides.** 121 Ind. Cas. 205=51 C.L.J. 136=1930 M.W.N. 60=32 Bom. L. R. 499=31 M.L.W. 176=A.I.R. 1930 P. C. 18=58 M.L.J. 245 (P. C.).

——Appreciation—Discrepancies.

A slight change in the statement as to date of birth is not necessarily to be discredited. 81 Ind. Cas. 484=11 O.L.J. 297=A.I.R. 1924 Oudh 385.

——Appreciation of—Rules as to discrepancies.

In weighing evidence, it must be remembered that there are discrepancies of truth as well as discrepancies of falsehood, and that a too minute attention to immaterial discrepancies may lead to serious failure of justice in the direction of conviction as well as acquittal. 11 Cr. L. J. 66=15 P. R. (Cr). 1909=37 P. W. R. (Cr.) 1909=4 Ind. Cas. 864.

——Appreciation of—Discrepancies in.

Discrepancies in the statements of witnesses on material points should not be lightly passed over, as they seriously affect the value of their testimoney. 36 All. 187=26 M. L. J. 442=18 C. W. N. 649=12 A. L. J. 495=19 C.L.J. 469=(1914) M.W.N. 405=15 M. L. T. 395=16 Bom. L. R. 352=1 L. W. 794=23 Ind. Cas. 715 (P. C.).

13. (d) Oral evidence.

——Appreciation of—Oral evidence—Absence of documentary evidence.

Where the oral evidence produced is itself convincing the absence of documentary evidence in support of it should not be made much of. 3 Lah. 48 (P. C.), Rel. on. 69 Ind. Cas. 331=A.I.R. 1924 Lah. 265.

——Appreciation—Oral evidence—Alibi in criminal case.

Where witnesses for the accused deposed that they met the accused Ghulam Ali and Fazal Illahi at Sangla about 10 a. m. on the 12th of July and this oral evidence was unsupported by any documentary evidence and the witnesses were not persons who would remember the date precisely:

Held, such evidence as that is easily obtainable in this country. 81 Ind. Cas. 347=25 Cr. L. J. 811=A. I. R. 1923 Lah. 232.

——Appreciation — Oral evidence—If interested testimony.

Whether the brother of the witness in question brought a complaint for causing hurt against the first cousin of the accused a year before,

Held, that this was not a sufficient reason for disbelieving the evidence of the witness. 86 Ind. Cas. 341=7 L. L. J. 44=26 Cr. L. J. 757=A. I. R. 1925 Lah. 318.

——Appreciation—Witness—Debtor of one party.

To say that, because one in the ordinary course of one's business, owes money to a certain person, one should not be believed when speaking in favour of that person, is too absurd. 70 Ind. Cas. 902=1 Bur. L. J. 213=A. I. R. 1923 Rang. 30.

——Appreciation—Oral evidence— Suggestion of doubt—Poor witness—Credibility.

In order to discredit a witness it is not enough to suggest doubts about his veracity. If the means of contradiction are available to the party who challenges his truthfulness these should be produced before the Court. It cannot be affirmed as a general rule that a person is not trustworthy because he is not wealthy. 66 Ind. Cas. 782=49 Cal. 132=34 C. L. J. 384=25 C. W. N. 779=A.I.R. 1922 Cal. 260.

—— Appreciation—Oral evidence — Registered document.

A defence based on oral evidence to frustrate a registered instrument should be always looked on with suspicion. 42 Ind. Cas. 372.

——Appreciation of—Oral and documentary evidence.

The evidence of respectable persons with special means of knowledge owing to relationship to the parties of the matters they depose to, should not be viewed with suspicion especially in cases where only oral evidence will ordinarily be available. 1 O.L.J. 383=25 Ind. Cas. 660.

——Appreciation—Oral evidence.

To believe a witness because his evidence tells in favour of the party who has called and examined him and against the adverse party is to beg the question in dispute. (1907) 9 Bom. L.R. 393.

——Appreciation of oral evidence—Criminal cases—Perjury.

It would be very dangerous to exercise the judicial function as if no credit could necessarily be given to witnesses deposing **viva voce** how necessary so ever it may be always to sift such evidence with great minuteness and care. Judges must be careful not to carry

the caution to an extreme length, nor utterly to discard oral evidence merely because it is oral unless the impeaching or discrediting circumstances are clearly found to exist. (1904) 6 Bom. L.R. 324=28 B. 479.

13. (e) Presumption.

——Appreciation of—Presumption—Non-production of accounts.

Where certain documents produced after the defendant's examination showed that the defendant's story on an important point was false and notwithstanding the fact that opportunity was given to recall him and explain, if possible, the contradiction, he was not recalled and where accounts in his possession, though summoned were not produced.

Held, that the proper presumption from these circumstances was that the defendant's case is untrue. 32 M.L.T. 86=27 C.W.N. 725=A. I. R. 1923 P. C. 31. (P.C.).

——Appreciation of — Presumption — Possession following title.

Where there is strong evidence of possession on the part of the respondents, opposed by evidence apparently strong also on the part of the appellants in estimating the weight due to the evidence on both sides, the presumption may well be regarded that possession went with the title. 70 Ind. Cas. 555=27 C.W.N. 305 =36 C.L.J. 396=A.I.R. 1923 Cal. 228.

——Appreciation of—Presumption against misconduct to be considered.

Presumption against misconduct is among the probabilities to be taken into account in estimating the value of evidence and where the character and possession of the person is above reproach, this probability becomes stronger. The mere fact that this or that thing in a complete transaction is improbable does not count for much as against clear and distinct evidence of reliable witness. 39 Cal. 245=16 C.W.N. 265=13 Ind. Cas. 577.

13. (f) Probabilities.

——Appreciation of — Probability and circumstances—Decision on.

Defendant at Calcutta holding in deposit on plaintiff's account cash certificates and certain sum in cash—Defendant asked to purchase two Government promissory notes for plaintiff out of money lying in deposit with him—Promissory notes purchased—At the time of leaving for Kathiawar, plaintiff obtaining all cash certificates and one of the promissory notes leaving the other with the defendant :

Held, on considering evidence that note with the defendant was not for collection of interest but as security for sum owed by the plaintiff to the defendant. A.I.R. 1938 Cal. 649.

——Appreciation of—Probabilities—When particular inference cannot be reasonably drawn from facts proved, party relying on it for discharging onus of proof fails.

Where the Court has to depend upon probabilities based on certain facts which do not lead to one conclusion, the Judge is entitled to draw inferences from the facts proved before him, but the inferences must be such as could be legitimately drawn from the facts, if the facts are such that no reasonable man could draw a particular inference and is such as to be equally consistent with non-liability and with liability, then the party who relies on the inference to discharge the onus of proof of establishing liability fails. 52 C.L.J. 235=58 Cal. 585=35 C.W.N. 133=A.I.R. 1930 Cal. 815.

——Appreciation of—Probability against positive evidence.

The Court may allow its decision to be affected by considerations of probabilities, even though there may be positive testimony to the contrary effect. 59 Ind. Cas. 814=33 C.L.J. 34=A.I.R. 1921 Cal. 677.

——Appreciation of—Improbability.

A theory of improbability in order to prevail against positive evidence must be clear and cogent; it must be such as to justify the rejection of the positive evidence as concocted and unreliable. 24 C.W.N. 860=53 Ind. Cas. 122.

——Appreciation of—Imperfect evidence—Probabilities.

Where evidence given by both sides is imperfect the court can decide on probabilities. 84 P.W.R. 1910=7 Ind. Cas. 352.

13. (g) Proof.

——Appreciation—Letter received by person—Evidence as to receipt is no proof of truth of contents.

When a person has received letters from his agent he can be allowed to depose to the receipt of these letters and even to say that in consequence of receiving these letters he took certain action or he did not take certain action, but his evidence is no proof of the truth of the contents of the letters or statements contained in them. A.I.R. 1943 All. 370=1943 A.L.J. 411=I.L.R. (1943) All. 752=1943 A.W.R. (H.C.) 224=210 Ind. Cas. 55.

Appreciation — Proof of — Genuineness — Discrepancy between alleged date of sale of stamp paper and alleged date of execution of deed thereon—No explanation—Accuracy of date of seal—Document was held to be not genuine. ('36) 161 Ind. Cas. 1=1936 O.W.N. 287=2 B.R. 336=1936 A.W.R. 314 (P.C.).

——Appreciation—Proof—Conveyances between—Same parties—Falsity of one—If of other also.

Where two instruments of conveyance between the same parties are very intimately connected with each other, and from the evidence of the parties one of them is found to be false and fraudulent, the evidence of the parties with regard to the other should be approached with great suspicion and subjected to strictest scrutiny. The mere fact that the one was false and fraudulent transaction does not by itself prove that the other deed was also false and fraudulent, but it does throw upon the party a heavy burden to prove that the same was a **bona fide** document and not executed with a view to defeat or delay any claims of the creditor on the executant of the deed. 7 O.W.N. 821=1931 M.W.N. 1=128 Ind. Cas. 647=35 C.W.N. 324=33 Bom. L.R. 155=A.I.R. 1930 P.C. 255. (P.C.).

——Appreciation of —Proof—Positive and negative.

An affirmative proposition is not established by showing that the witnesses who depose to a contradictory negative proposition are not reliable. Of course, if

there is a conflict of evidence on a point, it would be perfectly legitimate to take into consideration the circumstantial evidence with a view to show that evidence of the first class of witnesses was true and that of the second false. 71 Ind. Cas. 632=17 M.L.W. 481=27 C.W.N. 629=25 Bom. L.R. 548=37 Cal. L.J. 501=1923 M.W.N. 392=32 M.L.T. 137=A.I.R. 1923 P.C. 13 (P.C.).

——Appreciation—Proof of execution—Use of King Edward Stamp in 1915.

The mere fact that the promissory note is stamped with a King Edward stamp does not prove that the note was executed in 1911 and not in 1915, in the absence of any evidence that there were no King Edward stamps in extence in 1915. 80 Ind. Cas. 177=A.I.R. 1923 Lah. 607.

——Appreciation of—Circumstantial evidence—Will or adoption not proved.

Where if **B** had been adopted there was no necessity to have a will in his favour and it seemed that the husband of testatrix in his desire to retain the property of his deceased wife in his hands had been resorting to various devices and the idea of getting a will from his wife shortly before her death was one of those devices :

Held, that neither the will nor the adoption was held to be proved. 68 Ind. Cas. 769=4 Lah. L.J. 245=3 Lah. 242=A.I.R. 1924 Lah. 243.

13. (h) Relevant evidence.

——Appreciation of—Relevant evidence—Cumulative effect.

The proper and satisfactory way of appreciating evidence is to consider, not whether each piece of evidence proves the case by itself, but to consider the cumulative effect of all the relevant items of evidence adduced in the case. 31 All. 412 (P.C.) Foll. 122 Ind Cas. 653=1929 M.W.N. 664=A.I.R. 1930 Mad. 337.

——Appreciation of—Relevant evidence—Maxim, application of.

The maxim **falsus in uno falsus in omnibus** is entirely false. 65 Ind. Cas. 561=23 Cr. L.J. 129=A.I.R. 1922 Nag. 146.

——Appreciation of—Portion of evidence false.

It is not safe to assume that a case must be false if some of the evidence in support of it appears to be doubtful or is clearly untrue. There is on some occasions a tendency amongst litigants to back up a good case by false or exaggerated evidence. 24 C.W.N. 626 (P.C.).

——Appreciation of—Partition papers—Value on questions of existence of tenancy.

Partition papers are not of real assistance in the absence of detailed information as to the history of the document mentioned, when it was prepared, by whom, in whose presence, and for what purpose,

The question whether a document is admissible in evidence as a public document is fundamentally distinct from the question whether its contents are binding upon tenants without proof of notice on them or of their consent. Weight will obviously have to be attached to the statutory provision for the partition of estates in operation at that time; and how far the proceedings did in fact conform to these rule is plainly a relevant matter. 74 Ind. Cas. 383=36 C.L.J. 389=A.I.R. 1923 Cal. 261.

13. (i) Reliability.

——Appreciation of—Reliability—Signature in different places.

The fact that in one place of an account book the signature of a party may be forged cannot preclude the Court from holding that his signature in another place is genuine. 96 Ind. Cas. 1051=1926 M.W.N. 635=A.I.R. 1926 Mad. 963=51 M.L.J. 167.

——Appreciation—Evidence unreliable in part—Value of.

The ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases however untrustworthy much of the evidence submitted to the Courts may commonly be. (14 M.I.A. 346, Foll.). And therefore evidence should not be rejected wholesale simply because some of it is unreliable if the story told by the witnesses is in the main true. 89 Ind. Cas. 663=A.I.R. 1926 Nag. 129.

——Appreciation—Reliability—Vernacular record.

Generally in cases where evidence is given by a witness in his own language, the vernacular record is always treated as more reliable and entitled to greater weight, though this maxim could not always be safely applied in cases where a Magistrate who is taking down the evidence simultaneously in English understands the language as well as his reader. 73 Ind. Cas. 513=24 Cr. L.J. 625=A.I.R. 1923 Lah. 167.

——Appreciation—Reliability— Confession—Delay.

When the story of confession was not told by the witness until after a fortnight of the occurrence, the evidence is unreliable. 71 Ind. Cas. 219=1 Pat. 630=4 P.L.T. 76=24 Cr.L.J. 91=A.I.R. 1922 Pat. 582.

——Appreciation—Reliability of witnesses—Relatives—Interest in suit.

The mere fact that witnesses are relatives and interested in the suit is no ground to disbelieve them if the point can only be established by their testimony. 2 O.L.J. 562=32 Ind. Cas. 380.

13. (j) Witness.

——Appreciation of—Witness, nervous—If to be rejected.

A witness' evidence should not be rejected merely because he has appeared nervous in the witness box. A.I.R. 1940 All. 175=1940 A.L.J. 26=1940 A.W.R. 67=187 Ind. Cas. 747.

——Appreciation of—Witness deposing to—Transaction challenged after 20 years.

Where the transaction is challenged after 20 years, it is hard to expect the witness to remember the details. A.I.R. 1937 Oudh 406=1937 O.W.N. 825=13 Luck. 357=168 Ind. Cas. 725.

——Appreciation of—Witness—No cross-examination due to circumstances—Weight of deposition.

The deposition of a witness who has been examined-in-chief but has not been cross-examined due to certain circumstances should be treated as evidence on the record. The weight to be attached to the evidence depends on the circumstances and the Court should look at the evidence carefully to see whether there are indications that, by a completed cross-examination.

the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached. A.I.R. 1936 Pat. 34=2 B.R. 211=17 P.L.T. 101=160 Ind. Cas. 445.

——Appreciation of—Refusal to take special oath—Effect.

Although refusal to take a special oath is a conduct which the Court is entitled to consider along with other evidence, such refusal should not automatically be allowed to outweigh the positive evidence which has been adduced. A.I.R. 1933 Nag. 52=142 Ind. Cas. 137.

——Appreciation of—Witnesses — Cross-examination—Demeanour.

Unless the evidence given by witnesses is shaken in cross-examination or their demeanour is such as to lead one to the inevitable conclusion that they have perjured themselves, no Court is entitled to discard evidence on the ground that the witnesses are tenants of a party to the suit. 123 Ind. Cas. 637=A.I.R. 1930 Pat. 58.

——Appreciations—Witnesses—Partisans.

Where the witnesses are partisans there is always a tendency to strain a point in favour of a friend. It is doubtful if such can conceive that he was thereby doing something improper. The attitude of mind is often a self-deception produced sub-consciously by an outside cause. In these circumstances best method to arrive at a correct conclusion is to look at inherent probabilities of the case. 119 Ind. Cas. 337=6 O.W.N. 549=A.I.R. 1929 Oudh 494.

——Appreciation—Witness—Delayed information of crime.

When a witness admits that he disclosed his knowledge of a crime to the police at a very late date and gives no explanation of this delay, his evidence is of no value. 99 Ind. Cas. 857=3 L.L.J. 147=28 Cr. L.J. 185.

——Appreciation—Deposition—Stray sentences.

A few (say two) casual and somewhat ambiguous phrases in a deposition cannot destroy the very clear effect of the whole deposition. 79 Ind. Cas. 422=7 N.L.J. 217=A.I.R. 1923 Nag. 265.

——Appreciation of—Indian witnesses—Statements as to time.

In India where references to time are generally mere approximations there is a large margin of honest error. 15 Bom. L.R. 297=14 Cr. L.J. 232=19 Ind. Cas. 328.

——Appreciation of—Witness unbelievable in essential particulars.

Where a party comes into a Court with a story, which cannot be believed in its essential details, it is impossible to rely on a part of the story for the purpose of convicting the accused. 5 Pat. L.W. 157 =(1918) P. H. C. C. 288=19 Cr. L.J. 877=47 Ind. Cas. 73.

——Appreciation of—Partly in favour of accused and partly against.

It is improper to accept a portion of the evidence given by a witness which is in support of the case for the prosecution and to discard or discredit the other portions which go against it and so far as the accused is concerned, he is entitled to ask the court to consider all the facts deposed to by that witness and to show to the court that his evidence taken as a whole is in material contradiction of the evidence of the other witnesses. (1901) 5 C. W. N. 574=28 C. 397.

13. (k) Miscellaneous.

——Benefit of doubt—Civil case—Defendant's failure to prove positive case intended to rebut plaintiff's case.

In a civil case, it cannot be said that the benefit of very reasonable doubt must necessarily go to the defendant. The fact that the defendant has failed to prove a positive case which is intended to rebut the case of the plaintiff must be given its due weight. A.I.R. 1943 Mad. 38 (2)=(1942) 2 M.L.J. 427=55 L.W. 772= 207 Ind. Cas. 163.

——Good defence outside Court—Whether can be bad defence in Court.

What is a good defence to a claim outside the Court cannot become a bad defence by bringing the defendant into Court. A.I.R. 1935 Mad. 312=1935 M.W.N. 221=41 L.W. 281=68 M.L.J. 713=159 Ind. Cas. 458.

——Appreciation of—Injury—External marks.

The absence of any external mark of injury is not necessarily destructive of the case that the injury was caused by a brick. It is possible that a blow in the abdomen is less likely to leave a mark than one on a less elastic and resilient part of the anatomy. 74 Ind. Cas. 705=2 Pat. 309=1 Pat. L.R. Cr. 236=24 Cr. L.J. 801=A. I. R. 1923 Pat. 413.

——Appreciation of.

Per **Halifax, A. J. C.**—There is no distinction between what a prudent man would believe out of Court and what a Judge may believe. 65 Ind. Cas. 561=23 Cr. L. J. 129=A.I.R. 1922 Nag. 146.

——Appreciation of—Imagination or fact.

"Men without deliberately intending to falsify facts are extremely prone to believe what they wish, to confound what they believe with what they heard and to ascribe to memory what is merely the result of imagination." 66 Ind. Cas. 222=8 O.L.J. 439= A.I.R. 1922 Oudh. 178.

——Appreciation—Civil and Criminal Courts.

The conditions for receiving and acting on evidence in civil courts are very different to those governing the procedure of criminal courts. Especially is this the case with respect to the statements of accused persons and accomplices. (1908) 13 C.W.N. 501=4 Ind. Cas. 523.

——Inquiry not judicial—Statements not tested by cross-examination.

Their Lordships of the Privy Council refused to attach any value to statements elicited in the course of an enquiry initiated by the Collector for the purpose of prevention of a supposed crime, as it appeared to them that there was nobody to check the mode in which the alleged statements were elicited, whether by leading questions or otherwise nobody to test the statements by cross-examination, and nobody to watch the accuracy with which they were recorded. (1906) 30 B. 523=8 Bom. L.R. 705 =33 I.A. 198=1 M.L.T. 301=4 C. L. J. 181. (P. C.).

— ion of—Charge against dead person.

When an attempt is made to charge a dead person in a matter in which, if he were alive, he might have answered, the evidence ought to be looked at with great care. The burden of proof in the first instance in such a case lies upon the plff. but he may without any corroboration discharge the burden. 31 Ch. D 1 at p. 17 foll. 12 C. L. J. 470=8 Ind. Cas. 796.

——Appreciation of — Plea of alibi — Suit on pronote.

If the plaintiff and the attesting witnesses are examined and cross-examined in a suit on a pro-note the suit should not be dismissed simply because one of the attesting witnesses did not appear especially when the plea of **alibi** given by the defendant is unsupportable. 7 M. L. T. 39=5 Ind. Cas. 511.

14. Burden of Proof.

See also EVIDENCE ACT, SS. 101 to 111.

——Burden of proof—Immaterial when all evidence given. **See** EVIDENCE ACT, S. 101. A. I. R. 1950 P. C. 25.

——Burden of proof—Rule of—If justifies court giving decision in favour of party suppressing evidence.

Where a party has been guilty of suppression of evidence no conclusion in his favour should be arrived at merely on the ground of paucity of evidence which is of his own creation and a trial Judge would not be justified in giving his decision in favour of such a party on a mere application of the rule of onus of proof. 1949 F. L. J. 90=A. I. R. 1949 F. C. 88=62 L. W. 403=(1949) 1 M. L. J. 568 (F. C.).

——Burden of proof—Ejectment suit—Duty of plaintiff.

In a suit in ejectment, the onus lies on the plaintiff to prove his title; he has to prove his title and cannot succeed merely on the weakness of the defence. A. I. R. 1950 Pat. 359.

——Burden of proof—Importance of.

The question of burden of proof ceases to be a matter of any particular importance after adduction of evidence on both sides, and the Court is entitled to accept the case of one of the parties as proved, not merely on the positive evidence adduced by him but also on the discrepancies and lacuna in the evidence of the other side. A Court can base its conclusion not merely on the effect of the evidence taken as a whole but it may also draw adverse inference against a party who being in a position to adduce better evidence deliberately abstains from doing so. 62 L. W. 256=A.I.R. 1949 Mad. 689=(1949) 1 M. L. J. 434.

——Burden of proof—Sale for discharge of debts—Plea that consideration did not pass because debts were already discharged—Onus of proving discharge.

A suit was filed under O. 21, R. 63, C. P. Code, to set aside the order rejecting a claim for the raising of an attachment on the ground that the attached property belonged to the claimant plaintiff by virtue of a sale deed by the judgment-debtor and was in his possession. The debts which were the consideration for the sale deed, as stated on the face of it, were a promissory note for a certain sum, certain costs and certain interest amounting to about Rs. 10,000 and the promissory note was produced. The only ground on which the defendant sought to justify the dismissal of the suit was that some weeks before the conveyance of the property to the plaintiff, the judgment-debtor had received a sum of Rs. 30,000 in cash and that in those circumstances it must be presumed that the debt which the judgment-debtor owed to the plaintiff and for which the sale deed was executed were discharged by the judgment-debtor out of this amount.

Held, that the promissory note having been produced there was **prima facie** evidence on the part of the plaintiff that the consideration had really passed, as stated in the deed. In those circumstances the burden was on the defendant to prove that the suggested discharge had taken place and not on the plaintiff to prove that it had not taken place. 51 C. W. N. 850=60 L. W. 708=1947 M. W. N. 313 (2)=A.I.R. 1947 P. C. 98=(1947) 2 M. L. J. 54 (P. C.).

——Burden of Proof—Ejectment suit—Duty of plaintiff.

In the suit for ejectment it is upon the plaintiff to make out his title by definite evidence which is not open to any reasonable doubt. He cannot succeed merely by showing a semblance of title or by adducing evidence which would support the case only so far as to establish it to some slight degree of probability. He cannot reply on the weakness of the defendant's title, but must succeed on the strength of his own. Where he fails to satisfy the Court as to the truth of his claim, the suit has to be dismissed. 23 Luck. 62=1947 O. W. N. 509=A.I.R. 1948 Oudh 145=1947 A.W.R. (C. C.) 292.

——Burden of proof—Ejectment suit—Duty of plaintiff to prove his title.

The plaintiff who sues in ejectment can only succeed on the strength of his own title. There is no obligation upon the defendant to plead possible defects in the plaintiff's title and it is sufficient that in the written statement the defendant denies the plaintiff's title. 12 B.R. 459=1946 M.W.N. 389=1946 A.L.W. 258=1946 A.L.J. 228=81 C.L.J. 107=48 Bom. L.R. 430=1946 O.W.N. 207=1946 P. W. N. 250=1946 O. A. (P. C.) 94=1946 A. W. R. (P. C.) 94=223 Ind. Cas. 394=59 L. W. 268=50 C. W. N. 477=A. I. R. 1946 P. C. 59=I. L. R. (1946) Kar. (P. C.) 24=(1946) 2 M.L.J. 98 (P. C.).

——Onus—Question of pedigree—Trial and appellate Courts.

Although the initial burden in regard to the proof of a pedigree lies upon the plaintiff, after a finding has been given and appeal preferred the onus lies on the appellant to show that the decision of the trial Court is wrong. The onus is not discharged by merely shewing that there is an equal possibility of the judgment in favour of one party or the other being correct. 22 Luck. 249=231 Ind. Cas. 203=1947 O.W.N. 197=1947 O.A. (C. C.) 83=1947 A. W. R. (C. C.) 83=A. I. R. 1947 Oudh 164.

——Signature relied on as acknowledgment saving limitation—Allegation of forgery—Burden of proof—Handwriting expert's evidence—Value—Proof—Civil and criminal matters—Quantum of proof—Distinction.

Where an acknowledgment by judgment-debtors saving limitation is attacked as a forgery, the fact that the handwriting expert himself does not claim infallibility for his opinion that the admitted signature is different from the questioned one is immaterial. That consideration would be of great importance in a prosecution for forgery, in which the onus would be on the Crown

to satisfy the Court positively that the handwriting is not the handwriting of the person concerned. In the civil suit however it is the contrary proposition which has to be proved namely that the handwriting is the handwriting of the judgment-debtors and the onus is on the decree-holders. Where the evidence on behalf of the decree-holders is not sufficient to prove that the handwriting expert's opinion is incorrect the decree-holder must fail as he has not discharged the burden on him. 225 Ind. Cas. 528=12 B. R. 615=A. I. R. 1947 Pat. 139.

——Burden of proof on a party—Duty of that party.

Where the burden of proof lies upon a party it is his duty before he closes his evidence to produce all the evidence which he thinks it necessary to produce and which is available. A. I. R. 1934 All. 406=1934 A.L.J. 318=3 A.W.R. 529=56 All. 766=149 Ind. Cas. 781 (F. B.).

——Burden of Proof—Admissibility of document tendered.

It is for the person tendering documentary evidence to show that it is admissible. 84 Ind. Cas. 487= 3 Bur. L.J. 194=2 Rang. 391=A.I.R. 1925 Rang. 84.

——Burden of proof—Admission of debt—Plea of limitation.

Where a defendant admits a debt but pleads that it is barred, he has to prove his plea. Where, however, there is no such admission, the plaintiff has to prove everything required to entitle him to a decree. 123 Ind. Cas. 197=A.I.R. 1930 Mad. 742.

——Burden of proof—Wrongly laid—When immaterial.

When evidence has been led on both sides and a finding has been arrived at on a review of the entire evidence, it is immaterial that the **onus** of proof has been wrongly laid on a party. 74 Ind. Cas. 1004= 45 All. 53=A.I.R. 1923 All. 358.

——Burden of proof—Forgery, plea of.

Where a certain document filed by one party is alleged to be a forgery, the Court is not bound to enquire into the details but the party alleging that it is a forgery must **prima facie** make out a case of forgery before asking the Court to reject the document as a forgery. 72 Ind. Cas.. 971=24 Cr. L. J. 507= A.I.R. 1923 Pat. 31.

15. Certified copies.

See EVIDENCE ACT, Ss. 65, 76 and 86.

16. Character.

See EVIDENCE ACT, Ss. 52 to 55, 140 and 155.

17. Child witness.

See also (1) EVIDENCE ACT, S. 118; (2) Oaths Act, S. 13.

—Child witness—Reception of unsworn evidence of—Admissibility—Corroboration, if necessary for acting upon it—Rule of law and rule of prudence. **See** INDIAN OATHS ACT, S. 13. A. I. R. 1946 P.C. 3=(1945) 2 M.L.J. 493 (P.C.).

——Evidence of a boy, value of.

When reliance is sought to be placed upon an alleged statement made by a boy, it must be proved that the language used was his own and not put in his mouth by the person conducting the examination as nothing could be easier than to extract by the latter process almost any statement from a frightened child who suddenly finds himself alone in the custody of strangers and some of them officials. (1906) 8 Bom. L. R. 705= 30 B. 523=4 C. L. J. 181=33 I. A. 198= 1 M. L. T. 301 (P. C.).

18. Circumstantial evidence.

See also EVIDENCE ACT. (1) S. 3—"PROVED."
(2) Ss. 6 to 11.

(a) **Nature of.**
(b) **Prineiples.**
(c) **Reliance on.**
(d) **Value of.**
(e) **When conclusive.**
(f) **When sufficient.**

18. (a) Nature of.

——Circumstantial evidence—Nature and probative force.

Circumstantial evidence must like any other evidence be tested and weighed and must prevail or not by its own inherent proving force. 16 M.L.T. 535=1 L. W 1007=(1915) M. W. N. 34=16 Cr. L. J. 38=26 Ind. Cas. 332.

——Circumstantial—Nature of.

Circumstantial evidence must be exhautive and exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused. 15 Cr. L. J. 293=18 C. W. N. 1144=23 Ind. Cas. 501.

——Circumstantial—Nature of.

Circumstantial evidence is evidence of circumstances as opposed to what is called direct evidence. 4 Bur. L.T 97=12 Cr. L. J. 329=10 Ind. Cas. 929.

18. (b) Principles.

——Circumstantial evidence—Criminal case—Principles governing.

The principles to be followed in criminal cases based on circumstantial evidence are as follows: (1) The circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond all reasonable doubt and must be closely connected with the fact sought to be inferred therefrom; (2) in order to justify an inference of guilt the circumstances from which such an inference is sought to be drawn must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. 52 C. L.J. 417= 35 C.W.N. 169=1931 Cr. C. 43=A.I.R. 1931 Cal. 11.

——Circumstantial evidence—Principles of.

The fundamental rule by which circumstantial evidence is estimated is that in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other than that of his guilt. It is safer to follow the rule that "the fouler the crime the clearer and the plainer the proof ought to be." 59 Ind. Cas. 896=22 Cr. L.J. 154=1 Pat. L.T. 684.

——Circumstantial—Conviction — Rules for guidance.

Circumstantial evidence in order to justify a conviction must be exhaustive and must exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused. But 'exhaustive' does not mean that every incident short of the criminal act must be proved by positive evidence. and the "possibility" must not be treated as signifying "physical possibility" but so high a degree of probability that a prudent man considering all the facts and realising that the life or liberty of the accused person depends upon the decision, feels that the accused committed the crime. 32 P. R. (Cr.) 1916=18 Cr. L. J. 375=38 Ind. Cas. 759.

——Circumstantial, probative force of—Principles applicable.

It is a fundamental principle, and one of universal application in cases dependent on circumstantial evidence that in order to justify any inference of guilt, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of his guilt. If the circumstances are found to be as consistent with the innocence as with the guilt of the accused, no inference of guilt should be drawn. (1903) 8 C.W.N. 278 (F.B.).

18. (c) Reliance on.

——Circumstantial evidence—Reliance on—Direct evidence, partisan.

Where there is very strong feeling between the parties and direct evidence on both sides is of a partisan character, it is safe to decide the case upon the circumstances and probabilities. 113 Ind. Cas. 434=26 A.L.J. 705=50 All. 733=A.I.R. 1929 All. 18.

——Circumstantial evidence—Reliance on.

In order to justify an inference of guilt from circumstantial evidence the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis than that of his guilt. 8 C W.N. 278 Rel. on. 65 P.L.R. 1917=40 P. W. R. 1917=18 Cr. L. J. 897=42 Ind. Cas. 129.

——Circumstantial evidence—How far reliable.

To convict on circumstantial evidence alone the Court must be satisfied that each of the facts on which the presumption of guilt is founded is proved beyond doubt and there must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused. 136 P. L. R. 1909=36 P. W. R. 1909 Cr.=11 Cr. L.J. 82=4 Ind. Cas. 941.

18. (d) Value of.

——Circumstantial evidence—Value of — Equal value as oral evidence.

Where the question involved is whether the guardian was guilty of gross negligence in the conduct of the case:

Held, that circumstantial evidence is as good as any other kind of evidence in such matters and perhaps better evidence than oral evidence. 70 Ind. Cas. 335=31 M.L.T. 449=A.I.R. 1923 Mad 245.

——Circumstantial—Value of — Murder Case — Benefit of doubt.

In a murder case where there is no direct evidence but only circumstantial evidence the jury must first decide what portions of the circumstantial evidence have been established and then see whether they constitute sufficient proof and if they have doubts, they must let the prisoner have the benefit of doubt. 17 P. R. (Cr.) 1917=18 Cr. L.J. 482=39 Ind. Cas. 322.

——Circumstantial—Value of.

Where there is a break in the chain of the circumstantial evidence it destroys the whole; every piece of the evidence making up the chain must be on record or else the appellate court may find it difficult to see how the particular conclusion has been arrived at, and consequently miscarriage of justice may result. In capital cases it is better that every fact be strictly proved on record, than extracting admissions from counsel. 21 Cr. L.J. 777=2 U.P.L.R. (A) 128=58 Ind. Cas. 457.

——Circumstantial evidence — No explanation offered—Presumption.

Where there is a **prima facie** case against an accused the force of suspicious circumstances is augmented in the absence of an attempt to explain them. 7 S.L.R. 109=15 Cr. L.J. 497=4 Ind. Cas. 585

18. (e) When conclusive.

——Circumstantial evidence—When conclusive.

Per **Mukerji, J.**—Circumstantial evidence should not merely point to the inference that is to be drawn, but that the evidence must be of such a nature that it can possibly lead to no other inference. 116 Ind. Cas. 378=33 C.W.N. 211=56 Cal. 738=A.I.R. 1929 Cal. 37.

——Circumstantial evidence—Conviction on.

The ordinary rule in a case of circumstantial evidence is that, in order to justify a conviction, it should be incompatible with any reasonable hypothesis than that of the accused's guilt. 108 Ind. Cas. 501=52 Bom. 385=30 Bom. L.R. 330=10 A. I. Cr. R. 118=29 Cr. L. J. 403=A.I.R. 1928 Bom. 130

——Circumstantial evidence—When conclusive—Incompatibility with innocence.

In order to infer guilt from the circumstantial evidence it must be shown that the inculpatory facts are incompatible, with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. 112 Ind. Cas. 850=30 Cr. L.J. 18=11 A. I. Cr. R. 405=A.I.R. 1928 Lah. 382.

——Circumstantial evidence.

Accused robbed three passengers in the female compartment causing them injuries one of whom received a grievous hurt, and then jumped out of the train, and was found lying by the railside as he broke his leg while jumping, having in possession some of the ornaments robbed while more valuable things were taken away by his companion.

Held, the guilt of the accused is perfectly made out. The offence was committed in the morning and the offenders were in the compartment for some time taking off ornaments from the person of the

victims and causing them injuries, and there is nothing unlikely in their having been able to identify him. A.I.R. 1923 Lah. 169.

——Circumstantial evidence—When conclusive.

If an accused person is to be convicted on circumstantial evidence the circumstances must be such as to exclude all reasonable probability of his innocence. 81 Ind. Cas. 555=4 Lah. L.J. 235=25 Cr. L.J. 939= A.I.R. 1922 Lah. 263.

18. (f) When sufficient.

——Circumstantial evidence—When sufficient for conviction.

Circumstantial evidence to convict a person requires a high degree of probability, that is sufficiently high that a prudent man, considering all the facts and realizing that the life or liberty of the accused person depends upon the decision, feels justified in holding that the accused committed the crime. 32 P. R. 1916 Cr., Foll. 109 Ind. Cas. 912= 29 Cr. L.J. 640=10 A.I. Cr. R. 350.

——Circumstantial evidence—Exhaustiveness — Probability.

Though circumstantial evidence must be exhaustive, that does not mean that every incident short of the actual commission of the offence must be proved by positive evidence but that what is required is so high a degree of probability that a prudent man would feel justified in holding that the accused committed the crime. 97 Ind. Cas. 752=7 Lah. 396=27 Cr. L.J. 1168=27 P.L.R. 447=A.I.R. 1926 Lah. 582.

——Circumstantial evidence—When sufficient.

Every conceivable hypotheis of innocence must be reasonably excluded before conviction. 7 P.L.R. 1911 =11 P. W. R. 1911 Cr.=12 Cr. L.J. 69=9 Ind. Cas. 400.

——Circumstantial evidence—Redness of eyes—Inference of habitual Bhang smoker.

The redness in the eyes of a person may be due to several causes and in the absence of evidence it cannot be held that the person merely on that account is an habitual smoker of bhang. 89 Ind. Cas. 145=12 O.L.J. 388=26 Cr. L.J. 1281=A. I.R. 1925 Oudh 480.

19. Co-defendants.

——Co-defendants—Right of one to cross-examine another deposising.

The general rule is that a defendant may cross-examine his co-defendant who gives evidence, or any of his co-defendant's witnesses if his co-defendant's interest is hostile to his own. It is only where the evidence of a co-defendant or a co-respondent is adverse to the defendant or the respondent that the defendant or respondent can claim the right to cross-examine. Where the contentions of the defendant and the co-defendant are identical, there is no such right of cross-examination. 48 Bom. L.R. 36.

——Co-defendants.

When both defs. controvert plaintiff's claim the evidence of one deft. cannot operate against the co-deft. as the latter had no opportunity to cross-examine the former. 1 O. L. J. 447=25 Ind. Cas. 823.

20. Common intention.

See EVIDENCE ACT, S. 10.

21. Competency of witnesses.

See EVIDENCE ACT, S. 118.

22. Conclusive proof.

See EVIDENCE ACT, Ss. 3, 41, 112 and 113.

23. Confidential communisaiion.

See EVIDENCE ACT, Ss. 122, 126 and 127.

24. Confession.

See (1) CRIMINAL P. C., Ss. 164, 364 and 533.

(2) EVIDENCE ACT.

(i) Ss. 24 to 30.

(ii) S. 114—Accomplice.

(iii) S. 109.

25. Construction of document.

See (1) DEED—CONSTRUCTION.

(2) EVIDENCE ACT, Ss. 93—98.

26. Contradiction.

See EVIDENCE ACT, Ss. 145, 153, 155 and 158.

27. Corroboration.

See also : EVIDENCE ACTS. (1) 24, RETRACTED CONFESSION.

(2) S. 30, CORROBORATION.

(3) S. 133, CORROBORATION.

(4) S. 144, ACCOMPLICE.

(5) Ss. 156, 157 and 158.

——Corroboration—Contemporaneous documentary evidence—Oral evidence

When there is a difficult investigation of a fact, the history relating to which is somewhat obscure, contemporaneous documentary evidence, if it is trustworthy, should be preferred to any amount of oral evidence, which does not always create the same amount of confidence. 119 Ind. Cas. 99=A.I.R. 1929 All. 545.

——Corroboration—Statement of witness.

It is impossible to treat statements by a witness as corroborating his own evidence, these being merely parts of that very evidence itself. 107 Ind. Cas. 457 =47 C.L.J. 288=30 Bom. L.R. 757=29 M. L. W. 520=A.I.R. 1928 P. C. 127=56 M.L.J. 88 (P.C.).

——Corroboration—Partisan — Oral evidence—Corroboration by documentary evidence.

Where there two factions, each trying to support its own candidate, **i.e.**, either one party or the other they oral evidence given on either side should not be believed and acted upon except where it is borne out and corroborated by the documentary evidence. 103 Ind. Cas. 134=A.I.R. 1927 Mad. 820.

28. Credibility.

(a) Finding as to.

(b) Guiding principles.

(c) Question one of fact.

(d) Witness discredited (Illustrative).

(e) Miscellaneous.

28. (a) Finding as to.

——Credibility—Finding as to—Legal evidence necessary.

It is open to the Court to find that the evidenee of a person is not worthy of credit; but it cannot arrive at a finding in absence of legal evidence. 118 Ind. Cas. 230=A.I.R. 1929 All. 873.

——Credibility — Competency to decide — Privy Council.

On a pure question of credibility of witnesses, the Privy Council have no better competence to determine where the truth lay than the lower Appellate Court has. 111 Ind. Cas. 480=55 Cal. 1048=55 I. A. 299=48 C.L.J. 567=1928 M.W.N. 924=24 N.L.R. 154 =30 Bom. L.R. 1389=32 C.W.N. 1117=28 M.L. W. 55 =11 N.L.J. 229=A.I.R. 1928 P.C. 200=55 M.L.J. 248 (P.C.).

——Credibility—Trial Judge's opinion—Acceptance of, ordinary rule.

At all the time considerable weight should be attached to the opinion of the Judge who heard the witnesses as to their relative credibility. When the record does not show that the witnesses on either side have been materially discredited or greatly shaken in cross-examination, it is the duty of the Judge to decide which side is telling the truth. When the Judge has tried the case with marked care and intelligence his opinion as to credibility of the witnesses should ordinarily be accepted. 94 Ind. Cas. 193=27 Cr. L. J. 577=13 O.L.J. 69.

——Credibility—Trial Judge's opinion—Appellate Court's opinion.

When the question is whether a witness is speaking the truth or not, light is thrown upon it by the demeanour of that witness in the box by the manner in which he answers questions and by how the seems to be affected by the questions that are put to him, and so on. No doubt there the trial Judge has an advantage which cannot possibly be shared by any appellate Court. But when the views upon credibility are founded upon argumentative inferences from facts which are not disputed then the court of Appeal is really in just as good a situation as the Judge of first instance. 70 Ind. Cas. 949=27 C. W. N. 414=17 M.L.W. 1=31 M L.T. 307=A.I.R. 1922 P. C. 315.

28. (b) Guiding principles.

——Credibility—Sworn statement of plaintiff in open Court—No evidence to the contrary.

A Judge is perfectly justified in relying upon the sworn statement of the plaintiff made in open Court before him, if he believed it to be true and if there was no evidence to the contrary. A.I.R. 1942 Sind 143 =I.L.R. (1942) Kar. 340=203 Ind. Cas. 566.

——Credibility—Evidence doubtful—Corroboration of—Acceptance.

If there is any doubt concerning the eye-witnesses, evidence the Court need not discredit it altogether but can accept it after corroboration. A.I.R. 1940 Lah. 157 =42 P.L.R. 1=41 Cr. L.J. 576=188 Ind. Cas. 326.

——Credibility—Inconsistent answers from hearsay—Adverse inference—Not justified.

The mere fact that speaking from hearsay, the witness gave inconsistent answers in cross-examination does not justify an adverse contention based upon is alleged inconsistencies. A.I.R. 1938 Mad. 47=46 M.L.W. 358 =1937 M.W.N. 899=176 Ind. Cas. 247.

——Witness not summoned—His evidence—If not worthy of credit.

The fact that a witness has not been summoned is no justification of itself for saying that his evidence is not to be accepted. A.I.R. 1938 Pat. 281=4 B.R. 682=176 Ind. Cas. 129.

——Credibility—Witnesses not shaken in cross-examination—Court, if can rely on such evidence

Where the witnesses went into the witness-box and stated broadly that there were transactions between the plaintiff firm and the defendant firm and that certain sums were owing and the evidence was not shaken in cross-examination, there is nothing in law to prevent a Judge relying upon it. A.I.R. 1937 Pat. 222 =2 B.R. 316=161 Ind. Cas. 64.

——Credibility--Tests.

The real test as to whether the evidence is reliable or not, are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case. A.I.R. 1936 P.C. 60=1936 O.W.N. 38=40 C.W.N. 257=2 B.R. 215=43 L.W. 120=38 P.L.R. 69(2)=1936 A.W.R. 37=1936 M.W.N. 184=70 M.L.J. 225=19 N.L.J. 36=38 Bom. L.R. 344=63 C.L.J 42=1936 A.L.J. 755=160 Ind. Cas. 45(P.C.).

——Credibility—Evidence of party—If not entitled to credit.

There is no rule of law that the evidence of a person must be rejected as unworthy of credit by reason of his being a party to the suit. A.I.R. 1933 Oudh 393= 10 O.W.N. 1311=8 Luck. 119=147 Ind. Cas. 227(2).

——Credibility—Refusal to take oath—If affects.

Refusal of a party to take oath does not itself prove the falsity of his claim inasmuch as the party may have a perfectly true case and yet for peculiar reasons, be unwilling to bind his conscience by a particular form of oath. A.I.R. 1932 Lah. 25=32 P.L.R. 716= 135 Ind. Cas. 45.

——Credibility—Witness—Man of no means.

The fact that the witness is a man of no means does not necessarily show that he is not speaking the truth. A.I.R. 1935 Rang. 297=36 Cr.L.J. 1307= 158 Ind. Cas. 93.

——Credibility—Relationship of witness to party —If affects.

The evidence of a witness should not be discarded merely because he is related to the plaintiff when he is a man who **prima facie** must be regarded as respectable and reliable. A.I.R. 1933 Rang. 162=145 Ind. Cas. 330.

28. (c) Question of facts.

——Credibility—Question is one of fact.

The question whether evidence is or is not worthy of credit is a question of fact and not of law. A.I.R. 1942 Pat 183=20 Pat. 898=41 Cr.L.J. 570=8 B.R. 589=23 P.L.T. 332=199 Ind. Cas. 638.

28. (d) Witnesses discredited (Illustrative.

——Credibility—Witnesses deposing as to conversation which took place four years, ago from recollection—Documentary evidence to contrary.

It is impossible to rely implicitly upon the recollection of witnesses as to conversations alleged to have taken place so long as four years ago, when there is no documentary evidence to corroborate such recollection and especially when the documentary evidence is in direct contradiction thereof. A.I.R. 1935 P.C. 175=1935 O.W.N. 863=1 B.R. 771=69 M.L.J. 433=37 Bom L.R. 826=1935 M.W.N. 1182=157 Ind. Cas. 4 (P.C.).

——Credibility—Plaintiff at the end admitting defendants' case on one issue—Plaintiff's evidence if unreliable.

Where after the closing of the evidence, the plaintiff abandons his case and admits the defendants' case, and as a result, the Court disbelieves the evidence adduced by the plaintiff as tainted and unreliable, the Court is perfectly competent to decide, on that ground, the other issues also in defendants' favour, and this decision cannot be interfered with in second appeal. A.I.R. 1936 Pat. 7=16 P.L.T. 803=2 B.R. 268=15 Pat. 96=160 Ind. Cas. 984.

——Credibility—Witness easily won over.

It is very dangerous to believe the evidence of witnesses who may be easily won over by a party for an ordinary price in order to make out his case. A person who admits that he was a party to a fraud and then makes a **volte face** and exposes it, is hardly entitled to any respect. A.I.R. 1936 Pesh. 12=160 Ind. Cas. 452.

——Credibility—Witness under police surveillance —Produced by Police.

No reliance should ordinarily be placed on the uncorroborated testimony of a criminal who has undergone a sentence of imprisonment and is under police surveillance especially when he is produced by Police under whose supervision he is. 89 Ind. Cas. 311=7 L.L.J. 219=26 P.L.R. 518=26 Cr. L.J. 1335=A.I.R. 1925 Lah. 397.

28. (e) Miscellaneous.

——Credibility—Witnesses employees of party producing them.

The fact that the witnesses examined by a party happen to be the employees of the party, is not a sufficient reason for not relying upon the evidence of such witnesses. A.I.R. 1940 Pat. 629=6 B.R. 767 =189 Ind. Cas. 232.

——Credibility—Evidence of Indian witnesses on question of age.

The evidence of Indian witnesses on questions of age is notoriously often very vague and unreliable and it will be unsafe to base a finding of physical incapacity of a person on such evidence. A.I.R. 1935 P.C. 199 =1935 O.W.N. 1261=69 M.L.J. 868=2 B.R. 120 =1936 M.W.N. 15=43 L.W. 7=38 Bom. L.R. 1= 1935 A.W.R. 1395=38 P.L.R. 177=40 C.W.N. 360=159 Ind. Cas. 325 (P.C.).

——Credibility—Eye-witness—Delay in coming forward.

The mere fact that an eye-witness does not come forward immediately an investigation is begun is not by itself in this country necessarily a sufficient ground for rejection his testimony. A.I.R. 1931 Lah. 529= 32 P.L.R. 461=32 Cr.L.J. 1032=133 Ind. Cas. 446.

——Credibility—Old age, if guarantees truthfulness.

The fact that a witness is an old man of 75, by itself carries no guarantee of truthfulness, if his evidence is otherwise unworthy of credence. A.I.R. 1939 Cal. 595=69 C.L.J. 347=185 Ind. Cas. 634.

——Credibility—Evidence of witnesses examined on commission—Commissioner subsequently examined as witness—Evidence of witnesses recorded by him, if can be relied.

Where after examining certain witnesses on commission, the party examined the Commissioner who was appointed to examine them as his witness, though his name did not appear in the list of witnesses.

Held, that the Commissioner being an interested person, evidence of witnesses recorded by him could not be relied on. A.I.R. 1938 Rang. 81=176 Ind. Cas. 242.

——Credibility—Interested evidence.

Interested evidence is not necessarily false. A.I.R. 1938 Sind 202=40 Cr.L.J. 93=I.L.R. (1938) Kar. 75=178 Ind. Cas. 520.

——Credibility—Oral evidence—Documentary evidance.

The trail Judge did not deal with the genuineness of the entries in the books of Pandas upon any reasoned footing. He had no evidence before him directly bearing upon the topic of genuineness except such as may have been afforded by the comparison of certain signatures. He pronounced the entries forgeries because they were inconsistent with the evidence of one **B**, whom he believed in all. For the same reason he declared that one other document was a forgery, although apparently he had not before him the original or any satisfactory evidence of the circumstences in which it was alleged to have been made. The High Court, however, approached the matter from a different angle. The Judges thought it proper to make a critical examination of the actual books and of the evidence, if any, supporting or impeaching the genuineness of the entries, and after the most rigid scrutiny of these books, came to the conclusion that the entries were undoubtedly genuine. They also weighed the oral evidence directed to the rest of the case, and having seen **M**, the principal witness, rejected the evidence. Upon these findings the ultimate conclusion at which the High Court arrived was inevitable. 118 Ind. Cas. 13=1929 A.L.J. 856=30 M.L.W. 744=A.I.R. 1929 P. C. 217=57 M.L.J. 572 (P.C.).

——Credibility—Oral evidence—Marriage Settlements—No written evidence.

It would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an ante-nuptial agreement which would in effect be, a marriage settlement unless there was contemporaneous written evidence to corroborate the oral evidence. 88 Ind. Cas. 327=27 Bom. L. R. 1076= 29 C. W. N. 1013=1925 M. W. N. 717=48 Mad. 605 =3 Pat. L.R. 290=23 M. L. W. 138=23 A. L. J. 662 =52 I. A. 286=42 C. L. J. 8=A.I.R. 1925 P. C. 181=49 M.L.J. 109 (P. C.).

——**Credibility of witness—Changing sides.**

A witness who has changed sides and has made statements in favour of both the prosecution and the accused is an unreliable witness and neither of his statements can be believed. 88 Ind. Cas. 852= 26 Cr. L.J. 1236=A.I.R. 1925 Outh 726.

——**Credibility—Witnesses—Denomination if a guide.**

Credibility of witnesses or jurors must not be judged from their denomination. 11 C. W. N. 1085, Foll. 81 Ind. Cas. 264=51 Cal. 418=38 C. L. J. 397=25 Cr. L.J. 776=A.I.R. 1924 Cal. 323.

——**Credibility—Deposition—Fact disbelieved as impracticable—When justified.**

Where a witness states that he could see and did see, in apparently very short time, that a certain quantity of land had not been cleared, the statement can be disbelieved as being improbable only if cross-examination is directed to the impracticability of forming a judgment by mere inspection even with the aid of glasses, as to the proportion cleared. 77 Ind. Cas. 141=1923 M.W.N. 622=28 C.W.N. 589=33 M.L.T. 309=5 L.R.P.C. 25=A.I.R. 1923 P.C. 95=45 M.L.J. 438 (P.C.)

——**Credibility—Eye witness—Delay in disclosure.**

Where a witness keeps quiet for many days after the occurrence and comes forward after the police had made a discovery he is not reliable. 84 Ind. Cas. 321=5 L.L.J. 325=26 Cr. L.J. 257=A.I.R. 1923 Lah. 438.

——**Credibility—Testimony of witness—Testimony discredited on material facts.**

In dealing with the evidence of witness who have been discredited on important and material facts as not speaking the truth it will be well to remember that their evidence on other points must be received with considerable caution. Witnesses who are proved to be not speaking the truth on some important points ought not to be trusted implicitly. 1930 M.W.N. 417.

——**Credibility—Person acquitted in prior case—Innocence of.**

In estimating the value of the evidence given by a witness, the elementary principle must not be overlooked that where there has been an acquittal, the acquittal is conclusive and it would be a very dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates. 66 Ind. Cas. 774=49 Cal. 235= 34 C.L.J. 373=26 C.W.N. 113=A.I.R. 1922 Cal. 12.

29. Criminal trial.

See also CRIMINAL TRIAL.

(a) **Duty of Court.**
(b) **Duty of prosecution.**
(c) **Identification.**
(d) **Procedure.**
(e) **Quantum of evidence.**
(f) **Value of evidence.**

29. (a) Duty of Court.

——**Criminal trial—Defence witnesses—Creditibility of—Duty of Court to prevent insinuations as to defence witnesses being related to accuse**

The mere fact that some of the witnesses for the defence are fellow caste men of the accused is no ground for discrediting their evidence. A Court ought not to permit the making of institutions by the Police as to the defence witnesses being related to the accused, especially when there is nothing on the record to support such institution, and the witnesses have not been questioned with reference thereto. 20 Cr.L.J. 748=53 Ind. Cas. 156 (Oudh.)

29. (b) Duty of prosecution.

——**Examination of witnesses—Obligation of prosecution—Right of cross-examination by defence.**

The prosecution is under no obligation to examine witnesses who, it has reason to believe, will not speak the truth. It is usual in such circumstances for the prosecution to tender such witnesses for cross-examination. The defence, however, is certainly entitled to claim that privilege but having omitted to do so they cannot be permitted to make capital of the fact that these witnesses were not cross-examined. 8 Cal. 121, **held too widely stated.** 34 C.W.N. 170=1930 Cr. C. 134=A.I.R. 1940 Cal. 134.

——**Criminal trial—Accomplice—Duty to examine.**

If a witness can on reasonable grounds be regarded an accomplice the procecution need not produce and examine him. 21 C.W.N. 1152=19 Cr. L.J. 81=43. Ind. Cas. 241.

——**Criminal trial—Duty of prosecution—Accused unable to explain.**

Though an accused is unable to explain facts appearing strongly against him, the prosecution must give affirmative and conclusive evidence to prove his g ·it. (1910) M.W.N. 77=7 M.L.T. 314=11 Cr. L.J. 222= 20 M.L.J. 657=6 Ind. Cas. 51.

29. (c) Identification.

——**Criminal trial—Identification—Evidence of—Value.**

It is impossible to lay down any useful principle as to the exact amount of identification which is required in any particular case. The evidence which goes to prove that a person has identified another as having taken part in a particular offence, either in jail identification proceedings, or elsewhere, is admissible, though the value of such evidence is weakened by failure to identify subsequently in court. 128 Ind. Cas. 739=70. W.N. 862=1930 Cr. C. 1079=A.I.R. 1930 Oudh 455.

——**Criminal trial—Identification.**

Sometimes the identification of the particular accused by witnesses to whom they are strangers is useful. 17 Cr. L.J. 156. 19. P.W.R. (Cr.) 1916=33 Ind. Cas. 636.

29. (d) Procedure.

——**Criminal trial—Witness tendered.**

Where a witness was examined before the committing Magistrate and was simply tendered for cross-examination in the Sessions Court and the evidence before the Committing Magistrate was marked as exhibit in the Sessions Court, such procedure is illegal. 1915 M. W. N. 544=16 Cr. L. J. 615=30 Ind. Cas. 439.

——Criminal trial—First report—Admissibility of without proof.

Any statement made by a complainant in his first report is not admissible in evidence without proof and cannot be used against the accused in his trial.

When it is proved that the accused made a statement soon after the commission of the offence incriminating himself the reasonable inference is that it was a true representation of actual facts in the absence of rebutting evidence. 1 O.L.J. 687=16 Cr. L. J. 62 =26 Ind. Cas. 654.

——Criminal trial—Accused's statement.

An accused's statement if to be relied upon, must be taken as a whole and nothing can be read into it which is not found within the four walls of the statement. 15 C.L.J. 512=13 Cr. L. J. 195=16 C. W. N. 1055=14 Ind. Cas. 195.

——Criminal trial—Depositions before committing Magistrate—Admissibility.

Depositions before the committing Magistrate may on appeal be looked into by the High Court, where the cross-examination in the Sessions Court is not full. 10 M.L.T. 82=12 Cr. L.J. 503=12 Ind. Cas. 223.

——Criminal trial—Prosecution witness examined by the defence.

A witness mentioned by the prosecution but not examined must still be regarded for all practical purposes as prosecution witness even if examined by the defence. 71 P.L.R. 1910=2 P. W. R. (Cr.) 1911=11 Cr. L.J. 598=8 Ind. Cas. 239.

29. (e) Quantum of evidence.

——Criminal trial—Nature of offence—Quantum of evidence.

The fouler the crime, the clearer and plainer the proof ought to be, though it cannot be laid down as a proposition of law that the quantum or value of evidence must be proportionate to the enormity of the crime or the consequences which may follow from convictions. 59 Ind. Cas. 858=22 Cr. L.J. 154=1 P.L.T. 684.

——Criminal trial—Quantum of evidence—Presumption of innocence.

Where the acts proved in a case are perfectly consistent either with the innocence or guilt of the accused the presumption of innocence should prevail—**See** CRIMINAL TRIAL. 6 Bom. L.R. 551.

29. (f) Value of evidence.

——Criminal—Evidence resiled from—Reliance on in murder case.

In a case of murder the evidence of witnesses who have resiled from their previous statements should not be relied upon. 91 Ind. Cas. 50=27 Cr. L. J. 18= 1925 M.W.N. 319=22 M.L.W. 405=A.I.R. 1925 Mad. 879.

——Criminal trial—Witness—Unreliable against an accused—Reliance on, against others.

Evidence of a witness, if held to be unreliable in respect of one accused cannot be held to be reliable in respect to other accused. 99 Ind. Cas. 857=3 L.L.J. 147=28 Cr. L.J. 185.

——Criminal trial—Retracted statement—Value of.

Evidence of a witness who retracted his statement in the cross-examination cannot be relied upon for convicting an accused person unless there are very strong reasons to suppose that the second statement in the cross-examination is absolutely false. 84 Ind. Cas. 1052 =6 L.L.J. 280=26 Cr. L.J. 412=A.I.R. 1925 Lah. 44.

——Evidence—No cross-examination—Value of.

In the absence of cross-examination evidence is of little value. 17 C.W.N. 230, Foll. 88 Ind. Cas. 852 =26 Cr. L.J. 1236=A.I.R. 1925 Oudh 726.

——Criminal—Evidence disbelieved in essentials—Conviction if can be based on.

Where the prosecution cannot be believed in its essential details, conviction cannot be based upon a part of the story of the prosecution. Where the greater portion of the prosecution evidence is disbelieved, a Court cannot reconstruct a story and convict the accused on the story wholly inconsistent with that told by witnesses. 81 Ind. Cas. 212=5 P. L.T. 635=25 Cr. L.J. 724=A.I.R. 1924 Pat. 813.

——Criminal trial—Immaterial discrepancies in evidence—If grand for rejection.

Where the reason for the acquittal of the accused by the learned Sessions Judge was certain inconsistencies and improbabilities in the evidence of the prosecution story and the difficulty of finding any explanation justifying the rejection of the **alibi.**

It was **held**. that if the prosecution is to be rejected in substance there must be some other explanation of the facts that actually occurred. Failing any such explanation it is not permissible to reject the prosecution evidence owing to immaterial discrepancies or improbabilities. 74 Ind. Cas. 434=10 O. L. J. 68=24 Cr. L. J. 770=A.I.R. 1923 Oudh 217.

——Criminal trial—Character evidence.

Evidence as to character of the accused is generally inadmissible against him. 22 C.W.N. 494=19 Cr. L. J. 776=46 Ind. Cas. 696.

——Criminal trial—Trackers—Value of.

It is unsafe to rely completely on the evidence of trackers as to the correspondence of tracks. 65 P.L.R. 1917=40 P. W. R. 1917, Cr.=18 Cr. L. J. 897=42 Ind. Cas. 129.

——Value of—Torture resorted to, to extract the evidence.

Evidence obtained by torturing the deponent has no value. 17 Cr. L. J. 351=35 Ind. Cas. 527.

——Criminal trial—Statements made in the course of trial only and not in Police investigation.

Statements made in the course of trial only while they were not made in Police investigation are not to be believed. 54 P. L. R. 1916=17 Cr. L. J. 284=47 P.W.R. Cr. 1915=34 Ind. Cas. 1004.

——Criminal trial—First report—Omission—Track evidence value of.

Where the first report makes no mention of the offender and the complainant when questioned named nobody as his assailant the complainant's subsequent statement that he had identified the accused at the

time of attack cannot be relied upon. The track evidence of a flimsy nature could not be believed without sufficient corroboration. 10 P.W.R. (Cr.) 1915=91 P.L.R. 1915=16 Cr. L.J. 222=27 Ind. Cas. 346.

——Criminal trial—Statements of accused in police custody.

Per **Sankaran Nair, J.** Statements of accused in police custody are notoriously untrustworthy. (1912) M.W.N. 825=18 Cr. L. J. 465=20 Ind. Cas. 721.

——Criminal trial—Witness—Credibility of—Conviction of accused.

Evidence of a person, who knew the accused previously and who had ample opportunity of observing the accused at the dacoity and who immediately named him to the villagers and the police as one of the dacoits, is credible. 8 M. L. T. 244=11 Cr. L. J. 623=8 Ind. Cas. 317.

——Criminal trial—Dacoity—Association.

Evidence of actual participation by an accused in any given dacoity, is evidence both of his association with the gang and of his object in such association. Evidence though not believed for the purpose of a conviction under S. 395, I.P.C., may yet be relied upon for the purpose of a conviction under S. 403, I. P. C. 13 O. C. 235=11 Cr. L. J 551=7 Ind. Cas. 1006.

30. Criminating question.

See EVIDENCE ACT, S. 132.

31. Cross-examination.

See EVIDENCE ACT, Ss. 138 to 140, 145, 146, 154, 161 and 165.

32. Custom.

See EVIDENCE ACT, S. 48.

33. Documents.

See also EVIDENCE ACT, Ss. 60, 91 and 92.

(a) **Account Books.**
(b) **Award.**
(c) **Decree.**
(d) **Horoscope.**
(e) **Judgment.**
(f) **Probative value.**
(g) **Proof of.**
(h) **Receipts.**
(i) **Records.**
(j) **Relevancy.**
(k) **Reports.**
(l) **Taidad.**
(m) **Miscellaneous.**

33. (a) Account books.

——Documents—Account books.

The nothing of the items in the account book kept regularly by munim in whose presence the money was not paid is no evidence. 75 Ind. Cas. 812=A. I. R. 1923 Lah. 431.

33. (b) Award.

——Documents—Award.

Where exclusive title is set up on the strength of an award, the award must be produced. 96 Ind. Cas. 14 =A. I. R. 1926 Oudh 522.

33. (c) Decree.

——Documents—Decree.

Where there was a decree in favour of a co-sharer, against Government followed by a partition in accordance with the decree between that co-sharer plaintiff and Government.

Held, the decree being followed by partition is relevant and is an important piece of evidence in a suit by the plaintiff against the Government in respect of portion of the property covered by the previous suit. 77 Ind. Cas. 1048=32 M.L.T. 162=1923 M. W. N. 511 =50 Cal. 446=50 I. A. 121=28 C. W. N. 453=4 L. R. P. C. 50=A. I. R. 1923 P. C. 1=45 M. L. J. 444 (P. C.).

33. (d) Horoscope.

——Documents—Horoscopes.

Horoscope is not in itself a probative document. The importance of the custody of the documents related to their genuineness and not to relevancy. 83 Ind. Cas. 840=11 O. L. J. 164=A. I. R. 1924 Oudh 353.

——Documents—Horoscope—Admissibility of.

A Horoscope is admissible in evidence to show date of birth and parentage. It is corroborative or rebutting evidence of the person who had prepared it. 5 O.L.J. 655=21 O.C. 298=48 Ind. Cas. 400.

33. (e) Judgments.

——Judgment between same parties—Value of.

A previous judgment between the same parties, even if it does not operate as **res judicata**, is a valuable piece of evidence which cannot be ignored. 224 Ind. Cas. 117=48 P.L.R. 195=A.I.R. 1946 Lah. 387.

——Document—Judgment—Proof of litigation.

The fact that a judgment is admitted in evidence in order to prove that there was litigation which terminated in a certain way, does not make all the recitals in that judgment part of the evidence in the subsequent action. 20 C. W. N. 643; 23 C. L. J. 583 and 42 M.L.J. 324 (F.B.), Foll. 81 Ind. Cas. 667=28 C. W. N. 62=A.I.R. 1924 Cal. 523.

——Document—Judgments—Proof of Custom.

Where a question of custom is under consideration, a succession of judgments relating thereto is valuable evidence from which the Court can come to a conclusion. 74 Ind. Cas. 225=9 O.L.J. 552=A.I.R. 1923 Oudh 61.

33. (f) Probative value.

——Medical certificate—value.

There is nothing in the Evidence Act or outside it which makes a certificate given by a medical practitioner by itself evidence at all, relating to the illness of a witness which causes that witness to be absent

from Court; on a particular day. A.I.R. 1935 Mad. 659=42 M.L.W. 22=1935 M.W.N. 760=156 Ind. Cas. 143.

——Documents—Probative value.

The decision of a question of fact must depend on evidence. That evidence may be, and naturally, is documentary, but the documents admitted in evidence upon that question are really historical materials and although they have to be construed, and if possible understood, they are not to be treated as involving issues of law merely because they have to be construed. It is not as though they were being construed as instruments of title, or were contracts or statutes, or otherwise the direct foundation of rights. 74 Ind. Cas. 482=40 C.L.J. 16=29 C.W.N. 131=21 A.L.J. 723=25 Bom. L.R. 1287=4 L.R.P.C. 184=33 M.L.T. 291=1923 M.W.N. 832=4 P.L.T. 627=A.I.R. 1923 P.C. 187=45 M.L.J. 663 (P.C.).

——Document—Probative value of.

Writing does not by itself give any greater sanction to a statement or take the place of the sanction imposed by law. A document does not give itself nor is an improved signature proof of its having been written by the person whose signature it purports to bear. (1909) 37 C. 467=14 C.W.N. 1114=7 Ind. Cas. 359.

33. (g) Proof of.

——Document—Proof—Objection to mode of proof—When to be raised.

When no objection is taken to the mode of proof of a document at the time it is produced in Court, the party opposing its production cannot take any objection at a later stage. A.I.R. 1950 Pepsu 56.

——Document—Proof—Mode—Objection.

Any objection as to the method of proving a particular document must be taken when it is tendered for admission. 82 Ind. Cas. 974=A.I.R. 1925 Cal. 452.

——Documents—Proof of—Production by accused.

A document produced by the accused in support of his own defence need not be formally proved by prosecution as against the party producing it. 112 Ind. Cas. 902=30 Cr. L.J. 38=11 A.I. Cr. R. 526=A.I.R. 1929 Nag. 43.

——Document—Proof—Produced and exhibited in presence of opposite party.

Formal proof should be presumed to have been waived where a document is produced in the presence of the opposite party and marked as an exhibit. 98 Ind. Cas. 800=24 M.L.W. 677=A.I.R. 1927 Mad. 76.

——Document—Proof—Waiver.

The question of relevancy of a document is a question of law and can be raised at any stage but the question of proof is a question of procedure and can be waived by the parties. 63 Ind. Cas. 625=3 Pat. L.T. 149=A.I.R. 1922 Pat. 122.

——Documents—Certificate—Mode of proof.

A certificate is inadmissible in evidence without the writer of the certificate being produced in court and examined as a witness. 19 C.W.N. 1148=22 Ind. Cas. 654.

33. (h) Receipts.

——Receipt—Value of.

A receipt giving no details and not supported by reliable evidence as to the actual amount paid was of very little value even though there was evidence to the effect that a substantial sum had actually been paid. 33 P.L.R. 1918=55 P.W.R. 1918=44 Ind. Cas. 433.

——Receipt—Value of—Deed.

The written acknowledgment of receipt is undoubtedly evidence of the fact that the money has been received, but it is not conclusive. 85 Ind. Cas. 164=4 Pat. 210=6 P.L.T. 47=3 Pat. L.R. Cr. 85=1924 P.H.C.C. 349=A.I.R. 1925 Pat. 281.

33. (i) Records.

——Inam Register—Entries or notes in as to irrigation source—Evidentiary value of—Mention of stream or channel alone without mention of bund or dam to divert water—If negatives right to put up dam—Right to put up dam—If incident of right to take water.

Inam proceedings are primarily concerned with the fixation of the quit-rent of the inam lands with a view to offer to the inamdar the enfranchisement thereof on condition of paying the quit-rent in prepetuity. For that purpose, the irrigation and the nature of the crops and other essential items of information have to be gathered and noted. The mention of irrigation source is therefore one of the essential features of the entries in the Inam Register, but the method and manner by which that irrigation right is exercised, that is to say, whether it is by the construction of a dam or not, is not ordinarily necessary because it does not enter into the calculations regarding assessment. This being the normal procedure in such matters, and having regard to the nature of inam proceedings and the entries thereunder the note or entry in the Inam Register as to the irrigation source of wet lands in the inam village at the time is a very cogent and relevant piece of evidence; and the non-mention of a dam is not in any way indicative of the non-existence of the right to take the water from the specified irrigation source by means of a dam. These inam proceedings and the entries in the Inam-Register are of course not conclusive, but are very strong pieces of evidence not to be lightly disregarded except for solid or substantial reasons or on account of other rebutting or contrary evidence.

Once the right of irrigation from a stream or channel is made out, one of the ordinary modes of the exercise of such right is by putting up a bund or a dam across the stream or channel. What is required to be proved is not the right to put up a dam, but the nature, extent and duration of the dam so as not to interfere with the rights of the other persons lower down the stream. Such proof will depend upon the established user in relation to the matter. But though the right to put up a dam for the purpose of taking water from the irrigation source in a reasonable manner to a reasonable extent to be measured with reference to the accustomed user is inherent in the right to get water from an irregation source, once the same is established, it does not by any means follow that there is necessarily a right to put up a particular dam, such as a masonry dam, at a particular place. That is a matter to be established by positive evidence. A.I.R. 1950 Orissa 257.

——**Document—Inam statement—Inam register.**

An Inam statement is only a statement made by a party at the Inam inquiry and is merely an assertion of his alleged title before a tribunal which has to decide it. The Inam register embodies the result of the finding of the Inam Commissioner, based partly on statements put in by the parties and partly on other evidence and should be looked to see what the facts were. 'Maseethu' is a Telugu form of the Hindustani word "Musjid" which means a Mosque and a 'Punjab' is not called "Maseethu" in Telugu.

The word Devadayam implies a public endowment. 24 Mad. 243, Foll. 77 Ind. Cas. 777=19 M.L.W. 174=1924 M.W.N. 217=34 M.L.T. 347=A.I.R. 1924 Mad. 491=46 M.L.J. 245.

——**Documents—Rawalpindi Cantonment records.**

Cantonment records—General Land Register of Rawalpindi Cantonment—No implicit reliance can be put upon it without corroboration by other testimony of an unimpeachable character. A.I.R. 1935 Lah. 588 =37 P.L.R. 236=36 Cr.L.J. 1475=158 Ind. Cas. 858.

——**Document—Settlement record—Village note in—Presumption of correctness.**

No presumption of correctness attaches to a village note relating to a certain village in the settlement relating to that village. Such a note is only a piece of evidence. I.L.R. (1949) Cut. 312.

——**Settlement maps—Evidentiary value.**

Settlement maps, however important they may be, and whatever be their evidentiary value, cannot take the place of documents of title. 1947 O.W.N. 509= A.I.R. 1948 Oudh 139=1947 A.W.R. (C.C.) 366.

——**Documents—Maps—Thak or Survey Map—Value of.**

A survey map may be presumed to be correct when made and to furnish valuable evidence of the state of things at that time and the question whether the facts stated on a **thak** or survey map were in existence is essentially one of fact and should be determined on the facts and circumstances of each case. 2 D.R. 265.

——**Documents—Irrigation slips—Value.**

Even though irrigation slips may not carry any presumption of accuracy they are admissible in evidence and are relevant as pieces of evidence in support of the possession of the party in whose favour they are issued. 1948 R.D.. 258.

——**Documents—Private document—Conflict with Government records.**

A mere document between private parties cannot possibly be proof of the correctness of any description of the land contained therein, in the face of entries in Government records. 79 Ind. Cas. 881=A.I.R. 1925 Mad. 143.

——**Documents—Hakikat Chauhaddi Bundi papers.**

Hakikat Chauhaddi Bundi papers are boundary papers prepared by the owners of the estates and submitted to Government. 26 C.L.J. 500 (P.C.), Foll. 65 Ind. Cas. 866=34 C.L.J. 141=A.I.R. 1921 Cal. 687.

——**Documents—Maps—Entries.**

The entries in **Thakbast** map and **Khasra** made by an Amin before and for the preparation of survey have no evidentiary value. 71 Ind. Cas. 984=1923 M.W.N. 361=27 C.W.N. 925=3 P.L.T. 605=49 I.A. 399=36 C.L.J. 499=32 M.L.T. 1=2 Pat. 38= A.I.R. 1922 P.C. 272=45 M.L.J. 460 (P.C.).

——**Documents—Official—Latter of a Resident showing the Head of State to be ruling chief—Prima facie evidence.**

A Letter from the Resident of a native Government stating that the Head of the State is a Ruling Prince is **prima facie** evidence of his being so. 21 P.R. 1909 =27 P.W.R. 1909=32 P.L.R 1909=1 Ind. Cas. 604.

——**Records of Circuit Committee—Dispute between jamindar and Mohasadar.**

Although the records of the Circuit Committee may be good evidence with reference to the system upon which the Government claimed to deal with the zamindar's property, they cannot affect the rights of the mokhasadar as against the zamindar with regard to which no independent enquiry appears to have been made. (1909) 10 C.W.N. 161=3 C.L.J. 1=16 M.L.J. 1=3 A.L.J. 55=29 M. 52=33 I.A. 46=1 M.L.T. 3=8 Bom. L.R. 1 (P.C.)

33. (j) Relevancy.

——**Document—Relevancy of—Consideration by appellate Court—Civil P.C., O. 44, R. 24.**

The first appellate Court which is a Court of fact as well as of law can consider the question of the relevancy of a document which is only a piece of evidence, though this question was not raised in the trial Court. 109 Ind. Cas. 25=A.I.R. 1928 Cal. 512.

——**Documents—Relevancy of—Against non-party.**

Documents prepared by a surveyor under the authority of the Collector who was then the agent of the Court of Wards in the course of a survey under the Court of Wards Act for the purpose of the Court of Wards are of little or no probative value in a case of a person who was in no way concerned in the proceedings before the surveyor. 98 Ind. Cas. 301=A.I.R. 1927 Mad. 60=51 M.L.J. 637.

——**Suit for declaration of right of way—Complaints to magistrate of obstruction—If relevent to prove date of obstruction.**

Where, in a suit for declaration of a right-of-way, the defendant pleaded that the obstruction took place more than two years before suit, a complaint by the plaintiff that obstruction took place on a certain date is not relevant evidence to prove the date of obstruction. (1901) 6 C.W.N. 31.

33. (k) Reports.

——**Settlement report—Official report and mutation proceedings—Evidentiary value of as regards title.**

Settlement reports, however valuable they may be in giving a history of the areas coming within the operation of the settlement, are by no means conclusive of matters requiring judicial detemination, and they cannot, therefore, be taken as proof of title or division of shares. Nor can proceedings for mutation of names be taken as judicial proceedings in which title to, and proprietary interest in, immovable properties are determined. They are in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property

may be put in occupation of it. Orders in mutation proceedings are not evidence that the successful applicant was in possession as the sole legal owner in a proprietary sense, to the exclusion, for example, of all claims of other members of his family, as co-owners maintenance-holders or otherwise. Revenue authorities have no jurisdiction to pronounce on the validity of such claims. So also official reports regarding the nature of any estate, are valuable and in many cases the best evidence of the fact stated therein; but opinions therein expressed are not conclusive in respect of matters requiring judicial determination, however eminent the authors of such reports may be. It is not the function of such officers to decide questions of title. I.L.R. (1949) Cut. 139.

——Documents—Commissioner's report—Value—Commissioner estimate as to age of trees, when Commissioner is not an expert.

Where a person who has no expert knowledge on the question of the age of trees is appointed a Commissioner his estimate as to the age of certain trees can be treated, only as a rough one and cannot be taken as the last word on the subject. 1948 R.D. 274.

——Documents—Commissioner's report.

A Commissioner's report is evidence in the case but Courts should take care to see that the report is filed as an exhibit. 98 Ind. Cas. 301=A.I.R. 1927 Mad. 60= 51 M.L.J. 637.

——Documents—Commissioner's report.

Ordinarily in a boundary dispute the Commissioner's report is of great importance but where the finding of the Commissioner are inconclusive his report is not of much help to the Court. 90 Ind. Cas. 643=At I. R. 1926 Cal. 290.

——Collector's report—Proceedings under S. 13, Guardians and Wards Act—How for evidence—S. 46.

Apart from S. 46 of the Guardians and Wards Act, the report of a Collector as to any matter arising in proceedings under S. 13 is not evidence. (1902) 4 Bom. L.R. 800.

33. (l) Taidad.

——Presumption—Revenue free title.

Taidad filed in 1802 claiming lakheraj grant—Government not taking proceedings to assess lands to Revenue. **See** BENGAL REVENUE FREE LANDS (NON-BADSHAHI GRANDS) REGULATION (XIX OF 1793), Ss. 26 AND 27. 81 C. L. J. 274. A.I.R. 1947 Cal. 209.

33. (m) Miscellaneous.

——Document—Execution of—Subsequent conduct how far evidence of the real nature of the transaction—Intention at the time of the execution.

The intention of the parties to treat the execution of a deed as nominal must be sought wholly in the extent to which the deed was acted upon. (1902) 4 Bom. L.R. 180=26 B. 577.

——Documents—Privilege attaching to documents—Such documents to be properly described for identification—Documents passing between a company and its officials after threatened suit not per se privileged.

The defendants are bound to describe the documents for which they claim privilege sufficiently for the purpose of identification to enable the Court to order their production should the Court think right to do so. 7 Q.B.D. 400, foll. In a suit against a Railway Company, the papers which between the Company and its officials relating to the subject matter in dispute since the plaintiff threatened a suit are not by nature privileged. If privilege is claimed for any of them, the grounds thereof should be clearly set forth in the affidavit. (1908) 10 Bom. L.R. 796.

——Document—Obiter remarks as to genuineness in previous litigation.

An obiter remark doubting the genuineness of documents ought not be taken into consideration in a subsequent litigation where the genuineness of the documents comes into question. (1902) 29 C. 740.

——Document.

The minutes of a meeting are **prima facie** evidence of what happened at the meeting. 90 Ind. Cas. 580=26 Bom. L.R. 987=A.I.R. 1925 Bom. 49.

34. Dumb Witness.

See EVIDENCE ACT, S. 119.

35. Duty of Court.

——Duty of Court in admitting document.

Every document, particularly in a criminal trial, must be admitted in evidence to throw light on the obscure corners of the case. That light should always be welcome unless its entry in the Court is shut out for very special reasons. A.I.R. 1946 All. 227=1945 A.W.R. (H.C.) 298 (2).

——Duty of Court—Information gained from other cases—Not to rely on.

A Judge cannot rely for the rejection of the important witness in the case on information gained from other cases heard by him. A.I.R. 1941 Lah. 22=193 Ind. Cas. 327.

——Duty of Courts—Documents—Admissibility—Parties must get fair chance to produce evidence.

Where the question is as to whether the documents should or should not be taken in evidence by the Appellate Court, what the Court has to see is whether the parties have had a fair chance of placing their cases before the Court or not. A.I.R. 1936 Pat. 631=3 B.R. 140=166 Ind. Cas. 216.

——Duty of Court—Doubt as to admissibility of evidence.

It is a principle of law that if it is doubtful whether evidence is admissible or inadmissible then the benefit must be given in favour of the evidence. 109 Ind. Cas. 774=A.I.R. 1928 Lah. 824.

——Duty of Court—Loss of document—Absence of plea—Relevant evidence.

A document which was relied on was mentioned in the plaint. The document was lost and the fact that it was lost was mentioned in an oral pleading made while evidence was being given and leave was asked to prove it by secondary evidence. This was refused on the ground that no plea of loss of document was raised in the earliest stage. The document was found subsequently and was tendered in the lower Appellate Court, and that Court was of opinion that the refusal to admit secondary evidence was correct because no plea about the loss of the original document was made

and he refused to accept the document itself for the same reason.

Held, it is the duty of a Court to get hold of all the relevant evidence there may be and to examine it, giving of course due weight to any circumstances attending its production that might render it less or more credible, and giving the other party a fair opportunity of meeting it, and no Court has the right to reject evidence tendered at any stage of the trial before its close unless it is irrelevant. 103 Ind. Cas. 186=10 N. L. J. 129=A.I.R. 1927 Nag. 289.

——Duty of Court—Relevant evidence.

It is the duty of the Court to welcome any evidence that may be offered and indeed to search for it, and it is wrong to exclude any evidence that is relevant. If it is tendered late, such suspicion or disbelief of it as may be due to that fact will attach to it automatically, and if the other party has had no opportunity, because of the lateness of production of rebutting evidence he might have had, the disbelief is greatly increased. 92 Ind. Cas. 102=8 N.L.J. 227=A.I.R. 1926 Nag. 139.

——Duty of Court — Admissibility — Summary decision of.

Matters tendered in evidence by the prosecution affecting case, must be dealt with summarily and instantly by the Judge at the trial when they are tendered. Judges in a Court of appeal, are apt sometimes to attach weight to the opinion of the assessoss' and although their opinion does not have any legal effect, the Judge ought to guard very carefully against allowing a discussion in Court, of the reading of a document in Court, in the presence of the assessors injurious to the accused, when it is by law inadmissible. The benefit of a reasonable doubt ought to be given from the Bench, even to the admission of evidence particularly documentary evidence, during the trial, and when the Judge is unable to make up his mind about admissibility, the proper course for him is, either to direct the prosecution to keep back the documents until he has an opportunity of looking into the law, or to reject them altogether. No Judge in a doubtful case of admissibility ought to allow the evidence first to be given, and then in his judgment give a decision about their admissibility. Doubtful or inadmissible documentt ought not to be admitted in criminal trials. 86 Ind. Cas. 817=26 Cr. L. J. 881=6 L.R.A. Cr. 73=A.I.R. 1925 All. 405.

——Documents—Duty of Court to receive.

As the value of a document cannot be judged before it is produced and inspected, the Court is bound to accept a document produced and to look at it before it is excluded. 10 Cr. L. J. 492=13 C. W. N. 550=4 Ind. Cas. 67.

——Duty of Court—Treatment of witnesses.

Judge should invariably treat witnesses with courtesy and insist that counsel should do so, though instances do arise in which firmness is neccssary. A.I.R. 1941 Pat. 362=22 P.L.T. 327=7 B.R. 875=195 Ind. Cas. 107.

——Duty of Court—Witness a simple village—evidence of.

The simplicity of an ordinary villager can never be a sure and effective shield against the ingenuity of a trained awyer of the case. A. I. R. 1936 Rang. 71=37 Cr. L.J. 463=161 Ind. Cas. 574.

—— uty of Court—Evidence of both sides to be considered.

Where a Judge considers evidence produced by one party and records a definite finding before considering the evidence relied on by the other party, his treatment of the evidence is objectionable. A. I. R. 1939 All. 626=1939 A.L.J. 708=1939 R. D. 493=1939 A. W. R. 671=186 Ind. Cas. 564.

——Duty of Court—Benefit of admissions of a party.

The plaintiff is entitled to the benefit of the admission made in his favour by those defendants who confessed judgment. A. I. R. 1936 Lah. 971=38 P. L. R. 578=166 Ind. Cas. 70 (1).

——Duty of Court—Allegation against deceased person—Scrutiny of.

Where an allegation is made against a deceased person to the detriment of his estate, Courts of law should scrutinize it carefully before accepting it as correct. 125 Ind. Cas. 442=32 Bom. L. R. 201=A.I.R. 1930 Bom. 236.

——Dnty of Court—Written statement manifestly not true.

A written statement which is manifestly not true cannot be used as substantive evidence of the truth of what is stated in it. To do so is contrary to technical rules of evidence. A. I. R. 1930 Pat. 293=126 Ind. Cas. 369.

——Duty of Court—Guilt or innocence—Decision on—Not soundness of plea.

Even the entire omission of an available true and complete defence and the substitution for it of unsustainable falsehoods are so closely in accordance with the common, indeed almost universal course of human conduct that it cannot be inferred from such a defence that the guilt of the accused is likely. It is the duty of a Magistrate to find out whether an accused person is guilty or innocent, not merely to decide whether the pleas he chooses to put forward are sound or not. 66 Ind. Cas. 1001=23 Cr. L. J. 345=A. I. R. 1922 Nag. 87.

——Duty of Court — Production of books—Enforcement of order.

All account books must be produced by the party who has possession of or control over them. If a party disobeys the order made in this behalf, the Court has ample power to enforce its order. 66 Ind. Cas. 811=25 C.W.N. 847=A.I.R. 1921 Cal. 538.

——Duty of Court—Materials placed by consent—Decision on—Practice.

It is open to parties to agree as to materials to be placed before the Judge for his decision and if the Judge acts on such agreement, he does not thereby delegate his functions as a Judge. So if the parties consent, the Judge can act on the evidence taken by a Commissioner unauthorisedly. 66 Ind. Cas. 49=25 C. W. N. 369=A.I.R. 1921 Cal. 363.

——Duty of Court — Several accused charged—Necessity to ascertain what each individual did.

A court should always examine witnesses in great detail and elicit facts from them to show what was done by each of the accused persons, so that the court may be in a position to Judge of the culpability of each individual. (1901) 6 C.W.N. 72.

36. Duty of Judge.

See (1) CIVIL P. C., S. 107 AND O. 20, R. 4.
(2) CRIMINAL P.C., S. 367.
(3) EVIDENCE ACT, S. 136.

37. Dying declaration.

See also EVIDENCE ACT, S. 32.

——Value of—Dying declaration—Deceased himself aggressor—Lapse of time between occurrence and statement—Effect.

Under ordinary circumstances a dying declaration has considerable evidential value, but in cases where the deceased was himself the aggressor and there was sufficient lapse of time between the occurrence and recording of his statement the dying declaration loses its value. 1946 M.L.R. 27 (Cr.).

38. Estoppel.

See EVIDENCE ACT, SS. 115 to 117.

39. Examination-in-chief.

See EVIDENCE ACT, SS. 137, 138.

40. Exclusion of.

——Exclusion of evidence—Production at late stage.

Where an application made for admitting, at an abnormally late stage, evidence which could have been equally well produced at the proper time is vexatious and made with the object of delaying disposal of the suit, such evidence should be excluded. 109 Ind. Cas. 195=A.I.R. 1928 Nag. 223.

——Exclusion of evidence—Caste People—Voluntary evidence—If not grounds for.

Defence evidence should not be rejected on the ground that the witnesses were the caste-fellows of the accused or that they had come forward at the trial voluntarily without being summoned. 43 All. 186; A.I.R. 1923 All. 35 and 22 O. C. 375, Rel. on. 89 Ind. Cas. 147 =12 O. L. J. 413=26 Cr. L. J. 1283=29 O. C. 44= A.I.R. 1925 Oudh 473.

——Brahmins accused—If sufficient for rejecting reliable evidence.

Where the only ground which the lower Court gave for disbelieving witnesses was that accused were **Brahmins**, that the deceased was a woman and that the witnesses did not consider the death of a mere woman of any importance compared with the lives of **Brahmins** who were accused of her murder.

It was, **held**, the mere facts that the accused are **Brahmins** is not a sufficient reason for rejecting the evidence of witnesses who are **prima facie** reliable. 75 Ind. Cas. 733=6 L.L.J. 486=25 Cr. L. J. 45=A. I. R. 1923 Lah. 436.

——Exclusion of—Relevant evidence—Technical grounds.

The exclusion of evidence of relevant facts on merely technical grounds is always to be deprecated. No legal fiction of presumption can lead to a just decision so surely as an ascertained truth. 69 Ind. Cas. 619=A.I.R. 1923 Nag. 83.

——Exclusion of—Duty of Court to admit all relevant evidence—Effect of omission.

Held, that the Court below was not justified in refusing to exhibit the account books, which if regularly kept would be most material evidence in favour of the plff. and in refusing to examine more than four of his witnesses and that there should be a retrial of the case. 49 Ind. Cas. 756 (Cal.).

41. Expert evidence.

See also EVIDENCE ACT, SS. 45 to 47.

——Expert evidence—Court, if bound to accept.

A Court is not bound to accept the testimony of an expert witness in every case. A.I.R. 1950 Ajmer 68. =1950 A. M. L. J. 84.

——Expert evidence—Dispute as to age—Limitation—Medical evidence.

Medical evidence in cases of age of a party to a suit which falls to be decided for purposes of limitation cannot throw much light because from its very nature it is based on conjectures only and it cannot possibly be looked upon for the purposes of determining with precision the exact age of a particular person. In cases when limitation is pleaded in defence, a difference of even a single day settles the fate of the case one way or the other and no doctor, however conscientious and competent he may be, can give the precise age of a person so as to enable the Court to determine the exact date of that porson's birth. 113 Ind. Cas. 53=10 L.L.J. 183=A.I.R. 1928 Lah. 250.

——Expert evidence—When admissible.

The reports of the experts are not legal evidence unless they appear in Court as witnesses and are examined by both parties in respect of their opinion. 106 Ind. Cas. 493=29 P. L. R. 125=A. I. R. 1928 Lah. 427.

——Expert evidence in a different trial—Admissibility of.

The prosecution is not entitled to put in evidence statements made by a medical expert in some other trial in the absence of the accused. He ought to be examined orally like any other witnesses before the Magistrate and in the presence of the accused. Such statements if placed on record must be ignored. 94 Ind. Cas. 139= 26 Punj. L. R. 80=27 Cr. L. J. 571.

42. Handwriting.

——Disputed handwriting—Proof of—Duty of Judge.

The Judge should not take upon himself the duties of a handwriting expert or an expert of questioned documents but should form his judgment as to the genuineness or otherwise of a document after an intelligent perusal and appreciation of the evidence led by the parties. This evidence is subjected to the acid test of the cross-examination and other checks provided by law. A.I.R. 1935 Lah. 555=156 Ind. Cas. 253.

——Handwriting—Comparison of.

It is not safe for a Court to base its conclusion on a mere comparison of handwriting. 45 Cal. 60=21 C. W. N. 1076=26 C.L.J. 187=42 Ind. Cas. 484.

——Handwriting—Similarity of—Value of.

Similarity of handwriting though of some assistance in determining whether the evidence adduced to convict a certain person with the forgery can be believed is not at all a safe or certain test. 2 A. L. J. 444; 5 Ind. Cas. 355; 6 A.L.J. 184, Foll. 17. O.C. 276=15 Cr.L.J. 643=25 Ind. Cas. 843.

43. Hearsay.

See also EVIDENCE ACT, S. 60.

——Hearsay evidence—Not admissible.

Where evidence to support immigration of a Hindu family from one province into another is of witnesses who have heard about it from deceased members of the family, it is inadmissible. Cls. (5) and (6) of S. 32, Evidence Act do not apply to it. 123 Ind. Cas. 907=A.I.R. 1930 Nag. 267.

——Hearsay evidence—Basis of action—If precluded.

Under the Evidence Act hearsay evidence in admissible to prove a fact which is deposed to on hearsay, but does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed. 97 Ind. Cas. 785=24 M.L.W. 227=A.I.R. 1926 Mad. 1003.

——Hearsay—Objection to admissibility of.

The evil consequence of the admission of hearsay evidence is not merely that it prolongs litigation and increases its cost, but that it may unconsciously be regarded by judicial minds as corroboration of some piece of evidence legally admissible, and thereby obtain for the latter quite undue weight and significance. 6 L.W. 26=21 C.W.N. 345=(1917) M.W.N. 261=10 Bur. L.T. 79=36 Ind. Cas. 20 (P.C.).

——Hearsay—Question—Whether land is rent free—Admissibility.

On the question was whether a certain land was held rent free for 50 years, hearsay evidence is admissible and sufficient to show that it was. 1 O. L. J. 248=24 Ind. Cas. 790.

——Hearsay—Report of an official to whom a complaint is sent for report.

The hearsay report of an official to whom a complaint made to an executive officer as such, had been set for report is no evidence in the case. 2 P. W.R. 1909 Cr.=377 P.L.R. 1909=9 Cr. L.J. 152 =1 Ind. Cas. 93.

44. Hostile witness.

See EVIDENCE ACT, S. 154.

45. Identification.

——Identification proceedings—If evidence.

There is no section of the Evidence Act, which makes the identification proceedings evidence at all. 98 Ind. Cas. 478=7 L.R. A. Cr. 170=27 Cr. L.J. 1358=A.I.R. 1927 All. 163.

——Identification.

Indian women can identify their own articles of jewellery even if they are of a common pattern. 89 Ind. Cas. 449=26 Cr. L.J. 1361=A.I.R. 1926 Lah. 132.

——Identification—When unreliable.

An identification made of a man, who is said to have been wearing a beard at the time of offence and whose beard is concealed or absent at the time of identification, is by no means convincing, and when it stands alone, must be regarded as an unstable piece of evidence. 86 Ind. Cas. 817=26 Cr. L.J. 881=6 L. R. A. Cr. 73=A.I.R. 1925 All. 405.

——Identification—Outsiders with accused—Legality of Procedure.

Where owing to the scarcity of other under-trial prisoners in jail outsiders were brought in and placed in the line with the accused.

It was **held**, that the procedure was no doubt unusual; but in the peculiar circumstances of the case it was justified. 95 Ind. Cas. 756=47 All. 39=27 Cr. L.J. 836=5 L.R.A. Cr. 193=A. I. R. 1925 All. 223.

——Identification—After long time—Value of.

Evidence of identification of persons previously unknown after a number of months that certain persons took part in an attack is unreliable, unless there was a regular identification parade in which the witnesses picked out those persons from among others, especially where it is not stated that such persons bear any distinguishing marks by which they can be recognised. 85 Ind. Cas. 61=6 L.L.J. 320=26 Cr. L.J. 445= A..I.R. 1924 Lah. 722.

——Identification—After questions put by Court—Value of.

Where it appeared that it was only in answer to questions put by the Court that witness deposed to his being able to identify accused.

It was **held**, the danger of accepting such a testimony is apparent, since witness had ample opportunity to see the accused during the committal proceedings. 83 Ind. Cas. 499=26 Cr. L. J. 19=5 L. L. J. 477= A.I.R. 1923 Lah. 662.

46. Impeaching credit.

See EVIDENCE ACT, S. 155.

47. Improper admission and rejection.

See EVIDENCE ACT. S. 167.

48. Judgment.

See EVIDENCE ACT, SS. 11, 41 and 43.

49. Judicial notice.

See EVIDENCE ACT, S. 57.

50. Legitimacy.

See EVIDENCE ACT,S. 112.

51. " May presume. "

See EVIDENCE ACT, S. 4.

52. Minors.

See EVIDENCE ACT, S. 118.

53. Motive.

See EVIDENCE ACT, S. 8.

54. Objection to.

See EVIDENCE ACT, S. 5.

55. Official documents.

See EVIDENCE ACT, S. 79.

56. Opinion evidence.

—See also EVIDENCE ACT, SS. 45 to 51.

——Opinion evidence—Admissibility of.

Only what the witness actually saw and ward as to what a mob was doing and saying is admissible to prove the nature of the assembly; his opinion and impressions that the assembly appeared to be unlawful are not admissible. 105 Ind. Cas. 234=28 Cr. L. J. 906=9 P. L. T. 260=A.I.R. 1928 Pat. 98.

——Medical opinion—Eye-witnesses—Conflict.

Where the opinion of the doctor who visited the patient on one day was that she would not be capable of a particular action the next day after his visit.

It was **held**, the opinion must be hypothetical and cannot be implicitly relied upon or at any rate it must be put into the scale against the evidence of those who actually deposed that the particular act had been done by the patient. 83 Ind. Cas. 616=26 Bom. L. R. 622=A.I.R 1924 Bom. 457.

——Opinions—Report of officers.

The report of a Tahsildar or Naib Tahsildar being the result of the investigation made by him is only an expression of his opinion in the matter and cannot be the sole basis of a decision in regard to a question of title. 35 Ind. Cas. 237 (All.).

——Opinion—Panchayat—Guilt of accused.

The opinion of a **panchayat** as to the guilt of suspects when the latter decline to prove their innocence in the manner laid down by the **panchayat** is not a relevant fact. 13 P. R. (Cr.) 1914=16 Cr. L.J. 33=223 P.L.R. 1915=26 Ind. Cas. 625.

——Opinion—Witness—Value of.

The opinion of a witness is not entitled to any attention. 1 O.L.J. 447=25 Ind. Cas. 823.

57. Oralal.

See EVIDENCE ACT, SS. 3, 22, 60, 92.

58. Pedigree.

See also EVIDENCE ACT, S. 32.

——Geneology—Memory and tradition—Evidence based on—Admissibility.

In matters of geneology reliance can be placed upon memory and tradition. 30 P.L.T. 359.

——Pedigree—Unknown common ancestor—Relationship.

There can be no legal proposition that because the name of the common ancestor is not known, the relationship cannot be held to be proved. 104 Ind. Cas. 468=50 Mad. 877=26 M.L.W. 115=A.I.R. 1927 Mad. 844=53 M.L.J. 864.

——Pedigree—Common ancestor—Settlement record.

A certain common ancestor of the parties in the pedigree table recorded at the time of settlement indicates that the land in dispute was occupied by him. This is a piece of evidence to be taken into consideration along with other evidence in determining the issue, but it cannot be alone conclusive proof that the property has descended from that common ancestor. 96 Ind. Cas. 349.

——Pedigree—Earlier and later—Conflict.

Out of the two conflicting pedigrees, the one though brought to light later in point of time, but which was supported by verbal evidence and accepted by competent authorities was accepted in preference to that which was originally produced many years ago and contained the statement that it was all the pedigree that was then known made by the person who was the person most likely to have knowledge. 86 Ind. Cas. 326=A.I.R. 1925 P.C. 199.

——Pedigree—Production—Admission of relationship—Evidence Act, Ss. 17 and 21.

From the mere fact that a pedigree is filed by a person, it cannot be assumed that he admitted all the relationship stated in it to be correct. 69 Ind. Cas. 421=9 O. L. J. 186=26 O. C. 109=A. I. R. 1922 Oudh 218.

——Pedigree—Proof of—Value of.

In social conditions where people have not yet learnt to place exclusive reliance on written and printed records and where family pride or family rights encourage the maintenance of a body of oral family history, memory unaided by permanent materials is often a very suffieient medium of record and oral communication often preserves the record with singular uniformity. A pedigree does not therefore lose its value in proportion to its remoteness from the present time at least so far as names and kinship was concerned. 9 L.W. 416=24 M.L.T. 429=28 C.L.J. 53=1 P.W.R. 1919=21 Bom. L. R. 232=28 P. L. R. 1919=48 Ind. Cas. 540 (P. C.).

59. Personal Kowledge.

——Personal knowledge — Parties to mutation proceedings.

It is impossible to fasten the knowledge of mutation proceedings upon persons other than the parties in absence of evidence to show that they had such knowledge. 118 Ind. Cas. 808=A.I.R. 1930 Oudh 17.

——Dispute as to age—Statement of person concerned—Personal knowledge.

A man cannot give direct evidence of his own age, but his statements on the subject are not therefore to be dismissed as of no value. 63 Ind. Cas. 525=8 O.L.J. 324=A.I.R. 1921 Oudh 160.

——Duty of party—Deposition of facts known to him.

It is the bounden duty of a party personally knowing the facts and circumstances to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to descredit the truth of his case. 32 Bom. L.R. 924=54 Bom. 616=127 Ind. Cas. 510=A.I.R. 1931 Bom. 97.

——Personal knowledge—Judge — Local inspection—When reliable.

Where a plaintiff's evidence is not convincing but the defendant has produced practically no evidence, the Court can rely on the local inspection made by itself to determine whether the plaintiff's story is correct. 79 Ind. Cas. 314=21 A.L.J. 886=5 L.R.A. (Civ.) 1=46 All. 115=A.I.R. 1924 All. 153.

——Personal knowledge—Judge—If relevant.

A Judge is justified in using his knowledge of the character of the parties to a suit gained from several litigations in his court, to discredit their evidence. 9 L.B.R. 160=11 Bur. L.T. 98=45 Ind. Cas. 734.

60. Photograph.

——Photographs.

The uses for which mere production of photographs can be accepted as means of proof of matters of fact require careful delimitation.

A photographie picture cannot be relied upon as proof in itself of the dimensions of the depicted object or objects, and cannot be made properly available to establish the relative proportions of such objects except by evidence of personal knowledge or scientific experience to demonstrate accurately the facts sought to be established.

That the extent to which and the processes by which an accurate topographic plan can be produced from a pictorial delineation of a scene are matters of common knowledge could hardly be said, though such questions have long occupied the attention of men of science.

Two pre-requisites for the conversion of a photographed picture of a landscape into a map or plan—**after** ascertainment of the viewpoint of the photographer—are said to be proof that the lens used had been accurately corrected to yield what is known as a flat field and knowledge of the angle to the horizontal plan at which the camera was held. A.I.R. 1931 P.C. 189 =131 Ind. Cas. 771 (P.C.).

——Photograph—Father and son, if admissible.

Where the question of legitimacy arises, the resemblance of the son with the putative father is evidence and so the photographs of both are admissible in evidence. 15 C.L.J. 621=13 Ind. Cas. 678=45 Cal. 878= 47 Ind. Cas. 513.

1. Practice and Procedure.

——The practice of calling as his own witness by a party the clerk of his opponent condemned. A.I.R. 1940 P.C. 63=51 L.W. 578=22 P.L.T. 425=42 P.L.R. 328= 1940 Kar. (P.C.) 134 Sup.=7 C.L.T. 1=1940 A.L.J. 639=I.L.R. (1940) Lah. 470=1940 O.W.N. 315=71 C.L.J. 444=1940 M.W.N. 620=42 Bom. L.R. 640= 1940 A.W.R. 58=44 C.W.N. 625=6 B.R. 535=(1940) 1 M.L.J. 895=67 I.A. 160=187 Ind. Cas. 233 (P.C.).

——Cross-examination—Interference by Court—Discretion—Limits.

Cross-examination—Limits to interference by Court—Discretion—Questioning by appellate Court. **See** 1946 A.W.R. (P.C.) 15=1946 O.A. (P.C.) 15=1945 P.C. 38=221 Ind. Cas. 603.

——Practice—Great deal of evidence strictly unnecessary condemned.

The practice of introducing a great deal of evidence based upon prejudice and not strictly necessary to the inquiry which the Judge is conducting, which is common in India, condemned. A.I.R. 1933 Rang. 363=12 Rang. 64=149 Ind. Cas. 723.

——Procedure—Panchanama—Proof.

It is necessary if a panchanama is to be put in that it should be legally proved, as it does not prove itself. (1905) 7 Bom. L.R. 978.

——Evidence—Taking of—Exclusion of the public.

When the evidence in any case if published in the daily papers is likely to arouse religious or political disquietude, the Judge is entitled to exclude the general body of the public and to decline to let the evidence be published. (1908) 11 Bom. L.R. 409=2 Ind. Cas. 874.

——Admission.

Discretion not well exercised in not admitting—Plaintiff guilty of laches in applying after case closed for admitting document (in Persian) filed with plaint—Order on terms of paying cost of the litigation up to date within a fortnight to other side in any event. (1906) 33 C. 1345.

——Evidence—Pleader—Judge's remarks about the sufficiency of evidence.

When a Judge suggests to a pleader that it is needless for him to call further witnesses for evidence on a particular point and suggests that they should be merely tendered for cross-examination, that is an intimation to the pleader that the Judge is satisfied with the evidence so far as it has gone and that the cross-examination of the witnesses that have been called has not impressed him and when the Judge has made such a suggestion and it has been acted upon by the pleader, he and his client have a just cause of complaint if the judge or his successor afterwards turns round and says "I decree against you on that point." (1904) 6 Bom. L.R. 636.

——Evidence—Powers of Court—Cross-examination on commission, stopping of.

Where it is shown by affidavits that there has been a prolonged and unnecessary cross-examination on commission, the Court ordered the cross-examination should be finished a certain day. (1903) 30 C. 625.

——Examination of defendant as plaintiff's witnesses is objectionable and highly inconvenient. (1903) A. W. N. 70=25 A. 358. **See a(so** 33 A. 104=37 I.A. 1 (P.C.).

62. Presumption.

See also EVIDENCE ACT, SS. 79 TO 90, 101 TO 104 AND 114.

——Presumption of correctness—Entry of land in Record of rights, as niskar in earlier record and as rent paying land in later record—Presumption of correctness of latter—If rebutted by entry in earlier.

The entries in a later record of rights are presumed to be correct until rebutted by evidence. There is, however, no presumption of correctness in respect of entries in an earlier record of rights. The mere fact that a certain land was recorded as **niskar** in a record of rights of the year 1893, cannot possibly rebut the presumption of correctness relating to the entry in the current (later) record of rights of the same land as rent-paying land, especially when the former entry was based on a compromise, and entry in the later record has become final and has remained unchallenged. A.I.R. 1949 Cal. 609.

——Presumption — Advance by one brother to another—If gift—General rule—Loan.

It is a rule of equity that where money has been paid, it must either be repaid or properly accounted for. An advance made by one person to another, is usually a loan, and the mere fact that the advance is made by one brother to another does not raise a presumption that it is a gift and not a loan. A.I.R. 1948 Pat. 247.

——Presumption—Possession—Record-of-rights.

The presumption of correctness, which attaches to the finally published Record of Rights, relates only to possession at the time when the record is prepared: and, even if such presumption can be made in a criminal trial, it is clear that where there has been an interval of 10 or 12 years between the preparation of the record and the occurrence of an offence in respect of dispute arising over possession of land, any presumption arising

from the record is obviously of the weakest possible description. Indeed the probative value is practically nil since all sorts of changes may obviously take place in the course of 10 or 12 years. 34 C. W. N. 170=1930 Cr. C. 134=A.I.R. 1930 Cal. 134.

——Presumption—Demeanour—Finding of trial Court, basis for.

Trial Court not mentioning that reliance was placed on demeanour of witnesses — Reliance should be presumed.

Even though the trial Court does not mention that reliance was placed on demeanour of witnesses, it must be presumed. 118 Ind. Cas. 257=7 Rang. 498=30 M.L.W. 569=A.I.R. 1929 P.C. 202.

——Presumption—Non-production of document.

Non-production of important documents raises adverse presumption against party not producing the documents. 109 Ind. Cas. 96.

——Presumption—Stolen property.

The fact that a person is found in possession of stolen property shortly after the theft raises the presumption that he took part in the theft. 123 Ind. Cas. 393=31 Cr. L.J. 492.

——Summon to witness—Failure to examine—Presumption.

Where both parties did summon the two attesting witnesses, and as the plaintiff gave them up the defendants did the same, the inference that if they had been examined they would have deposed against the plaintiff, cannot be drawn. 96 Ind. Cas. 401=A. I. R. 1926 Nag. 482.

——Credibility of witness—Relation to party—No presumption.

The mere fact that a witness is related to a party is not a true criterion for holding that he has given untrue or perjured evidence. 98 Ind. Cas. 166=5 Bur. L.J. 116=A.I.R. 1926 Rang. 204.

——Presumption—Separate acquisitions of holder of impartible raj. SEE HINDU LAW—IMPARTIBLE RAJ. 27 All. 203=2 A.L.J.=720 (1904) A.W.N. 244.

63. Previous conviction.

See EVIDENCE ACT, Ss. 14, 54 AND 153.

64. Previous depositions.

See EVIDENCE ACT, S. 33.

65. Privileged communications.

See EVIDENCE ACT, Ss. 122-125.

66. Public documents and records.

See EVIDENCE ACT, Ss. 35, 74.

67. Rebuttable presumptions of fact.

See EVIDENCE ACT, Ss. 86-88 AND 90.

68. Rebuttable presumptions of law.

See EVIDENCE ACT, Ss. 79 TO 85 AND 89.

69. Recitals.

See also EVIDENCE ACT, Ss. 21, 32.

(a) **Admissibility.**

(b) **Of necessity.**

(c) **Value of.**

69. (a) Admissibility.

——Recitals—Living person—Admissibility.

Where a document containing recitals by a person who is alive is admitted in evidence as evidence of a transaction, the recitals in the document do not become part of the evidence unless the person making the assertions is brought before the Court. 68 Ind.Cas. 282=A.I.R. 1923 Cal. 290.

——Recitals—Deeds of third parties—Admissibility—Evidence Act, Ss. 11, 13 and 32 (2).

Recitals of boundaries of lands in documents between third parties are not admissible in evidence under S. 11 or S. 13 but are admissible under S. 32 (2) of the Evidence Act. 68 Ind. Cas. 314=A.I.R. 1923 Nag. 22.

——Recitals—Boundaries—Third parties' documents.

Recitals of boundaries of other lands in documents between third parties are not admissible in evidence. 63 Ind. Cas. 954=25 C.W.N. 1022=35 C.L.J. 19=A.I.R. 1922 Cal. 251.

——Recitals—Admissibility of, against strangers.

Under ordinary circumstances and apart from statute recitals in deeds can only be evidence as between the parties to the conveyance and those claiming under them, Recitals of necessity in a deed of alienation by a Hindu widow are of little weight as against reversioners. 44 Cal. 186=20 M.L.T. 335=31 M.L.J. 563=(1916) 2 M.W.N. 336=4 L.W. 458=18 Bom. L.R. 868=14 A.L.J. 1103=24 C.L.J. 487=1 Pat. L.W. 1=21 C.W.N. 225=10 Bur. L.T. 177=43 I.A. 249=36 Ind. Cas. 420 (P.C.).

——Recitals in deeds—Third parties—Value of.

Recitals in deeds are only evidence against the parties to the deed and persons claiming through or under them. 69 Ind. Cas. 409=A.I.R. 1923 Lah. 31.

——Recitals—Evidence only against parties.

The recitals in a deed are strictly speaking evidence only against the parties to the deed and those claiming through them. 41 Bom. 300=21 M.L.T. 236=32 M.L.J. 175=19 Bom. L.R. 151=(1917) M.W.N. 258=21 C.W.N. 558=25 C.L.J. 311=44 I.A. 36=39 Ind. Cas. 627. (P.C.).

——Recitals—Third person.

Recitals in a deed are not relevant evidence against a person who is not a party to the deed. But the parties to the deed may be presumed to have allowed the recitals to be embodied in the deed without objection. 133 P.W.R. 1913=224 P.L.R. 1913=19 Ind. Cas. 770.

——Recitals—Value against strangers.

A recital in a document is not evidence as against a stranger to it. 17 C.L.J. 173=15 Ind. Cas. 698.

69. (b) Recital of necessity.

——Debts—Recitals of necessity—Proof of.

Mere recitals in bonds are not presumptive proof of the necessity for the debts borrowed thereunder. 62 Ind. Cas. 905=3 P.L.T. 43=6 P.L.J. 451=A.I.R. 1923 Pat. 143.

——Recitals—Necessity—Weight of.

Recitals in a document do not of themselves afford sufficient proof of legal necessity. 36 A. 187 foll. 26 Ind. Cas. 376 (Mad.).

——Recitals—Evidence of necessity.

Recitals in deed as to necessity is some evidence that the facts recited were present to the minds of the parties to the transaction but they are not sufficient to prove the necessity in question. 5 C. 363, rel. on. (1914) M.W.N. 490=27 M.L.J. 138=24 Ind. Cas. 426.

——Recitals of necessity—Evidentiary value.

Recitals are not by themselves evidence of necessity as against third parties impeaching the sale. 36 All. 187=(1914) M.W.N. 405=19 C.L.J. 419=16 Bom. L.R. 352=18 C.W.N. 649=1 L.W. 794=12 A.L.J. 495=15 M.L.T. 395=23 Ind. Cas. 715 (P.C.).

——Recitals of necessity—If binds co-parcener.

Recitals in a deed as to necessity are not evidence against the co-parcener to defeat whom, the deed was executed. 11 A.L.J. 713=20 Ind. Cas. 951.

——Recitals—Necessity—Weight of.

The recital in a mortgage deed of an antecedent debt is not of much weight by itself. 13 Ind. Cas. 142 (All.).

69. (c) Value of.

——Recitals—Acknowledgment of receipt of consideration—Value of.

Where a mortgage deed is proved to have been executed and the document contains an acknowledgment of the receipt of the consideration, this is strong **prima facie** evidence that the consideration has been actually received and is evidence not only against the mortgagors but also against persons claiming under them subsequent to the date of the mortgage. A.I.R. 1938 Lah. 463=40 P.L.R. 313=181 Ind. Cas. 505.

——Recitals—Value of.

Recitals in a deed are evidence. 44 C. 186 (P.C.) Rel. on. 71 Ind. Cas. 390=A.I.R. 1923 All. 366.

——Recitals—Judgment—Value of.

The substance of the pleadings narrated in the judgment furnishes evidence of the allegations made by the parties on that occasion. 72 Ind. Cas. 680=36 C.L.J. 434=A.I.R. 1923 Cal. 18.

——Recitals—Judgment—Recitals as to age—Value of.

The statements of the plaintiff's age in a decree to which the defts. or their predecessors were no parties, are not conclusive and binding against them. 32 C.L.J. 75=59 Ind. Cas. 3.

——Recitals in—Invalid compromise—Value of.

Where the compromise is not binding on the parties any recital in it is not of much value as evidence. Parties are often willing to make admissions for the purpose of effecting a compromise, to which it would be unfair to hold them, if the compromise falls through. 9 O.L.J. 262=A.I.R. 1922 Oudh 231.

——Recitals in deed—'Mother'—Value of.

Mother is a term used out of respect and affection among Indians and the mere use of this word in a deed does not denote the actual relation of mother and child between the parties when the whole tenor of the document is against such a conclusion. 65 Ind. Cas. 308=8 O.L.J. 569=A.I.R 1921 Oudh 242.

——Recitals—Effect.

A man that takes a deed is not ordinarily bound by the statements contained therein. 17 M.L.T. 87=2 L.W. 69=28 M.L.J. 1=(1915) M.W.N. 53=26 Ind. Cas. 757 (F.B.) [O.A. **See** 42 Mad. 523=50 Ind. Cas. 498 (P.C.)].

——Recitals—Evidentiary value of.

The recital of consideration in a deed and the admission of consideration before the registering officer. are evidence against the persons claiming through the executant of the deed. 10 A.L.J. 87=16 Ind. Cas. 483,

——Recitals—Value of.

Recitals in deeds are not in themselves conclusive and not preclude the courts from ascertaining and giving effect to the intention of the parties. 7 M.L.T. 81=5 Ind. Cas. 754.

——Recitals—Admission in kabuliyat as to character of land, if relevant.

An admission in a kabuliyat as to the character of land is relevant evidence. 13 C.W.N. 135=9 C.L.J. 15=1 Ind. Cas. 571.

——Recitals—Release deed by major member.

If a major member of a family executes a release deed alleging that certain debts exist, the deed is evidence of the existence of such debt. 19 M.L.T. 346=3 L.W. 379=35 Ind. Cas. 243.

——Recitals—Value of.

The recitals may be taken as evidence but cannot be treated as admissions so as to shift the onus of proof. (1913) M.W.N. 924=21 Ind. Cas. 566.

—Recitals—Receipt of consideration.

The receipt of consideration for a document may be proved by the recital in the bond to that effect. 13 O.L.J. 413=37 Ind. Cas. 31.

—Recitals.

Recitals in a deed are not sufficient proof of the facts recited. 9 Ind. Cas. 56 (Oudh.)

70. Refreshing memory.

See EVIDENCE ACT, Ss. 159, 161.

71. Relationship.

See EVIDENCE ACT, S. 50.

72. Resjesta.

See EVIDENCE ACT, S. 6.

73. Secondary.

See EVIDENCE ACT, Ss. 63, 65, 66.

74. State of mind.

See EVIDENCE ACT, S. 14.

75. Sufficiency.

——Congenital idiocy, proof—Conduct of affairs—Sufficiency of.

The facts that on father's death the property was transferred to the name of son in the revenue records that **kabuliyats** in respect of the lands were taken in the son's name, and that his name was entered in respect

of the **patilki** rights in the village, would not necessarily negative the allegation that the son was a congenital idiot. A.I.R. 1942 Bom. 178 (2)=44 Bom. L.R. 371= I.L.R. (1942) Bom. 486=201 Ind. Cas. 401.

——Ownership of property—Evidence of tenant—Sufficiency of.

The evidence of a witness that he is occupying the property in dispute as the tenant of the plaintiffs is insufficient to establish the ownership of the plaintiffs. A.I.R. 1939 Lah. 285=41 P.L.R. 108=182 Ind. Cas. 1008.

——Sufficiency—Single witness—Corroboration necessity of.

Where a point in issue has to be decided on the testimony of a single witness, it is unsafe to rely on his evidence unless there is some corroborative evidence. A.I.R. 1936 All. 205=1936 A.L.J. 180=1936 A. W. R. 93=161 Ind. Cas. 610.

——Occupation of land—Taking water—If proof of right.

The evidence that a person has the occupation of lands and that he has been taking water to irrigate his lands through a channel from a tank is good evidence that he has some right to do so. This is not one of those things that can be concealed. The fact of enjoyment of such a right is some evidence of the right itself. 124 Ind. Cas. 829=A.I.R. 1930 Cal. 289.

——Plaintiffs claim accepted by trial Judge—Evidence of both sides open to criticism—Not sufficient to be set aside by the appellate Court.

Plaintiff who had a certificate entitling him to collect the debts due to the estate of the deceased aunt claimed from the defendant (another nephew of the aunt) a sum of rupees 10,000, which the defendant deposited under a deposit note with the National Bank of India at Mandalay. The issue in effect was whether the money which the defendant deposited in the Bank was his own money or his aunt's. The plaintiff said and he gave explicit evidence to the effect that, on the instructions of his aunt, shortly, before she died he took out the money in his hands which belonged to her, Rs. 10,000, and handed to the defendant, and that is the money which had been deposited in the bank and has not been repaid. The defendant said that he had considerable funds of his own and that Rs. 10,000 was his, which he deposited in the bank of his own account. Evidence produced by both the parties was open to criticism. The trial Judge, who gave careful attention to the evidence, found in favour of the plaintiff's story. The High Court did not believe the story of either side but reversed the decree of the trial Court.

Held, that the trial Judge accepted plaintiff's story, and once plaintiff's story was accepted defendant's evidence was not sufficient answer to plaintiff's case and the original judgment of the trial Court should not be disturbed. 123 Ind. Cas. 174=A.I.R. 1929 P.C. 295.

——Sufficiency—Disbelief of defence—No proof of claim.

Disbelief of a defence does not naturally involve pro of of a claim. 110 Ind. Cas. 818=A.I.R. 1928 All. 688.

——Proof of sale—Admission by vendor—No evidence by vendee—Sufficiency of.

A sued **B** and **C** for possession of land on the ground that the land was sold to him by **B** but **C** was resisting possession. **B** admitted sale of land to **A** in his written statement and **C** denied **A's** title and joined issue on the point. No evidence was led by **A** to prove the sale.

Held, that **B's** admission was not sufficient proof of the sale and **A** must fail. 101 Ind. Cas. 589=A. I. R. 1927 Lah. 356.

——Sufficiency—Semen in loin cloth of women—Inference of consent.

The mere presence of semen in the loin cloth of the woman is not sufficient to prove that she was a consenting party, especially in the absence of any spermatozo in the vagina. 6 L.L.J. 474=A.I.R. 1925 Lah. 94.

——Omission to examine—When material.

Where **A** was a tenant of a house, and **B**, a guest in his house complained to Magistrate of nuisance and **A** was not examined as a witness.

Held, that omission to examine **A** as witness was not material. 84 Ind. Cas. 854=48 Bom. 241=25 Bom. L.R. 1321=26 Cr. L.J. 374=A.I.R. 1924 Bom. 241.

——Proof of mortgage—Revenue Records, only evidence of—Not sufficient.

Where in a suit for redemption of a usufructuary mortgage, the mortgagee was found to be in possession for a period over 20 years and the only reliable evidence as to be existence of the mortgage was the extracts from supplementary revenue record register No. 1 and register No. 5.

Held: that in the absence of other reliable evidence supplementary survey records are insufficient to prove mortgage. 2 U.B.R. (1907-1909) Evidence 19, Foll. 77 Ind. Cas. 380=1 Rang. 562=A.I.R. 1924 Rang. 135.

——Proof of fraud—Evidence equally balanced—Fraud not established.

Where a case of fraud is attempted to be made out and the evidence adduced in the case is equally consistant with the allegations of the plaintiff as with the denial of the defendants a case of fraud is not established. 71 Ind. Cas. 843=4 Pat. L.T. 102=(1923) P.H.C.C. 137=1 P.L.R. 252=A.I.R. 1923 Pat. 327.

——Alteration of trial Court's conclusion—Cogent grounds, necessary.

Cogent grounds would be needed to alter the conclusion drawn by the trial Court from the oral evidence in spite of the fact that the witness spoke Greek and

that it seemed doubtful whether the interpreter thoroughly understood Greek while the Court did not at any rate profess to understand that language. 70 Ind. Cas. 156=84 Ind. Cas. 737=32 M.L.T. 81=27 C.W.N. 557=18 M.L.W. 664=1923 M.W.N. 846=46 Bom. 857=25 Bom. L.R. 116=A.I.R. 1922 P.C. 371.

——Evidence of possession—Proof of lease—If sufficient.

Where the question is whether certain tenancies are fictitious or reals the crucial test is whether the alleged lessees are in possession. 66 Ind. Cas. 433=34 C.L.J. 302=A. I. R. 1921 Cal. 584.

——Suspicion—Sufficiency.

Where one **A**, the plaintiff gave evidence that he was the legitimate son of one **M** but the defendants adduced evidence that he was the son of another man also named **M** and the High Court decreed in favour of the defendant on the ground that the defendant's case was quite possible and laid stress on the fact that **A** was supported in money by co-plaintiff, in whose favour **A** had executed a sale deed of a part of the property. *Held* that the decision was unsound. 21 C.W.N. 873=(1917) M.W.N. 529=7 L.W. 66=42 Ind. Cas. 3 (P.C.).

——Thumb impression—Similarity of—If sufficient for conviction.

Similarity of the thumb impression taken at the time of presentation if corroborated by other evidence in the case, is sufficient for conviction of the person presenting the document, but by itself is not so. 16 Cr. L. J. 228=27 Ind. Cas. 900.

76. Suspicion.

——Delay in registration—Suspicion—Not sufficient, to doubt genuineness.

Delay in registering a deed is not a sufficient reason for doubting the genuineness of the deed. A.I.R. 1930 Pat. 121=127 Ind. Cas. 281.

——Marksman—Difference in marks.

It cannot be said that because an illiterate woman put a particular kind of mark in a certain document the mark put by her in another document 23 years afterwards, which differs slightly from the mark in the previous instrument could not be genuine. 87 Ind. Cas. 621=21 M. L. W. 415=1925 M.W.N. 285=A.I.R. 1925 Mad. 861.

——Allegation of—Suppression of document by opponent.

A claim to recover an agreement which is not produced and is alleged to have been fraudulently detained by an opponent is always one which should be regarded with extreme suspicion and closely examined in every aspect before it is accepted. 89 Ind. Cas. 361=3 Rang. 177=A.I.R. 1925 Rang. 308.

——Positive testimony.

Positive testimony should not be rejected on mere suspicion. 66 Ind. Cas. 345=34 Cr. L.J. 256=26 C. W.N. 36=A.I.R. 1921 Cal. 730.

——Suspicion—Not a ground for decision.

The court's decision must rest not upon suspicion but upon legal grounds established by legal testimony. 44 Cal. 662=1 Pat. L.W. 425=5 L.W. 711=32 M.L.J. 425=21 C.W.N. 585=21 M.L.T. 344=15 A.L.J. 382=25 C.L.J. 508=19 Bom. L. R. 424=(1917) M.W.N. 473=44 I.A. 472=40 Ind. Cas. 242 (P.C.).

——Suspicion—Judicial decision.

Suspicion though a ground for scrutiny of evidence, cannot be made the foundation of a judicial decision. 34 A. 511=39 I.A. 68=12 M L.T. 392=15 O.C. 278=14 Bom. L R. 1073=10 A.L.J. 373=17 C.W.N. 49=16 C.L.J. 629=(1912) M.W.N. 1052=17 Ind. Cas. 396=23 M.L.J. 741(P.C.).

——Suspicion—Not a ground.

Conjecture is not a substitute for legal proof in a Court of law. 35 Cal. 1039=35 Ii A. 206=42 P.R. 1910=12 C.W.N. 1049=3 C.L.J. 359=10 Bom. L.R. 790=6 Ind. Cas. 721 (P.C.).

——Suspicion—Not a ground for decision.

A court must not proceed upon suspicion and must not make any presumption against apparent ownership. 14 C.W.N. 191=2 Ind. Cas. 385.

77. Trial.

——Defence not directed to contradict plaintiff's story—Cross-examination of defence—If necessary.

Where in a suit by vendors for damages for breach of contract of sale, the plaintiffs' evidence of the purchasers' grounds for requesting delay is corroborated in more than one particular and the writer when called by the purchaser is not asked a single question to contradict the story given by the vendor, it is not correct to say that the vendor ought to have raised the question of the grounds in cross-examination of the witness. Contradiction, if any could be made, ought to have been given by the witness in examination-in-chief. 117 Ind. Cas. 485=1929 A. L. J. 791=31 Bom. L. R. 909=33 C.W.N. 949=6 O. W. N. 617=1929 M. W. N. 558=30 M.L.W. 281=51 C. L. J. 105=A. I. R. 1929 P. C. 179 =57 M.L.J. 323.

——Trial—Charge of fraud—Cross-examination of person charged.

A person who is charged with fraud should, when he is examined in Court, be cross-examined in regard to it and his explanation taken into consideration. 91 Ind. Cas. 426=27 Bom. L.R. 1318=A.I.R. 1926 Bom. 33.

——Trial—Attestor—Scribe.

It cannot be said as a matter of law that a scribe cannot be an attesting witness. It is a question of fact which must be determined by a Court of fact. 90 Ind. Cas. 774=A.I.R. 1926 Cal. 150.

——Trial—Evidence for one accused—Treatment as evidence against the other—Evidence of co-accused.

The evidence of a defence witness produced by one accused cannot be treated as prosecution evidence against the other. A.I.R. 1923 All. 769, Foll. 99 Ind. Cas. 989=27 Cr. L. J. 1037=A.I.R. 1926 Lah. 627.

——Trial—Possession—History of title.

When evidence of possession is scrutinised, the history of title cannot well be ignored. 77 Ind. Cas. 564=36 C. L. J. 472=A.I.R. 1923 Cal. 82.

——Trial—No opportunity to cross-examine.

Acting on evidence without giving opportunity to cross-examination is illegal. 73 Ind. Cas. 339=24 Cr. L. J. 595=A.I.R. 1923 Pat. 53.

——Trial—Mode of evidence—Agreement of parties.

Though the recitals in a judgment cannot be relied upon for the purpose of proving the contents of a document, yet parties, if so minded may ordinarily agree that evidence shall be taken in a particular way. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent, cannot be used. Evidence not taken before the Judge actually deciding the case has been made admissible in India by Statute. 43 Mad. 609; 38 Mad. 160; 30 Bom. 109, Foll. 69 Ind. Cas. 15=16 M.L.W. 122=1922 M.W.N. 464=31 M. L. T. 125=A.I.R. 1922 Mad. 394=43 M.L.J. 448.

——Evidence taken in a particular way—Jurisdiction of the Court.

Parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way, and it is common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the court. It is merely that parties allow certain materials to be used as evidence which, apart from their consent, cannot be so used. (1905) 7 Bom. L. R. 642=30 B. 109.

——Trial—Incidents in—Statement of Judge.

Per Mookerjee, J:—The statement of the presiding Judge as to what actually took place before him is conclusive. 44 Cal. 447=21 C. W. N. 33=24 C. L. J. 400=18 Cr. L. J. 385=38 Ind. Cas. 945 (F. B.)

——Trial—Counsel's address—Notes taken by the judge—Evidence.

The notes taken by the judge of counsel's address are good evidence that when the counsel was addressing the judge he did say what the judge has noted. But if there is any real contention as to the correctness of the notes, it would be open to the other side to prove that they were not correct. (1907) 9 Bom. L.R. 1042.

78. Value of.

——Entry in Khewats—Value.

See HINDU LAW — JOINT FAMILY. (1948) 2 M.L.J. 226=A.I.R. 1948 P.C. 210.

——Panchanamas.

Putting in **panchnamas** signed by **panchas** as part of the evidence of a Police Officer is worthless except to corroborate the evidence of the officer that **panchas** were employed and to show that the provisions of S. 103 (1) and (2) of the Criminal P. C., have been complied with. A. I. R. 1932 Bom. 181=33 Cr. L. J. 389=34 Bom. L.R. 257=136 Ind. Cas. 868.

——Value of—Rennell's Survey Map.

Though Rennell's Survey Map made in 1764 before the Permanent Settlement is valuable evidence on the topography, the absence of a certain rivulet in it is not conclusive of its non-existence. 133 Ind. Cas. 573=A.I.R. 1931 Cal. 239=34 C.W.N. 1113.

——Value of—Thak statements.

Thak statements have evidentiary value and are admissible in evidence unless they deal with matter altogether outside the scope of the survey. 113 Ind. Cas. 465= 56 Cal. 813=56 I. A. 74=33 C. W. N. 289=49 C. L. J. 112=A.I.R. 1929 P.C. 50.

——Value of—Summary proceedings—Questions of custom.

Where the proceedings of a case are necessarily summary as in objection proceedings much reliance cannot be placed upon the decision of the case as an evidence of any custom. 112 Ind. Cas. 447=A.I.R. 1928 Lah. 966.

——Positive and negative evidence — Relative value of.

It is more important to look to the positive evidence than to the negative. 112 Ind. Cas. 68=5 O. W. N. 275=A.I.R. 1928 Oudh 269.

——Value of—Public document—Discovered not public.

If a document is once admitted in evidence on the understanding that it is a public document, it loses all evidential value when it is discovered that it is not a public document. 94 Ind. Cas. 125=27 P. L. R. 198=A.I.R. 1926 Lah. 452.

——Value of—Cumulative effect of facts in evidence.

Though each of the facts inconclusive, their cumulative value may establish the guilt and exclude other possibilities. 95 Ind. Cas. 311=27 Cr. L.J. 775.

——Value of—Anonymous letter.

An anonymous letter is no evidence of its contents. 91 Ind. Cas. 50=27 Cr. L.J. 18=1925 M. W. N. 319=22 M.L.W. 405=A.I.R. 1925 Mad. 879.

——Printed leases—Expressions in—Value of.

Much reliance cannot be placed upon the words and expressions used in leases executed on printed forms where they are used indiscriminately. 79 Ind. Cas. 648=A.I.R. 1925 Cal. 181.

——Value of—Evidence as to social position and custom—Suit for agreed dower—(No document.)

In a suit for dower on the basis of an agreement fixing the amount of the dower, evidence regarding social position of the parties and customary dower is not material except as affording some test of the credibility of the witnesses of the party alleging the agreement. In the case of an agreement entered into 37 years back, the oral evidence of the agreement must be clear and convincing in order to establish a claim against the estate of the man who is said to have been a party to it. 76 Ind. Cas. 948=37 C. L. J. 461=27 C. W. N. 854=18 M.L.W. 670=4 L.R.P.C. 95=A.I.R. 1923 P. C. 29=44 M.L.J. 714 (P.C.).

——Value of—Bearing of onus.

The weight to be attached to the evidence of a party is not governed by any such external consideration as that of the burden of proof but depends entirely on the intrinsic evidence. 69 Ind. Cas. 541=A. I. R. 1923 Nag. 62.

——Value of—Secondary and inferior evidence.

It is quite unsafe to accept the evidence more or less secondary in its character and certainly of inferior quality to the evidence which would have been produced but has been withheld. Where therefore most of the facts deposed to by the witness of one party are matters which the opposite party would have in the natural course of circumstances of any particular case, direct knowledge, it is an act of impertinence on the part of the latter party to ask the Court to disbelieve the evidence led by the former party, when he himself is not prepared to take the responsibility of an oath and give to the Court his own version of the facts. 65 Ind. Cas. 380=8 O.L.J. 681=A.I.R. 1922 Oudh. 59.

——Value of measurement and plan.

Where in a deed there is variation in measurement and plans the plans are to be preferred to measurement. 191 P. L. R. 1919=58 Ind. Cas. 67.

——Value of—Cross-examination of opposite party's witnesses.

A party is entitled to have taken into consideration the statements of the opposite party's witnesses in cross-examination. 1 O.L.J. 366=25 Ind. Cas. 648.

——Value of—Negative evidence.

Very little weight can be attached to the evidence of a negative character. 15 C.L.J. 621=13 Ind. Cas. 678.

——Value of—Registrar's endorsement—Payment of consideration.

Where the question is whether full mortgage money was paid by the mortgagee to the mortgagor the Registrar's note on the back of the mortgage deed at the time of the registration that the mortgagor admitted having received full consideration money, is no evidence. (1917) Pat. H.C.C. 49.

79. Evidence—Miscellaneous.

——Age of witness—Statement in criminal proceedings.

In criminal proceedings, the statement of a witness's age forms no part of his deposition and is not usually the statement of the witness himself but an estimate of the Court. A.I.R. (Vol. 20) 1933 Pat. 627=148 Ind. Cas. 413.

——Age of witness—Deposition.

The statements of ages of witnesses at the head of depositions do not furnish evidence on the subject. 26 All. 108 (P.C.), Foll. 80 Ind. Cas. 357=39 C.L.J. 90=28 C.W.N. 1033=A.I.R. 1924 Cal. 558.

——Dispute as to age.

Conclusive evidence of age is very rarely obtainable in India. 83 Ind. Cas. 840=11 O.L.J. 164=A.I.R. 1924 Oudh 353.

——Proof of date of birth after lapse of time.

In India it is no doubt difficult to prove such facts as the date of birth, after a lapse of many years, and it would be unreasonable to require such a class of evidence as would justly be demanded in England. But the evidence must be such as to carry reasonable conviction to the mind. (1906) 29 A. 29=11 C.W.N. 130=17 M.L.J. 32=9 Bom. L.R. 80=34 I.A. 1=5 C.L.J. 4=1 M.L.T. 429. (P.C.)

——Legal practitioner—Pleader advising client—Malicious prosecution—Competent witness.

A pleader advising a client is a competent witness in a suit against the client of damages for malicious prosecution. 14 C. W. N. 86=5 Ind. Cas. 50 (P. C.).

——Marriage certificate.

A marriage can be proved otherwise than by a marriage certificate but if a certificate, is produced, the names mentioned in it should be identified with the parties to the divorce proceedings. (1910) M. W. N. 734=9 M. L. T. 43=8 Ind. Cas. 759.

——Marriage—Inference from co-habitation as husband and wife.

Their Lordships refused to draw any inference either way from the mere fact that the alleged wife was kept in a house separate from that in which the admittedly legal wife was living. 1904 A.W.N. 12=26 A. 295.

——Value of an estate—Deeds of sale of portion of the estate—How far evidence.

In order to determine the value of a share of an estate deeds showing the price at which other portion of the same estate were sold are good evidences (1902) 30 Cal. 1=6 C. W. N. 688.

——Shipping—Total loss—Circumstantial evidence.

The circumstances attending the wreck of a vessel the abandonment of the same by its officers and crew and the subsequent sale of the goods show that there has been a total loss of goods. That a cargo has been so damaged by the perils of the sea as to render an immediate sale necessary and the sale has taken place, sufficiently constitute total loss. 36 Bom. 484=13 Bom. L.R. 1211=12 Ind. Cas. 897.

——Secret trust—Quantum of evidence:

In cases of secret trust, the party setting it up must show that the trust was communicated to the universal legatee by the testator and that the universal legatee agreed to accept the legacy burdened with the trust. (1903) 30 C. 783.

——Evidenee Act (I of 1872)—Scope.

The intention of the Legislature in using the words "in civil proceedings" in S. 196 (7) Companies Act was to make the statement admissible against the person examined unconditionally so far as civil proceedings are concerned and in criminal proceedings subject to the provisions of S. 132, Evidence Act. S. 196, Companies Act was not intended in any way to override the provisions of the Indian Evidence Act. 98 Ind. Cas. 599=27 Cr.L. J. 1383=A.I.R. 1926 Lah. 385.

——Ceylon Ordinance.

The Evidence Ordinance of Ceylon is merely the application to Ceylon of the Indian Evidence Act, S. 1. 52 I. A. 372=A.I.R. 1925 P.C. 229.

——Scope—Evidence Act is a complete Code of the law of evidence.

In questions relating to matters expressly provided for in the Evidence Act, it must not be dealt with as a mere modification of the law of evidence prevailing in England. The Evidence Act is a complete Code of the law of evidence in British Burma. A.I.R. 1938 Rang. 177=1938 Rang. L.R. 190=39 Cr.L J. 581=175 Ind. Cas. 465 (F.B.).

——Scope—Applicability of Cr. P. Code.

The Evidence Act is a separate statute dealing with an important branch of law, and its provisions are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope unless it is clearly proved that they have been repealed or altered by another statute. 94 Ind. Cas. 901=7 Lah. 84=27 Cr.L. J. 709=27 P.L.R. 583=A.I.R. 1926 Lah. 88.

——Scope—Applicability of Oaths Act.

The provisions of the Oaths Act are not intended to be utilized in such a manner as would abrogate the provisions of the Evidence Act. 90 Ind. Cas. 378=A.I.R. 1926 Nag. 194.

——Scope of the Act—Not exhaustive—English law.

The provisions of the Evidence Act are not exhaustive of the rules of evidence and the Courts can invoke the aid of the principles of jurisprudence or of English law as supplementing and explaining the rules of evidence given in the Act. 39 Mad. 449=28 M. L. J. 329=17 M.L.T. 214=(1915) M.W.N. 229=16 Cr.L. J. 294=28 Ind. Cas. 518.

——Scope—Extradition Act—Per Woodroffe, J.

The Evidence Act is not exhaustive. The records of the German Court authenticated in the manner prescribed by Secs. 14 and 15 of the English Extradition Act, are admissible in evidence. 39 Cal. 164=15 C.W.N. 1053=14 C. L. J. 375=12 Cr. L. J. 505=12 Ind. Cas. 273.

——Scope of the Act.

The Act is in the nature of a Code of Principles and law of evidence which the Indian Courts are to observe, and its object is that the law should be ascertained as regards any point specifically dealt with in them by interpreting the language used in those enactments and assigning to it its natural meaning and not by searching for authorities elsewhere. 213 P.L.R. 1910=86 P.W.R. 1910=7 Ind. Cas. 505.

——Scope of the Act—Trusts Act (1882) S. 2—Scope.

S. 7 of Statute of Frauds (29 Car. 11 C. 3) was never applied to India. The Evidence Act and the Trusts Act, S. 2 repeal it entirely both as regards public and private trusts. 33 Bom. 509=11 Bom. L. R. 85=5 M.L.T. 301=2 Ind. Cas. 701.

——S. 2—Justice, equity and good conscience.

According to S. 2 Courts in India cannot apply in matters of evidence, the principles of equity justice and good conscience if they are inconsistent with the statute i. e., the Evidence Act. 6 N. L. R. 161=8 Ind. Cas. 1124.

——S. 2—Scope.

In India the question of relevancy is to be decided in accordance with the provisions of the Evidence Act. Party tendering a document in evidence must show that it is admissible under some provisions of the Act. A. I. R. 1946 Bom. 184=47 Bom. L.R. 997=224 Ind. Cas. 25=47 Cr.L.J. 555.

——S 2—Scope.

The Evidence Act has repealed all the rules of evidence A party seeking to put any document in evidence must show under which section of the Act it is admissible. A.I.R. 1945 Cal. 492=49 C. W. N. 791=I.L.R. (1946) 1 Cal. 149.

——S. 2 (1)—Scope.

S. 2 (1). Evidence Act, prohibits the employment of any kind of evidence not specifically authorized by the Act itself A.I.R. 1943 Cal. 76=75 C.L J. 301=I.L.R. (1942) 2 Cal. 299=46 C.W.N. 729=205 Ind. Cas. 344.

——S. 2—Scope—Subsequent repeal of S. 2—Effect.

Under S. 2, all rules of evidence not contained in any statute, Act or Regulation in force in any part of British India were repealed. The repeal of S. 2, under a subsequent Amending and Repealing Act makes no difference because its repeal does not have the effect of re-enacting the rules which it repealed. The rule in **Russell** v. **Russell** (1924) A.C. 687 was the rule of the English Common Law and was repealed by S. 2. A.I R. 1945 All. 190=I.L.R. (1945) All. 620=1945 A.L. J. 162=1945 A.W.R. (H.C.) 390.

——S. 2 (1)—Scope.

Evidence excluded by statute as inadmissible should not be admitted merely because it may be essential for ascertainment of truth. A.I.R. 1941 P.C. 16=1941 M. W. N. 354=53 L. W. 469=7 B. R. 656=(1941) 1 M.L. J. 746=1941 A. W. R. 34=43 Bom. L.R. 794=I.L.R (1941) 1 Cal. 468=73 C.L. J. 555=22 P.L.T. 286=1941 O.W.N. 572=45 C.W.N. 435=I.L.R. (1941) Kar. (P. C.) 54 Sup.=68 I. A. 34=193 Ind. Cas. 220 (P.C.).

[Reversing 41 C.W.N. 1103=65 C.L. J. 520].

——S. 2 (1)—Scope.

According to the Muhammadan Law in the case of missing persons, different presumptions arise according as the case is one in which the right to be ascertained with regard to property which he might have inherited from others or with respect to property which belonged to missing person himself. But as these rules are only rules of evidence according to the provisions of cl. (1) of S. 2, Evidence Act, the Courts are bound to administer the rules contained in that Act. A.I.R. 1934 Oudh 41=9 Luck. 401=10 O.W.N. 1254=147 Ind. Cas. 973.

——Ss. 2, 44, 11—Scope—Minor entitled to prove negligence of guardian as ground for setting aside decree against him.

Per Full Bench (**Sulaiman** and **Sen JJ.**, **Boys J.**, dissenting):—A minor is entitled to avoid a decree on the ground of negligence of the guardian. This is a substantive right and there is nothing in S. 44 or S. 2 of the Evidence Act, which precludes the minor from proving that a judgment obtained against him had been obtained by negligence of the guardian. A.I.R

1932 All. 293=1932 A.L.J. 437=16 R.D. 327=54 All. 646=138 Ind. Cas. 465 (F.B.).

——**Ss. 2 and 165—Statments before Police not** properly proved—Use of such statements to discredit witness, legality of.

S. 2, Evidence Act, leaves the provisions of the Criminal P. C., unaffected, and the power conferred on a Judge under S. 165, Evidence Act, cannot be exercised for the purpose of introducing evidence in contravention of the provisions of S. 162, Criminal P.C.

Where certain alleged statements before the Police were not properly put in evidence under S. 162, Criminal P.C., and were not even proved as substantive evidence and yet the Judge made use of them in order to discredit the witness in so far as he did not support the prosecution case:

Held, that the procedure was illegal. A.I.R. 1931 Cal. 189=35 C.W.N. 317=32 Cr.L.J. 841=58 Cal. 1009=132 Ind. Cas. 159.

——**S. 3. Synopsis.**

1. **"Court"**
2. **Evidence**
3. **"Fact"—See also Evidence Act S. 27**
4. **"Fact in issue"**
5. **"Proved"—See also Evidence Act S. 67.**

1. "Court".

——**S. 3—'Court' does not apply to Debt** Settlement Board under Bengal Agricultural Debtors' Act, 1936.

The definition of the word "Court" in the Evidence Act has been framed only for the purposes of that Act which, under S. 45, Bengal Agricultural Debtors' Act, has no application to Debt Settlement Boards, in the absence of express provision to that effect. A.I.R. 1940 Cal. 286=44 C.W.N. 530=41 Cr. L. J. 662= I.L.R. (1940) 2 Cal. 14=188 Ind. Cas. 686.

——**S. 3—Court—Bengal Land Registration Act VII of 1876**—Deputy Collector holding enquiry—If a Court.

A Deputy Collector holding an enquiry under the Bengal Land Registration Act for the purpose of registering the names of rival claimants is a Court within S. 3 of the Evidence Act and the enquiry held by him is a judicial enquiry. 47 Ind. Cas. 710. (Pat.)

——**S. 3—"Court"—Magistrate—Whether Court.**

The Cr. P. Code contains no definition of "Court" but according to Sec. 3 of the Evidence Act the word "court" includes all magistrates. **Quaere**: Whether the definition of "court" can be held to apply to the Cr. P. Code. 17 Cr. L. J. 491=34 P.R.Cr. 1916= 36 Ind. Cas. 171.

2. Evidence.

——**S. 3—Evidence—Admission of—Effect.**

Admission of evidence for one purpose in a suit is evidence for all purposes in the case. 37 Bom. 122=40 I. A. 1=12 M.L.T. 646=(1913) M.W.N. 29 =15 Bom. L.R. 1=24 M. L. J. 176=17 C. L. J. 146= 17 C.W.N. 358=17 Ind. Cas. 663 (P.C.).

——**S. 3—"Evidence".**

The mere swearing of the affidavit does not make the statement contained therein a piece of evidence which a Court would be bound to admit in a judicial proceeding within the meaning of S. 3 Evidence Act. A.I.R. 1936 Cal. 657=43 C.W.N. 1033=41 Cr. L. J. 21=I.L.R. (1939) 2 Cal. 459=184 Ind. Cas. 468.

——**S. 3—Evidence—Documents.**

Documents which are neither produced, nor proved, nor admitted in evidence in a case before the Court, should not be considered in its judgment though they may have been produced in another case between the same parties. 7 P.L.R. 1912=126 P.W.R. 1912=16 Ind. Cas. 488.

——**S. 3—"Evidence"—Meaning of.**

Per **Macnair, A.J C.**—The word "evidence" in the Act signifies only the instruments by means of which relevant facts are brought before the Court, viz., witnesses and documents, and by means of which the Court is convinced of these facts. 26 N. L.R. 229=125 Ind. Cas. 673=A.I.R. 1930 Nag. 242 (F.B.).

——**S. 3—"Evidence" and "Matters before it"—Meaning of.**

Every Court is bound to base its decision not merely on "evidence" but on "matters before it." The expression "matters before it" in S. 3 of the Evidence Act includes matters which do not fall within the definition of "evidence" as given in that section. Therefore in determining what is evidence othe than "evidence" in the phraseology of the Act, the definition of "evidence" must be read with that of "proved" given in the said section. 79 Ind. Cas. 609=A.I.R. 1924 Nag. 385.

3. "Fact".

——**Ss. 3, 59, 60 and 114—"Fact"—Statement of fact** and request made to witnesees—Person who made the statement and request, not identified and not called as a witness—Fact not a relevant fact unless made a relevant fact by resort to a presumption under S. 114—Presumption of authority to make the request—Admissibility.

The evidence of a group of witnesses was to the effect that when they were seated in the common room of the Lewis Jubilee Sanatorium before dinner chatting, a man came with the news that **K** was just dead, and he made a request for men to help to carry the body for cremation. One of such witnesses had a distinct recollection of this request as the news broke in upon the talk they were having and the thing had stuck in his memory. The man who so came into the common room had not been identified and was not a witness. On a question whether the evidence of this group of witnesses was admissible in evidence where the crucial question at issue was the time of death of **K,**

Held, that the statement and request made by the man was a fact within the meaning of Ss. 3 and 59 Evidence Act and that it was proved by the direct evidence of witnesses who heard it, within the meaning of S. 60; but it was not a relevant fact unless the learned Judge was entitled to make it a relevant fact by a presumption under the terms of S. 114 of the Act. As regards the statement that **K** had just died, such a statement by itself would not justify any such presumption, as it might rest on mere rumour, but it can be held in relation to the fact of the request for help to carry the body for cremation, that it was likely that the request was authorised by those in charge at the residence of **K,** having regard to "the common custom of natural events, human conduct and public and private business" and therefore to presume the existence of such authority. When such presumption is made, the fact of such an authorised request became a relevant fact, and evidence of that group of witnesses became admissible. 73 I.A. 246=1947 M.W.N. 7=49 Bom. L.R. 246=51 C.W.N. 98=A.I.R. 1947 P.C. 19=1946 A.W.R. (P.C.) 182=1946 O. A. (P.C.) 182 =227 Ind. Cas. 177=1946 A. L. J. 441=13 B. R. 68=I.L.R. (1947) Kar. (P.C.) 85=(1946) 2 M. L. J. 442 (P.C.).

——S. 3—"Fact"—Misrepresentation of fact.

A misrepresentation as to the intention of a person (on stating the purpose for which the consent is asked) is a misrepresentation of 'fact' within the meaning of the section. 17 P.R. Cr. 1916=18 Cr.L. J. 18=36 Ind. Cas. 850.

4. "Fact in issue."

——S. 3—Fact in issue if can be proved by one not called as a witness.

A fact in issue cannot be held to be proved by secondary evidence of statements made by a person who is not called as a witness and who is held by the Magistrate to be a liar. 5 S.L.R. 136=13 Cr.L. J. 28=13 Ind. Cas. 220.

5. "Proved."

——S. 3—"Proved"—Tests.

In judging whether a fact is or is not proved, the Court is entitled to take into consideration not only the statements of witnesses but also surrounding circumstances and the probabilities of the case. Even if the statements of the witnesses, standing by themselves, are open to criticism, a fact may be held established on such evidence read in the light of the surrounding circumstances. 4 A.I.Cr.D. 10=1950 A. L. J. 596.

——S. 3—"Proved"—Meaning of.

If a fact is to be held "proved," the Court must either believe it to exist or consider its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it did exist. 228 Ind. Cas. 251=48 Cr. L. J. 168=48 Bom. L. R. 746=A.I.R. 1947 Bom. 38 (S.B.).

——S. 3—Proved—Benefit of doubt — Guilt of accused—Burden of proof.

When L was convicted of the offence of murder and K of abetment, the Chief Court set aside the conviction of K holding that evidence against L was overwhelming but the police report and the surrounding circumstances showed that probably K was implicated owing to his being extremely unpopular in the village. 90 P. L.R. 1909=19 P.W.R. 1909 (Cr.)=4 Ind. Cas. 992= 11 Cr. L. J. 130.

——S. 3 — Proved — Circumstantial evidence—conspiracy.

Charge of conspiracy — Circumstantial evidence— Inference of guilt may be drawn only when the circumstances are such as to be incapable of any other reasonable interpretation. 70 Cal. L. Jour. 471.

——S. 3 — Proved — Circumstantial evidence— Criminal trial—Inference of guilt, when justified.

In order to justify an inference of guilt, the circumstances from which such an inference is sought to be drawn must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. A.I.R. 1946 All. 191=1945 A.W.R. (H.C.) 287=1945 O.W.N. (H.C.) 334 (2)=1946 A. L. J. 86=224 Ind. Cas. 366 =47 Cr. L. J. 611.

——S. 3—Proved — Circumstantial evidence— Conviction on—When can be based—Benefit of doubt—Rule as to, stated.

The conviction in a criminal case must rest upon direct or circumstantial evidence and not on mere conjectures. Where the evidence is only circumstantial, it must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of his guilt. In other words, where the guilt of an accused person is doubtful, he must be given the benefit of that doubt and acquitted. But the doubt must be such as a reasonable mind entertains and that it must not be the doubt of a weak and vacillating mind hesitating or shirking to take a decision because there is an infinitesimal possibility of its being mistaken. If, therefore, the facts proved are incapable of explanation on any reasonable hypothesis other than that of the guilt of the accused person, the Court must act on the hypothesis of guilt and cannot refuse to convict merely because certain other hypotheses which are not reasonable hypotheses are possible. A.I.R. 1945 Lah. 27=46 Cr. L J. 407=218 Ind. Cas. 145.

——S. 3—Proved—Circumstantial evidence.

Four things are required for the proof by circumstantial evidence:

(1) Circumstances should be fully established.

(2) All facts should be consistent with the hypothesis.

(3) Circumstances should be of conclusive nature and tendency.

(4) They should actually exclude every hypothesis but the one proposed to be proved. 1941 A.L.J. 416.

——S. 3—Proved—Circumstantial evidence—Duty of Court.

In a case for claim for value of a consignment, the defence was that the consignment was placed in shed No. 3 where it was looted by a mob in course of disturbances which broke in Bihar in that month. The Munsif had found that there was a riot at the station on that day, but held that the fact that the particular consignment was looted was not proved:

Held, that the trial Judge was wrong in ignoring the circumstantial evidence. He should have directed himself first to the question whether the defence had proved that the consignment was in shed No. 3. If it was, the only reasonable inference would be that it was looted by the mob which attacked that shed. A.I.R. 1945 Cal. 267.

——S. 3—"Proved"—Circumstantial evidence.

In the definition of 'proof' in the Evidence Act, no distinction is drawn between circumstantial and other evidence. In every case, the Court should consider the whole matter before the Court and proceed with prudence before acting on probabilities. A.I.R. 1931 Lah. 529=32 P.L.R. 461=32 Cr.L.J. 1032=133 Ind.Cas. 446.

——S. 3—"Proved"—Conjectures.

Conjectures, however well-founded, cannot take the place of proof. 39 P.L.R. 589.

See also: A.I.R. 1944 All. 94=1944 A.L.J. 87=1944 O.W.N. 36=1944 A.W.R. (H.C.) 64=45 Cr.L.J. 573= 212 Ind. Cas. 309.

——Ss. 3, 67, 68,—"Proved"—Definition should be read along with Ss. 67 and 68.

Because a witness is unable to point to the signature on a document of the person whose signature he purports to have attested it does not necessarily follow that he has failed to prove that signature within meaning of Ss. 67 and 68. There is nothing in the Evidence Act which indicates that it is necessary for the attesting person in order to prove execution to point to the signature or mark made by the executant. S. 67, Evidence Act, only shows what has to be proved and S. 68 what kind of evidence is essential for this purpose. If this evidence is forthcoming, there is no reason why the word "proved" in S. 3, Evidence Act should not be construed according to the definition. A.I.R. 1945 Oudh 40=1943 A.W.R. (C.C.) 147=1943 O.W.N. 425 =210 Ind. Cas. 300=19 Luck. 443.

——S. 3—"Proved"—Degree of proof.

Where a reversioner is suing persons who are merely trespassers no strong proof is required of the death of a

nearer reversioner. A prudent man might within the meaning of the definition of "proved" in S. 3, Evidence Act, consider the death of the nearer reversioner sufficiently probable on very little evidence. 103=Ind. Cas. 329=A.I.R. 1927 All. 687.

——S. 3—"Proved" explained.

"Legal proof" is neither more nor less than what is indicated by the definition of the word "proved" in S. 3, Evidence Act. It is, however, the duty of the Court in each case to concentrate its attention on the relevant and admissible evidence and then to decide whether or not a particular fact has been proved from the evidence adduced in the case. While the Court is entitled to insist that the best possible evidence should be produced, no hard and fast rule as to the quantum of evidence required for the proof of a particular fact can be laid down as this must necessarily vary with the circumstances of each case.

Conjectures cannot be accepted as substitute for proofs. A.I.R. 1944 All. 94=1944 A.L.J. 87=1944 O.W.N. 36 =1944 A.W.R. (H.C.) 64=45 Cr.L.J. 573=212 Ind. Cas. 309.

——S. 3—Proved—Duty of Court.

A Court when it has to consider whether a fact is proved or not, must not expect evidence which cannot be produced or evidence which it is unnecessary to produce in view of the definition of what is required to prove a fact. The whole of the evidence must be considered together and the cumulative effect of it must be weighed. A.I.R. 1940 Oudh 35=1939 O.W.N. 1114=15 Luck. 191=184 Ind. Cas. 521.

——S. 3—Proved.

Where, by his personal appearance before Court and by the affidavit averring that he is a European British subject, the applicant satisfies the Court that he is a European British subject, it amounts to a sufficient proof under S. 3, Evidence Act. A.I.R. 1935 Sind 244=37 Cr.L.J. 312=29 S.L.R. 60=160 Ind. Cas. 115.

——Ss. 3, 134—Proved.

The rule of the English Common Law that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a safe guide for the Indian Courts which are bound by statute law of India. A.I.R. 1931 All. 362=32 Cr.L.J. 780=53 All. 598=131 Ind. Cas. 594 (2).

——S. 3—"Proved"—Meaning of.

When, after considering all the matters before it, if a Court believes a certain thing exists it cannot say that the thing is not proved 81 Ind. Cas. 901=25 Cr.L.J. 1077=A.I.R. 1925 Nag. 37.

——S. 3—"Proved"—"Not proved" "disproved" and "reasonable doubt"—Meaning of.

The word "proved" means that it is so probable that a fact is established that a person should as a reasonable man act upon it. The law does not require that facts should be proved with anything like mathematical certainty. The word "disproved" is merely the converse of the previous proposition. The expression "not to be proved" indicates a state of mind between the two states of mind, when it is not possible to say precisely how the matter stands. "Reasonable" doubt is the doubt which reasonable men may reasonably entertain and not the doubt of a weak or vacillating mind. 31 Bom. L.R. 515.

——S. 3—"Proved"—Test.

A District Judge in appeal held that in all probability the tenant defendant had paid an enhanced rent but he declined to draw the inference that this rent was paid at the enhanced rate contracted for by the tenants as in his opinion it was absolutely impossible to determine what sum was paid; the finding involves an error of law as the test of proof applied is one not embodied in S. 3 of the Evidence Act. 23 C.L.J. 209= 34 Ind. Cas. 783.

——S. 3—"Proved" and "Disproved"—Test.

The test of whether a fact in issue was proved or disproved is whether a prudent man after considering the matters before him deemed it proved or not, and the Courts can never be boundby any rule but by their Judicial discretion. The same rule of evidence applies both to Civil and Criminal trials. 40 Cal. 898=18 C.W.N. 185=23 Ind. Cas. 25.

——S. 3—'Proved'—Objection that more evidence might have been adduced.

Where there is sufficient evidence of a fact it is no objection to proof of it that more evidence might have been adduced, demonstrations or a conclusion at all points logical, cannot be expected nor can a degree of certainty be expected of which the matter in question is not reasonably capable. 39 Cal. 245=16 C.W.N. 265 =13 Ind. Cas. 577.

——S. 3—"Proved"—Uncorroborated evidence of plaintiff.

When the claim is put forward against the estate of a deceased, the evidence of the plaintiff, though uncorroborated, may be acted upon, but such evidence must be carefully tested and scrutinised. 12 C.L.J. 470= 8 Ind. Cas. 796.

——S. 3—"Proved"—Uncorroborated evidence of plaintiff.

Where a person prefers a claim against the estate of a deceased person which has devolved upon a minor, he cannot sustain the action solely by his own deposition. 5 Bom. L.R. 181.

——S. 4—Discretion of Court.

Under S. 4, Evidence Act, it is open to a Court upon proof of a marriage to hold as proved the subsistence of that marriage on later date unless and until it is disproved. A.I.R. 1943 Cal. 76=I.L.R. (1942) 2 Cal. 299=75 C. L. J. 301=46 C. W. N. 729=205 Ind. Cas. 344.

——S. 4—Discretion of Court.

Under S. 4, Evidence Act it is open to the Court upon proof of the marriage on a certain date either to regard as proved the subsistence of the marriage on a certain subsequent date unless and until it is disproved, or else to call for proof of it, using the discretion entrusted to the Court by the first clause of S. 4 in a judicial manner according to the circumstances of the case. A.I.R. 1941 P. C. 11=1941 O. W. N. 565=7 B. R. 650=1941 A.W.R. (P.C.) 27=193 Ind. Cas. 209 (P.C.).

——S. 4—Evidence of accomplice.

It is not desirable that in cases where the evidence of an accomplice it tendered, the Court should call for proof of the presumption that he is unworthy of credit unless corroborated in material particulars. It is unsafe to convict upon the uncorroborated testimony of an accomplice alone, although it is not illegal to do so. The Court should, therefore, regard an accomplice as **prima facie** unworthy of credit; but this presumption which it is open to the Court to draw is not a hard and fast presumption but one which may be displaced in the circumstances of a particular case. A.I.R. 1938 Rang. 177=1938 Rang. L.R. 190=39 Cr.L.J. 581=175 Ind. Cas. 465 (F.B.).

——S. 4.

Notification of imposition of tax is conclusive proof and therefore, the Court must, under S. 4, Evidence Act, regard it as proved that the tax was imposed in

accordance with the provisions of the C. P. Municipalities Act, 1922. A.I.R. 1937 Nag. 168=I.L.R. (1937) Nag. 4'4=170 Ind. Cas. 133.

——S. 4—Official acts.

Although official acts may be presumed to have been regularly performed, such presumption cannot supply deficiency in the proof. A. I. R. 1933 Cal. 347=56 C.L.J. 583=34 Cr.L.J. 549=143 Ind. Cas. 285.

——S. 4—Presumption—Possession.

Per **Dawson Miller, C. J.**—Possession, however, is not necessarily the same thing as user and if the land is of such a nature as to render it unfit for actual enjoyment in the usual modes it may properly be presumed that the previous possession of the plaintiff continued until the contrary is proved. This presumption is a presumption of fact. It is by no means conclusive and whether it should be applied or not must depend upon the facts of each particular case.

Per **Mullick, J.**—In every case the Court may draw a presumption as to possession from title. It is a presumption of fact which the Evidence Act expressly warrants by S. 114. S. 4 of that Act enacts that the Court may regard the fact as proved unless and until it is disproved or may call for proof of it. The discretion of the Court is to be exercised with due regard to the nature of the land and the evidence in the case. 2 P.L.T. 55=1921 P.H.C.C. 118=A.I.R. 1921 Pat. 158.

——S. 4—Presumption—Powers of Court—Public purposes—Declaration in acquisition.

The fact that the declaration may be conclusive as to the land being needed for a public purpose does not in any way debar the Court from enquiring into the validity of the steps which led up to that declaration. 48 Cal. 916=A.I.R. 1921 Cal. 159.

——S. 4—Scheme suit—Burden of proof.

A Court is not bound to decide in a scheme suit, whether the alienations of the trust property were binding on the institution. Where a person sets up that a temple is a public one, the burden lies on him to prove it. (1916) 2 M.W.N. 351=4 Ind. L.W. 444=37 Ind. Cas. 688.

——S. 4—"Shall presume"—Meaning of—Agra Tenancy Act (1901), S. 201 (3).

The words 'shall presume" in the section mean there is irrebuttable and conclusive presumption even if the parties are members of a joint Hindu family. 33 All. 799 (F.B.), Foll. 103 Ind. Cas. 346=25 A.L.J. 706=8 L.R.A. Rev. 168=A.I.R. 1927 All. 810.

——S. 5. Synopsis.

1. **Admissibility**
2. **Conduct of party**
3. **Depositions**
4. **Exceptions**
5. **Irrelevant evidence**
6. **Objection to admissibility**
7. **Relevancy of evidence**
8. **Relevant facts**
9. **Third party's documents**
10. **Weighing of evidence**

1. Admissibility.

——S. 5—Admissibility.

All answers to questions not relating to issues before Court are inadmissible. A.I.R. 1944 Mad. 195=1943 M.W.N. 684=(1944) 1 M.L.J. 1=I.L.R. (1944) Mad. 340=217 Ind. Cas. 106.

——S. 5—Admissibility.

Suit for breach of agreement to sell—Agreement unregistered admissible in evidence, 1931 M.W.N. 297.

——S. 5—Admissibility of evidence—Doubtful or remote relevance.

When considering the question of admissibility, the Court should lean always in favour of the accused, and exclude all evidence tendered by the prosecution which is of doubtful or remote relevance. A.I.R. 1936 Cal. 73 =40 C.W.N. 432=37 Cr.L.J. 394=63 Cal. 929=64 C.L.J. 154=161 Ind. Cas. 74.

——S. 5—Admissibility of evidence—Murder.

Where the sole point for decision is whether the accused were parties to a murderous attack on the Police, it is quite unnecessary and indeed wholly irrelevant to consider whether they were terrorists or members of any other body. A.I.R. 1936 Lah. 341= 16 Lah. 345=37 P.L.R. 605=37 Cr.L.J. 504=161 Ind. Cas. 900.

——S. 5—Admissibility—Question whether person died as Hindu or Muhammadan.

Where it is alleged that a Hindu Jat became a Muhammadan, the question whether he died as a Hindu or as a Muhammadan is not to be decided by evidence as to his conversion many years ago; it is to be decided by the consideration of the evidence, oral and documentary, of more recent years. A.I.R. 1936 All. 202=1936 A.L.J. 488=1936 A.W.R. 198=160 Ind. Cas. 48.

——S. 5—Admissibility.

The opinion recorded by the Income-tax Officer that there was separation of the family and had separate grain business is irrelevant in the civil suit and was rightly excluded from consideration. 19 Nag. L. Jour. 287.

2. Conduct of party.

——S. 5—Conduct of a party.

In a suit against the son of a lambardar for profits, the evidence brought to prove that there was difficulty in the collection of the rent and to prove that on the death of the lambardar no one could be induced to take his place is relevant and admissible. 9 L.R.A. Rev. 23=107 Ind. Cas. 702=A.I.R. 1928 All. 166.

3. Depositions.

——S. 5—Depositions—Cr. P. Code, S. 360—Non-compliance with S. 360 does not make record entirely inadmissible in evidence.

The provisions of S. 360 Cr. P. Code, are mandatory. But non-compliance does not legally result in the total inadmissibility of the record of evidence and in the absence of any definite provision of law entailing inadmissibility, each case of non-compliance must be considered by the Court on its own merits and the document which purports to be the record can be admitted, but without the presumption laid down in S. 80 of the Evidence Act, and, therefore, open to question by the defence and appraisal by the Court.

The law itself does not expressly lay down that the least failure to comply with the provisions of S. 360 renders the whole document inadmissible. Where therefore there has been an attempt by the presiding officer to comply with its provisions and to secure the accuracy of the record of evidence the provisions of S. 80 do not lead to complete exclusion of the document, and the Court is bound to admit under S. 5 but it is open to each side to adduce evidence as to its faithfulness or otherwise and as to the degree of presumption under S. 80 and the weight to be attached to it. 86 Ind. Cas. 33 =16 S.L.R. 255=26 Cr. L. J. 657=A.I.R. 1921 Sind 151.

4. Exceptions.

——S. 5—Exceptions to—Strict construction.

Exceptions such as in S. 117 Cr. P. Code to the general rules of evidence must only be applied to the cases to which they are confined by the legislature. 34 Mad. 255=21 M.L.J. 488=8 M. L. T. 347=(1911) 1 M.W.N. 34=11 Cr.L.J. 663=8 Ind. Cas. 493.

5. Irrelevant evidence.

——S. 5—Irrelevant evidence—Omission to object—Effect.

Even if the party affected has not objected, an irrelevant evidence cannot be admitted and considered. A.I.R. 1945 Cal. 492=49 C.W.N. 791=I.L.R. (1946) 1 Cal. 149.

——S. 5—Irrelevant evidence—Omission to object—Effect.

Omission to object to admission of irrelevant evidence does not make it relevant. A.I.R. 1936 Lah. 114.

——S. 5—Irrelevant evidence—Omission to object—Effect.

When a piece of evidence is irrelevant, the erroneous omission before the lower Courts to object to the admission of that evidence does not make that evidence relevant. A.I.R 1931 Mad. 601=1931 M.W.N. 261=135 Ind. Cas. 572.

——S. 5—Irrelevant evidence—Omission to object—Duty of Court.

The mere omission to object to a document which is not in itself admissible as evidence does not constitute that document evidence so as to be available to either party at the trial. It is clearly the duty of the Judge, apart altogether from any objection by the parties or their pleaders, to exclude irrelevant evidence. 1921 P.H.C.C. 17=A.I.R. 1921 Pat. 61=5 Pat. L.J. 410=57 Ind. Cas. 561.

6. Objection to admissibility.

——S. 5—Objection to admissibility—Stage for—Relevancy and proof.

An erroneous omission before the lower Court to object to the admission of evidence does not make that evidence relevant.

This, however, applies only where the document is per se irrelevant or inadmissible and no objection was taken to its admissibility.

Where evidence is admitted in the trial Court without any objection to its reception and the evidence is admissible and relevant, then no objection will be allowed to be taken to its reception at any stage of the litigation on the ground of improper proof. But if the evidence is irrelevant or inadmissible, as for instance, owing to want of registration omission to take objection to its reception does not make it admissible and the objection may be raised even in appeal for the first time.

The question of relevancy is a question of law and can be raised at any stage but the question of proof is a question of procedure and is capable of being waived. A.I.R. 1946 Bom. 193=47 Bom. L.R. 962=224 Ind. Cas. 169.

——S. 5—Objection to admissibility—Stage for.

Where it does not appear that any objection on the relevancy of a document was taken at the time the document was marked in the lower Court, the High Court would not be justified in allowing such objection to be taken in the second appeal. A.I.R. 1945 Mad. 361=(1945) 1 M.L.J. 378=1945 M.W.N. 352=58 M.L.W. 321.

——S. 5—Objection to admissibility—Stage for.

A document can be objected to as irrelevant at any time. A document can be objected to as inadmissible as opposed to irrelevant at the first hearing only. 109 Ind. Cas. 728=10 L.L.J. 370=A.I.R. 1928 Lah. 428.

7. Relevancy of evidence.

——S. 5—Relevancy of evidence — Court's powers—Extent of.

In determining the relevancy or otherwise of any evidence the Court cannot consider matters beyond the purview of Evidence Act. 12 A.L.J. 285=15 Cr. L. J. 429=24 Ind. Cas. 165.

——S. 5—Relevant evidence—Murder trial.

In the trial for the murder of a particular person the case against the accused under trial, should be determined on evidence which is relevant and admissible under the Act and on the strengh of evidence which the Court may consider necessary to record and appreciate with reference to two entirely different murders committed by the accused. 62 Ind. Cas. 545=22 Bom. L.R. 1274=22 Cr.L.J. 529.

8. Relevant facts.

——S. 5—Relevant facts.

The cross-examination and the examination in chief must relate to relevant facts, in order that statements made in the course of such examinations may be admissible. 5 L.B.R. 4=9 Cr. L.J. 576=29 Ind. Cas. 34.

9. Third party's documents.

——S. 5—Third party's documents.

Documents relating to land on the boundaries of the land in suit are not admissible for the purpose of showing possession of the disputed land. 91 Ind. Cas. 688=A.I.R. 1926 Cal. 479.

——S. 5—Third party's documents.

The recitals of boundaries of other lands in documents between third partie's are not admissible in evidence either with regard to a question of boundaries or as to the nature of the land. 91 Ind. Cas. 449 (Cal.).

10. Weighing of evidence.

——S. 5—Weighing of evidence—Presumption of innocence.

Where the facts proved in a case are perfectly consistent either with the innocence or guilt of the accused, the presumption of innocence should prevail. 6 Bom. L.R. 551.

—S.5—Weighing of evidence—Prosecution story taken as a whole false—Accused is entitled to an acquittal, even if parts of the story be true. 6 C.W.N. 380.

——S. 6. Synopsis.

1. Illustration. (a)
2. Charge of Conspiracy
3. False Complaint
4. Hearsay evidence
5. Irrelevant evidence
6. Rape
7. 'Res gestae'
8. Statement by testator before registering-officer
9. Statement made to police
10. Unlawful Assembly

1. Illustration. (a).

——S. 6, Illust. (a) — Remarks of persons not eye-witnesses.

The word "by-standers" in S. 6,illust. (a), means persons present at the time of occurrence and not those who are attracted to the spot after the occurrence. Hence the remarks of persons who are not eye-witnesses must be regarded as hearsay because they must have picked up the news from others. A.I.R. 1945 Lah. 46=46 P.L.R. 353=I.L.R. (1944) Lah. 461=218 Ind. Cas. 242=46 Cr. L. J. 431.

——S. 6. Illust. (a)—Remarks of person not eye-witness.

Evidence of a witness who was not present at the occurrence but only deposed to circumstances after the occurrence is not admissible to prove facts relating to the occurrenee. 91 Ind. Cas. 812=7 L.L.J. 436=26 P.L.R. 674=27 C.L.J. 140=A.I.R. 1925 Lah. 578.

——S. 6. Illust. (a)—Remarks of eye-witness shortly after occurrence, if relevant.

Hearsay evidence of the statement of a by-stander as to an occurrence would be admissible in evidence as a part of the **res gestae** only if it was made at the time the transaction was taking place or so shortly before or after it as to form part of the same transaction. If the transaction had terminated when the statement was made, it would be irrelevant. In this case a chowkidar deposed that one G ran up to him and stated that he had seen the accused person's murder his mistress whom he had met by assignation and that he had run away from the place of occurrence to save his life. What interval of time passed between the murder and the alleged statement did not appear. G seemed to be quite sensible when he made the statement and the condition of his mind did not appear to be such as to exclude the supposition of his fabricating evidence or being tutored.—Held, that the statement was inadmissible in evidence. 11 C.W.N. 266.

2. Charge of Conspiracy.

——Ss. 6 and 5—Charge of conspiracy to defraud companies — Evidence that accused acted as receiver for conspirators, if relevant.

Where the main crime charged is conspiracy to defraud certain companies with three subsidiary charges relating to particular instances in which some of these firms had been cheated, any evidence which might show or tend to show that during the course of the alleged conspiracy, one of the accused had acted as a receiver for the conspirators, would not only be relevant to the issue, but would also be highly material. A.I.R. 1945 Cal. 441=47 Cr. L.J. 202=221 Ind. Cas. 547=I. L. R. (1944) 2 Cal. 327.

——S. 6—Charge of conspiracy.

A conspiracy may be proved by other than oral evidence. It may be proved by the evidence of surrounding circumstances and the conduct of the accused both before and after the alleged commission of the crime. 9 Bom. L. R. 347 =5 Cr.L.J. 329.

3. False Complaint.

——S. 6—False complaint.

Where the offence under trial is filing a false complaint, what happened at the subsequent Police Investigation of the complaint forms no part of the **res gestae**. 85 Ind. Cas. 209=26 Cr. L. J. 721=48 Mad. 640=21 M.L.W. 190=1925 M.W.N. 68=A.I.R. 1925 Mad. 579=48 M. L. J. 195.

4. Hearsay evidence.

——S. 6—Hearsay evidence—Basis of action—Relevancy.

Under the Evidence Act hearsay evidence is in-admissible to prove a fact which is deposed to on hearsay, but does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed. 97 Ind. Cas. 785=24 M.L.W. 227=A.I.R. 1926 Mad. 1003.

——S. 6—Hearsay evidence—Statement by by-stander—Admissibility.

A statement by a person alleged to be the eye-witness of a murder made to persons who came to the scene of occurrence after the murderer has left the place, cannot be proved against the accused for the purpose of showing that their names were mentioned as murderers. In order to make the statement of a by-stander admissible it must have been made as contemplated by S. 6 and illustration (a) to S. 6 at the time the transaction took place or so shortly before or after as to form part of the transaction. The statement would be irrelevant if made after the transaction is complete. The admissibility depends on the continuity of the transaction. 34 P.R.Cr. 1914=26 P.L.R. 1915= 16 Cr.L.J. 184=27 Ind. Cas. 664.

5. Irrelevant evidence.

——S. 6—Irrelevant evidence—Applicability.

A certain witness stated that he had seen three women, who were sleeping in the same bari as the complainant and his wife that night, searching something at dusk.

Held, that as the alleged search that evening was not part of the same transaction as the abduction at night, S. 6 could not make it admissible and as the women were neither parties to the case nor agents to any party, S. 8 was inapplicable, S. 9 was also inapplicable. 90 Ind. Cas. 433=42 C.L.J. 111=26 Cr.L.J. 1553=A.I.R. 1926 Cal. 105.

6. Rape.

——S. 6—Rape.

In absence of definite and reliable evidence that the outrage upon a girl in an offence under S. 376, I.P.C. and her statement of the occurrence to her father constitute together **res gestae** much value cannot be attached to the statement even if it is held to be admissible. A.I.R. 1930 Lah. 337=31 P.L.R. 612=127 Ind. Cas. 862.

——S. 6—Rape—Statements after transaction.

Where the statement of the girl to her mother does not form part of the transaction., viz., the raping of the girl, or occur during it, but is made after the transaction is over, when the perpetrator had gone away and the girl came away from the scene of occurrence to her mother's house, the statement is not relevant under S. 6. 50 C.L.J. 524=1930 Cr.C. 132=A.I.R. 1930 Cal. 132.

——S. 6—Rape—Statement by complainant after occurrence.

In a case of rape, a statement made by the complainant immediately after the occurrence to another woman is admissible, not as evidence of the truth of the charge alleged, but as corroborating the credibility of the complaint and of the evidence of the consistency of her conduct. 19 Cr.L.J. 155=43 Ind. Cas. 443 (L.B.).

——S. 6—Rape.

Where the woman raped made a statement to her relative shortly after and committed suicide about three days after the occurrence,

Held, that the statement was not admissible under S. 6. A.I.R. 1931 Mad. 233 (2)=32 Cr.L.J. 751=131 Ind. Cas. 456=1930 M.W.N. 702.

7. "Res gestae".

——S. 6—Res gestae.

The statement of a complainant made sometime after the occurrence is not admissible in evidence on the principle of res gestae. The declarations, to be admissible as res gestae should be contemporaneous with the transaction in issue, that is, the interval should not be such as to give time or opportunity for fabrication and they should not amount to a mere narrative of a past occurrence. They are admitted when they appear to have been made under the immediate influence of some principal transaction relevant to the issue and are so connected with it as to characterise or explain it. A.I.R. 1942 Oudh 130=43 Cr.L.J. 280=1941 O.W.N. 1290=1941 A.W.R. (C.C.) 397=197 Ind. Cas. 839.

——S. 6—Res gestae—Statement made to third party—Admissibility of.

In certain cases, a witness may be asked to give particulars of what a person has said shortly after an occurrence and a complaint that such a person may have made shortly after an occurrence not as being evidence of the facts complained of but as being evidence of the consistency of the story of the complainant. This, however, is an exception to the general rule of evidence, which is, that statements may be used against a witness as admissions, but one is not entitled to give evidence of statements, on other occasions by the witness in confirmation of his testimony. Where, therefore, a dispute between X and Y is whether X had agreed to make a purchase from Y on a certain date, a statement in support of Y's allegation in a letter written by Y to a third party is inadmissible either in examination-in-chief or in cross-examination. A.I.R. 1939 P.C. 146=50 M.L.W. 81=41 P.L.R. 622=182 Ind. Cas. 27 (P.C.).

——S. 6—Res gestae.

It cannot be argued that because a fact or statement is not relevant under S. 6, Evidence Act, it is not relevant at all. A.I.R. 1938 Oudh 26=1937 O.W.N. 1058=13 Luck. 697=171 Ind. Cas. 481.

——S. 6—Res gestae.

Evidence of witnesses to whom complaint was made long after the incident is not admissible as such evidence is not res gestae. A.IR. 1934 Cal. 17=57 C.L. J. 447=150 Ind. Cas. 209.

——S. 6—Res gestae.

Events preceding and leading to assault on the deceased have to be considered in approaching the evidence led by the prosecution to prove the guilt of the accused. A.I.R. 1934 Rang. 44=35 Cr.L. J. 855=148 Ind. Cas. 1069.

——S. 6—Res gestae—After occurrence.

What a witness tells at the time of the occurrence in respect of the occurrence itself is res gestae under S. 6. But a statement with regard to an event which took place a year ago would not be part of res gestae. 92 Ind. Cas. 442=53 Cal. 372=42 C.L. J. 504=27 Cr.L.J. 266=A.I.R. 1926 Cal. 139.

——S. 6—Res gestae.

Whenever recollection comes in, whenever there is opportunity for reflection and explanations, then statements cease to be part of the res gestae. 4 L.L.J. 491=A.I.R. 1921 Lah. 258.

8. Statement by testator before registering officer.

——S. 6—Statement by testator before registering officer—Admissibility of.

Statements made by a testator at the registration of the will are admissible in evidence. 37 M.L.J. 489=47 Ind. Cas. 611.

9. Statement made to police.

——S. 6—Statement made to police.

Statement of a person, differing from a written report handed over by the same person but written by another, cannot be admissible against person writing the report. 17 A.L.J. 760=20 Cr.L. J. 311=50 Ind. Cas. 487.

10. Unlawful assembly.

——S. 6—Unlawful assembly—Statements of members.

Evidence of statements, made by members of an assembly the promoters of which were charged with offences under S. 325 read with S. 149, I.P.C., of their determination to force their way through the police forms evidence of a part of the res gestae and is admissible to indicate that the promoters' intention to ignore the police orders had been communicated to sections of the crowd. 90 Ind. Cas. 918=3 Rang. 352=26 Cr.L J. 1622=A.I.R. 1925 Rang. 354.

——S. 7—Absence of entry—Relevancy.

The absence of an entry in an account book is a relevant fact, under either S. 7 or S. 8 or S. 11 of the Evidence Act. 76 Ind. Cas. 327=A.I.R. 1924 Nag. 22.

——S. 7—Evidence that there were foot-prints near scene of occurrence.

Evidence that there were foot-prints at or near a scene of offence or that these foot-prints came from a particular place or led to a particular place, is relevant under S. 7 of the Evidence Act. A.I.R. 1942 Sind. 11=I.L.R. (1941) Kar. 525=43 Cr.L.J. 308=198 Ind. Cas. 110.

——S. 8 Synopsis.

1. Complaint by deceased of apprehension of danger to life
2. Conduct
3. Disappearance of accused after occurrence
4. Evidence of excessive claim by insured
5. First informant
6. Informer's statement
7. Joint act of several persons
8. Motive
9. Preparation
10. Previous attempts to kill.
11. Previous conduct
12. Previous statement
13. Rape—Conduct of victim
14. Res gestae
15. Silence of accused
16. Statements

1. Complaint by deceased of apprehension of danger to life.

——S. 8—Complaint by deceased regarding apprehension of danger to life.

A written complaint by the deceased to the S.D.O. stating that he apprehended danger to his life, liberty and reputation, would be admissible in a trial for conspiracy to murder the deceased under S. 8, Evidence Act, of conduct of the deceased an offence against whom was the subject of the trial, such conduct being influenced by his fear of injury. A.I.R. 1938 Cal. 51=66 C.L.J. 225=42 C.W.N. 129=39 Cr.L.J. 161=I.L.R. (1938) 1 Cal. 290=173 Ind. Cas. 65.

2. Conduct.

——S. 8—Conduct.

Even if the statement made by the accused which led to the discoveries were not taken into consideration, the conduct of the accused in disclosing the places where the articles were concealed by them and producing the same is relevant under S. 8. A.I.R. 1946 Nag. 120=I.L.R. (1945) Nag. 931=47 Cr.L.J. 441=222 Ind. Cas. 389.

——S. 8—Conduct.

The fact that the father took no interest in the child by itself is not of much value in establishing illegitimacy of child nor can the fact whether the father did or did not perform the funeral obsequies of his wife be of very great assistance either. A.I.R. 1942 Mad. 129=54 L.W. 411=201 Ind. Cas. 39.

——S. 8—Conduct.

When a person is accused of a crime, the fact that, either before or at the time of, or after the alleged crime, he destroyed or concealed evidence or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, is relevant. A.I.R. 1941 Oudh 130=42 Cr.L.J. 165=1941 O.W.N. 133=1941 A.W.R. (C.C.) 59=191 Ind. Cas. 466.

——S. 8—Conduct.

On the question of conversion of a person, it is relevant and important to learn from the conduct and statements of his Hindu wife whether she thought herself to be the wife of a Hindu or Muhammadan. A.I.R. 1939 P.C. 249=6 B.R. 1=44 C.W.N. 66=I.L.R. (1940) Kar. (P.C.) 1 Sup.=183 Ind. Cas. 662 (P.C.)

——S. 8—Conduct—Accused pointing out shop where he purchased crackers.

Quaere—Where a Magistrate does not act, under S. 164 or S. 364, Criminal P. C., and gives evidence to the effect that the accused pointed out a certain shop alleging that he had purchased crackers from that shop, whether only the statement or even the gesture of pointing out the shop is excluded from evidence. A.I.R. 1937 Lah. 746=39 P.L.R. 453=39 Cr.L.J. 262=173 Ind. Cas. 105.

——S. 8—Conduct.

Per Broomfield J.—Gestures of the deceased shortly before his death in reply to questions put to him as explained by the questions will be relevant as conduct under S. 8, Evidence Act.

Per Wassoodew J.—The form of the question cannot affect the admissibility of the signs if such signs are rendered admissible under the Evidence Act. The evidence of this kind is admissible under S. 32, not under S. 8, Evidence Act. A.I.R. 1936 Bom. 372=38 Bom. L.R. 818=37 Cr.L. J. 1140=I.L.R. (1937) Bom. 68=165 Ind. Cas. 422.

——Ss. 8, 27, 24—Conduct — Conversation between accused and Police.

Where on information contained in the confession of an accused, a visit was made by that accused himself, together with certain witnesses and police officers, to a spot where arms were concealed, and during the time that the arms were dug on the information of the accused person in custody, various conversations took place between the accused and the police which amounted to conversation to the detriment of the accused person and actually adding to the confession he had already made, then the conversation is admissible in evidence as proof of conduct and the whole of this evidence cannot be excluded because, presumably, the whole incident is tainted by the verbal communications which the accused made to the police at the time of the search. A.I.R. 1936 Cal. 316=63 C.L.J. 232=37 Cr. L. J. 775=63 C. 1053=163 Ind. Cas. 41.

——S. 8—Conduct—Spot of hiding ornaments shown and ornaments dug out.

Where the accused gives information which leads to discovery, and the exact spot where the ornaments are buried is shown, and they are dug out from there, the question is not so much whether the accused was in physical possession of the ornaments but the important point is rather that the circumstances and the conduct of the accused point clearly to his knowledge of the exact spot where the ornaments were, and in the absence of any explanation, the reasonable inference is that he put them there himself, and such conduct is admissible under S. 8, Evidence Act and this fact, taken along with other evidence of his being seen with the deceased, is sufficient to warrant a presumption of complicity in murder. A.I.R. 1936 Nag. 200=I.L.R. (1936) Nag. 78=37 Cr.L.J. 1047=164 Ind. Cas. 964.

——S. 8—Conduct.

The conduct of a person who was no party to the crime and was not called as a witness cannot be admissible under S. 8, Evidence Act. A.I.R. 1935 Nag. 81=17 N.L.J. 274.

——Ss. 8 and 9—Conduct.

The fact of the production of the share of the property of one particular accused involved in a decoity case is admissible as conduct under S. 8, Evidence Act and if the fact of production is admissible then the circumstances in which the production took place are also relevant under S. 9. A.I.R. 1932 Bom. 286=34 Bom. L.R. 303=56 Bom. 172=33 Cr.L.J. 396=137 Ind. Cas. 174.

——S. 8—Conduct—Subsequent conduct—Value of.

Different persons are differently constituted and that some accused even though innocent deliberately abscond rather than face the ordeal of a criminal trial and that some other innocent accused do equally foolish things such as make a false admission of guilt or pay off the amount said to have been stolen or embezzled in the vain hope that they may escape a criminal prosecution or get off with a light punishment. Such subsequent conduct cannot dispense with the positive proof of the guilt of the accused, the burden of which lies upon tne prosecution. When once the Crown has estabiished the guilt of the accused by the evidence of prosecution witnesses then such subsequent

conduct may be utilized as furnishing further proof of the correctness of the conclusion as to the guilt of the accused drawn from the evidence of the prosecution witnesses; by itself, however, it can furnish no legitimate proof of the guilt of the accused. 7 O.W.N. 564=A.I.R. 1930 Oudh. 324.

——S. 8—Conduct—Approver.

The mere fact of an accused person having taken the Magistarate to a pariticular spot and pointed out the several places, where the various incidents narrated by the approver took place, is not admissible as evidence of conduct nor is it of any value in determining his guilt. 121 Ind. Cas. 497=1929 Cr.C. 426=31 Cr.L.J. 269=A.I.R. 1929 Lah. 794.

——S. 8—Conduct—Construction of deed.

Per Mukerji. J.—Where the meaning of the document regarding certain transactions is not clear, the conduct of the parties is admissible in evidence to show in what light they themselves regarded the transactions.

Per Ashworth, J.—Subsequent conduct is only admissible for the purpose of construing a deed when it is impossible to arrive at a clear finding as to the meaning of the deed from its own terms and from surrounding circumstances. 111 Ind. Cas. 701 =25 A. L. J. 849= A.I.R. 1928 All. 34.

——S. 8—Conduct—Robbery and assault.

A statement made by the deceased immediately after the robbery regarding the robbery and also regarding the assult committed in the course of the robbery, is admissible showing conduct, though the person who made it cannot be called to depose to it on oath. 106 Ind. Cas. 698=6 Pat. 747=9 A.I. Cr. R. 375=29 Cr. L.J. 106=A.I.R. 1928 Pat. 162.

——S. 8—Conduct and character.—Criminal tendency—Acts which formed basis of prior charge—Relevancy.

It is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue. (1894) A. C. 57, Foll.

Evidence of defalcations both prior or subsequent whether such defalcations formed the basis of another charge on which the accused may have been acquitted or not are admissible in evidence to prove guilty intent as also to anticipate the defence of the non-existence of such intent. 97 Ind. Cas. 1041=21 S.L.R. 55=27 Cr. L. J. 1217= A.I.R. 1927 Sind 28.

——S. 8—Conduct—Murder case.

The fact that the accused pointed out the place, where the weapon was found as being the place at which it was concealed, and the fact that shortly after the crime he was in a very agitated state and made a statement which led to his being asked to show the spot where the weapon used in the commission of the murder was concealed are evidence of conduct under S. 8 of the Evidence Act, which render highly probable, the oral evidence in the case and indicate that the accused was the murderer. 86 Ind. Cas. 664=26 Cr. L.J. 840=21 M.L.W. 199=A.I.R. 1925 Mad. 574.

——S. 8—Conduct—Offence under S. 147, I.P.C. —Subsequent conduct.

Where the evidence against a person charged with an offence under S. 147, I.P.C. is open to doubt, his conduct, sometime after the occurrence cannot be taken to be evidence under S. 8 of the Evidence Act and cannot be used against him in the case. 21 Cr. L.J. 167=54 Ind. Cas. 775 (Pat).

——Ss. 8 and 27—Conduct—Accused pointing out spot to Police officer.

If an accused accompanies a Police officer and points out the spot where the stolen property is concealed it amounts to conduct, proof of which is admissible under S. 8. (1916) 2 U.B.R. 114=35 Ind. Cas. 962.

——S. 8—Conduct of parties—Intention.

The conduct of the parties after the transaction is important in order to ascertain the intention of the parties as to when the property should pass. (7 P. R. 1897 and 68 P. R. 1900, Ref). 27 P. L. R. 1911=41 P.W.R. 1911=55 P. R. 1911=9 Ind. Cas. 547.

——S. 8—Conduct—Proof of conspiracy.

A conspiracy may be proved by the evidence of surrounding circumstances and the conduct of the accused both before and after the alleged commission of the crime. 9 Bom. L.R. 347=5 Cr. L. J. 329.

3. Disappearance of accused after occurrence.

——S. 8—Disappearance of accused after occurrence.

Disappearance of the accused after the occurrence is a circumstance which, in the absence of any plausible explanation, might be taken into consideration against them. The failure of the accused to put forward any explanation must, therefore, be regarded as a point in favour of the prosecution. At the same time it would be more satisfactory if the Magistrate or the Sessions Judge questions the accused under S. 342, Criminal P. C., particularly with regard to their disappearance. A.I.R. 1941 Oudh 517=42 Cr.L.J. 758=1941 O.W.N. 981=1941 A.W.R. (C. C.) 265=195 Ind. Cas. 630.

——S. 8—Disappearance of accused after occurrence.

Mere absconding of an accused person should not form the basis of a conviction. It comes in as a very useful piece of corroborative evidence if there is other evidence to connect the accused with the crime, but per se absconding is not enough to bring home the charge to the person who has absconded. A.I.R. 1936 Pesh. 169=37 Cr.L.J. 988= 164 Ind. Cas. 630.

——S. 8—Disappearance of accused after occurrence.

Although the mere fact that an accused person absconds cannot in itself be taken as proof of his guilt, it is of great corroborative value when weighing direct evidence. A.I.R. 1935 Pesh. 75=36 Cr.L.J. 958=156 Ind. Cas. 433.

——S. 8—Disappearance of accused after occurrence.

The mere fact that an accused has absconded will not necessarily fix him with guilt but the fact is undoubtedly a piece of relevant evidence against him which should be taken into consideration. 35 P.L.R. 740.

——S. 8—Disappearance of accused after occurrence.

Conduct like that of absconding, though it may raise presumptions, is at most corroborative, and is not in itself sufficient to substantiate a charge in the absence of substantive evidence. A.I.R. 1933 Pesh. 28=34 Cr. L. J. 386=142 Ind. Cas. 392.

4. Evidence of excessive claim by insured.

——S. 8—Evidence of excessive claim by insured is inadmissible.

Where the allegation against the insured is that the fire was intentionally caused by him, the fact that the claim made by the insured against the insurance company after the fire was excessive, is inadmissible in evidence. A.I.R. 1941 Rang. 324=1941 Rang. L.R. 566=43 Cr. L. J. 373=198 Ind. Cas. 455.

5. First informant.

——S. 8—First informant.

Where the first informant is alive, the first information cannot be regarded as substantive evidence but where he is dead, it is admissible under S. 32 (1) or S. 8, Evidence Act. A.I.R. 1943 Cal. 74=I.L.R. (1942) 2 Cal. 144=44 Cr. L. J. 322=205 Ind. Cas. 92.

6. Informer's statement.

——S. 8—Expl. 2—Informer's statement—When admissible—Inference from circumstances.

An informer's statement to the police that he purchased opium from the accused is not admissible unless it was made in the presence of the accused but the finding of marked coins on the accused and opium on the informer are circumstances in this case from which it may be inferred that the accused sold the opium. 4 Bur. L.T. 222=12 Cr. L. J. 479=12 Ind. Cas. 87.

7. Joint act of several persons.

——Ss. 8, 27—Joint acts of several persons.

Where joint acts of several persons are sought to be proved in order to ask the Court to draw an inference from such conduct, evidence should be led with some degree of particularity so that it may be possible for the Court to draw the necessary inference from the conduct of each one of the persons concerned in the act. The principle applies not only to evidence relevant under S. 27 but also to that under S. 8, Evidenee Act. A.I.R. 1935 Cal. 184=62 Cal. 572=39 C. W. N. 368=36 Cr. L. J. 808=155 Ind. Cas. 687 (F.B.)

8. Motive.

——S. 8—Motive—Proof of.

The prosecution is entitled to call evidence in support of an alleged motive, however improbable it may be, and none the less so because such evidence may suggest that the accused have committed some crime other than that with which they are charged. If such evidence is given with a view to showing that they are persons likely to have committed the offence with which they are charged the evidence would be inadmissible; but it would be admissible to establish the motive for the offence with which they are charged. 73 I.A. 195=227 Ind. Cas. 1=59 L.W. 650=1946 A. L. J. 407=1946 O.A. (P.C.) 470=1946 P.W.N. 336=1946 A.W.R. (P. C.) 170=12 B.R. 33=1946 M. W. N. 620=A. I. R. 1946 P. C. 187=51 C.W.N. 200=1947 A.L.W. 16=1947 O.W.N. (P. C.) 16=21 P.L.T. 292=1947 A. Cr. C. 1 =(1946) 2 M.L.J. 297 (P. C.)

——S. 8—Motive.

An accused cannot be convicted because of the motive. At best it raises a very strong suspicion that he committed the crime but suspicion cannot take the place of positive proof. 46 P.L.R. 283.

——S. 8—Motive—Inadequacy of motive.

Absence of motive or the existence of an inadequate motive is a matter of comparative unimportance, where there exists absolutely cogent evidence that a crime has, in fact, been committed by a certain person. But where there is no adequate evidence and on the evidence that is led, the Court entertains serious doubt as to the accused's complicity in the crime, the absence of any adequate motive for the crime becomes a matter of some importance. A.I.R. 1937 Oudh 236=1937 O.W.N. 291=38 Cr. L. J. 424=167 Ind. Cas. 579.

——S. 8—Motive for confession.

It is not very natural that an accused person should, merely from the annoyance at not getting his proper share of the loot, take an action which he must know will put himself in jail. A.I.R. 1935 All. 549=1935 A.L.J. 478=36 Cr. L.J. 636=1935 A.W.R. 388=155 Ind. Cas. 119.

——S. 8—Motive—If must be proved.

When once the crime of the accused has been proved beyond all reasonable doubt, it is unnecessary to consider the question of motive. A.I.R. 1935 Oudh 265=1935 O.W.N. 321=36 Cr. L.J. 529=154 Ind. Cas. 691.

——S. 8—Motive, if must be proved.

If upon the evidence of the prosecution witnesses, the crime of the accused has been brought home to him, then the question of the motive with which the crime was committed becomes a matter of secondary importance. A.I.R. 1935 Oudh 354=1935 O.W.N. 561=36 Cr. L. J. 767=155 Ind. Cas. 527.

——S. 8—Motive.

The existence of the motive does not necessarily lead to the conclusion that persons having the same must have committed the offence. It can also be the cause for a false charge. A.I.R. 1934 Pesh. 129=36 Cr. L. J. 443=153 Ind. Cas. 35.

——S. 8—Motive.

The prosecution is not bound to furnish any evidence as to the motive with which the accused committed an offence. A.I.R. 1933 Oudh 340=34 Cr. L. J. 538=10 O.W.N. 585=143 Ind. Cas. 129.

——S. 8—Motive—Value of.

Although the absence of adequate motive is immaterial where the commission of the crime is clear, yet where the prosecution case has not only failed completely as regards motive but also the evidence of the actual commission of the crime is not definite, the accused should not be convicted. A.I.R. 1933 Oudh 299=10 O.W.N. 642=34 Cr. L.J. 838=144 Ind. Cas. 769.

——S. 8—Motive.

Where the direct evidence as to the commission of a crime breaks down, it is unnecessary for the Court to discuss the evidence of the motive for the crime. A.I.R. 1933 Oudh 265=34 Cr. L.J. 1009=10 O.W.N. 1108=145 Ind. Cas. 470.

——S. 8—Motive.

Mere motive cannot be considered as sufficient evidence to show that a crime had been committed. A. I. R. 1932 Lah. 195=33 P.L.R. 86=33 Cr. L. J. 501=137 Ind. Cas. 681.

——S. 8—Motive—Evidence of motive.

Dictum.—When the prosecution are unable to prove satisfactorily the intention or knowledge of an accused person, they generally ascribe to him certain words which he is supposed to have spoken in order to supply the missing proof. This method is more often adopted in cases in which a certain person is sought to be punished for constructive liability as regards the commission of a crime of violence. A.I.R. 1931 Lah. 63=32 Cr. L.J. 582=31=P.L.R. 1004=130 Ind. Cas. 649.

——Ss. 8, 32—Motive—Hearsay evidence, admissibility.

Under S. 8, Evi. Act, a motive is provable as a relevant fact, but it cannot be proved by hearsay evidence. Where a statement made by the deceased person not falling under S. 32 (1) is said to constitute a motive for another to commit the crime of murder, the statement cannot be proved under Expl. (1) to S. 8, if it did not explain or accompany any act of the deceased. A.I.R. 1931 Mad. 689=34 L.W. 128=61 M.L.J. 608=1931 M.W.N. 1177=54 M. 931=33 Cr. L. J. 51=134 Ind. Cas. 1143.

——S. 8—Motive—Value of.

Motive for a crime, while it is always a satisfactory circumstance of corroboration when there is convincing evidence to prove the guilt of an accused person, can never supply the want of reliable evidence, direct or circumstantial, of the commission of the crime with which he is charged, 94 Ind. Cas. 901=7 Lah. 84=27 Cr. L. J. 709=27 P.L.R. 583=A.I.R. 1926 Lah. 88.

——S. 8—Motive—What is.

In a trial for the murder of a particular person, the prosecution should not show, that on two previous occasions the accused under trial had committed murders but had falsely charged and got convicted some others as murderers. The fact that the previous murders have been committed by the accused does not constitute a motive or preparation under S. 8.

Per Crump, J.—A motive is that which moves a man to do a particular act. Whether the belief which produces the state of mind is true or false, the motive remains the same and the truth or falsity, of the belief is not really in question. 62 Ind. Cas. 545=22 Cr. L.J. 529=22 Bom. L.R. 1274.

9. Preparation.

——Ss. 8, 9—Preparation.

Accused charged with cheating by importing goods in port of Karachi by deceiving Customs Authorities—Evidence of previous connected visit of accused to another port for similar object is admissible under Ss. 8 or 9, Evidence Act. A.I.R. 1937 Sind 293=39 Cr. L.J. 123=32 S.L.R. 87=172 Ind. Cas. 374.

10. Previous attempts to kill.

——S. 8—Previous attempts to kill boy—Admissibility of, to rebut suggestion of accidental drowning.

There is always a possibility, when a boy of twelve gets drowned in a tank that there has been an accident but previous attempts to kill the boy would be admissible to rebut a suggestion of accidental drowning. A.I.R. 1940 Bom. 365=42 Bom. L.R. 777=I.L.R. (1940) Bom. 695=42 Cr. L.J. 111=191 Ind. Cas. 272.

11. Previous conduct.

——S. 8—Previous conduct.

A Magistrate cannot import into a case his knowledge of the previous conduct of the accused.

A Court can take judicial notice of matters of universal notoriety, and its general knowledge of daily life, but a Judge cannot use from the Bench under the guise of judicial knowledge that which he knows only as an individual observer. A.I.R. 1931 Sind. 127=25 S.L.R. 213=32 Cr. L.J. 923=132 Ind. Cas. 476.

——S. 8—Previous conduct — Principal and agent.

It is a matter of common knowledge that brokers sometimes for the purposes of gain do resort to the nefarious system of entering into a transaction unauthorisedly in the expectation of its subsequent ratification but it is a far cry that because an agent had been shown to be guilty of shady practice once his evidence as to the circumstances under which the contract in suit was entered into should be entirely discarded. 80 Ind. Cas. 969=17 S.L.R. 15=A.I.R. 1924 Sind 105.

——Ss. 8, 9, 14 and 15—Previous conduct—Relevancy of.

On the trial of the accused for murder, evidence was sought to be given that on previous occasion the accused conspired together, murdered a person and implicated their enemies into the offence; held, the evidence was not admissible either under S. 8 or S. 9 or S. 14 or S. 54 of the Evidence Act. But such evidence may be admitted to explain the conduct of the falsely implicated persons in absconding when they received the news that they were mentioned as offenders. 22 Bom. L.R. 1274=62 Ind. Cas. 545=22 Cr. L.J. 529.

12. Previous statement.

——S. 8—Previous statement.

The fact that the complainant at first said that a certain person was the real culprit is relevant. 25 P.W.R. 1910 Cr.=11 Cr.L. J. 425=6 Ind. Cas. 957.

13. Rape—Conduct of victim.

——S. 8,—Illus. (j) and (f)—Rape—Conduct of victim—Statements by women to witnesses immediately after alleged attempt to ravish her.

A women made a complaint against the accused that he tried to ravish her. The Court took into consideration the fact that immediately after the alleged attempt, the women made statements to the witnesses that the accused tried to ravish her. The Court was also impressed with the fact that even though the woman made accusations against the accused, he kept silent all the time. There was no evidence that the accusations were made to the accused or in his presence. The accused was convicted under S. 366 (1), Penal Code:

Held, that as the woman made no complaint but only made statements, they were not relevant as under S. 8, illus. (j), Evidence Act; she ought to have made a complaint and that as there was no evidence that the accusations were made in the presence of or to the accused, the mere silence of the accused did not fall under illus. (f) to S. 8, Evidence Act, and was not, therefore, relevant. The accused could not, therefore, be convicted. A.I.R. 1938 Rang. 127=39 Cr.L. J. 581 (2)=175 Ind. Cas. 222.

——S. 8—Rape—Conduct of victim.

When a woman was tried for bringing a false charge of rape against a Sub-Inspector, the fact

that she did not make any particular allegations before but made it in enquiry is relevant. A.I.R. 1935 Nag. 69=17 N.L.J. 189.

——S. 8—Rape—Conduct of victim.

If the conduct of a woman who has been ravished is such that she lodges a complaint, then that conduct is relevant and the terms in which the complaint was made are relevant as conduct but they are not relevant as direct proof of the act. The particulars of the complaint may, so far as they relate to the charge against the prisoner, be given in evidence, not as being evidence of the facts complained of but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box and as negativing consent on her part. But if she does not go into the witness-box, there is nothing to confirm or corroborate and the statement or complaint cannot be proved under S. 8, Evi. Act. A.I.R. 1931 Mad. 233 (2)=32 Cr. L.J. 751=1930 M.W.N. 702=131 Ind. Cas. 456.

——S. 8—Rape—Conduct of victim.

S. 8 does not render a statement by a woman raped admissible in evidence when there is nothing to corroborate or confirm the same. (1930) M.W.N. 702=32 Cr. L.J. 751=131 Ind. Cas. 456=1931 Cr. C. 329=A.I.R. 1931 Mad. 233.

——S. 8—Rape—Conduct of victim.

Where the statement of the girl to her mother does not form part of the transaction, viz., the raping of the girl or occur during it, but is made after this transaction is over, when the prepetrator had gone away and the girl came away from the scene of occurrence to her mother's house, the statement is not relevant under S. 6. 50 C.L.J. 524=1930 Cr.C. 132=A.I,R. 1930 Cal. 132.

——S. 8—Rape—Conduct of victim.

The answers given by the child in reply to mother's queries could not be admitted in evidence by letting in the mother's statement and that to hold otherwise would be admitting hearsay evidence. 120 Ind. Cas. 539=1930 Cr. C. 100=31 Cr.L.J. 141=31 P.L.R. 391=A.I.R. 1930 Lah. 84.

——S. 8—Rape—Conduct of victim.

If the raped girl went to her relatives straight after the occurrence and complained on her own initiative about her rape, her conduct would have a direct bearing upon and connection with the occurrence, but if she only answered questions put to her, her statement would be mere hearsay. 89 Ind. Cas. 1043=26 Cr. L.J. 1475=A.I.R. 1926 Pat. 58.

——S. 8—Rape—Conduct of victim.

Where a tender girl was alleged to have been raped, a statement made by her stating that she was raped, and uttered immediately after the rape, crying and weeping, is admissible as explaining her act of crying, under S. 8 and by way of corroboration under S. 157. 82 Ind. Cas. 142=25 Cr. L. J. 1214=A.I.R. 1925 Nag. 74.

14. Res gestae.

——S. 8—Res gestae—Admissibility of.

Statements accompanying conduct, and explaining such conduct, are relevant. 45 Ind. Cas. 904 (Nag).

15. Silence of accused.

——S. 8—Silence of accused.

Per Full Bench.—The fact that an accused person remains silent when denounced in the presence of witnesses by another person as the latter's assailant, is admissible in evidence. The reason of the confrontation of the accused by the person he is alleged to have attacked is two-fold. First it is of importance as affording evidence of identification: if the victim dies, it may be of the highest importance that before his death he identified the accused as his assailant: if he lives and gives evidence of the identity of the the accused at the trial the fact that he did so at the first possible moment is often valuable as showing the consistency of his story. Secondly it affords the accused person an opportunity of which, however, he is not bound to avail himself, either of denying that he is the person who attacked the injured party or of setting up some fact which may at a later stage form part of his defence, such as that he was acting in self-defence, or under grave and sudden provocation, or that the injuries received were due to accident.

The degree of weight to be attached to the silence of an accused person in such circumstances depends upon the nature of the case. Care must be taken in all cases not to put too high a value on the absence of an immediate denial unless the surrounding facts point unequivocally to the conclusion that any accused person, whether educated or ignorant, cautious or impulsive, voluble or taciturn, would have felt bound to make a rejoinder in view of the particular charge against him and in the particular circumstances prevailing when he was made aware of it. It is not permissible to arrive at an adverse verdict on the strength of the opinions formed as to the conduct of an accused person to supplement a case for the prosecution which at the conclusion of the evidence heard on both sides is too weak to justify conviction. A.I.R. 1937 Rang. 83=14 R. 666=38 Cr. L.J. 524=168 Ind. Cas. 193 (F.B.).

16. Statements.

——S. 8—Statement while pointing out buried property.

A statement of accused while pointing out buried property that he had concealed the property, though admissible under S. 27, is not admissible under S. 8. A.I.R. 1945 Bom. 292=47 Bom. L.R. 63=47 Cr.L.J. 51=221 Ind. Cas. 86.

——S. 8—Statements.

Accused taking in his hands certain articles and handing them over to Police:

Held, that this act does not amount to statement. A.I.R. 1941 All. 145=42 Cr.L.J. 485=1941 A.L.J. 86=1941 O.W.N. 337=1941 A.W.R.H.C. 65=I.L.R. (1941) All. 280=193 Ind. Cas. 873.

——S. 8—Statements.

Report made to Police by the accused after the first information report—Accused not questioned by the Police:

Held, that the accused's report is not a statement made in course of investigation within the meaning of S. 162, Criminal P. C., and is admissible under S. 8, Evidence Act. A.I.R. 1941 Oudh 359=1941 O.W.N. 722=1941 A.W.R. (C.C.) 188=42 Cr.L.J. 539=194 Ind. Cas. 236.

——S. 8—Statements.

Statement that accused deposited karas belonging to deceased and showing the spot is the evidence of conduct admissible under S. 8. A.I.R. 1937 Nag. 220=38 Cr.L.J. 642=I.L.R. (1937) Nag. 268=168 Ind. Cas. 962,

——S. 8—Statements.

Arrest in the course of investigation—Evidence of Police Officer of the statement made by the accused:

Held, that such evidence is not admissible under S. 8, as explanatory of conduct. A.I.R. 1935 Mad. 479=1935 M.W.N. 82=36 Cr.L.J. 1107=157 Ind. Cas. 297.

——S. 8—Statements.

Evidence of Police Officer and of complainant as to pointing out of various places by accused is really evidence of confession and hence inadmissible under Ss. 25 and 26, Evidence Act, and such evidence cannot be treated under S. 8, Evidence Act as evidence of conduct apart from the accompanying statements. A.I.R. 1935 Oudh 1=11 O.W.N. 1383=36 Cr.L.J. 166=10 Luck. 281=152 Ind. Cas. 473.

——S. 8—Statements.

Statements of the accused made before the Sub-Registrar are admissible under S. 8, Evidence Act as accompanying and explaining their conduct. 1933 M.W.N. 96.

——S. 8—Statements.

Under S. 8, Evidence Act, unless the statements are the essential complements of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as a ground for interference with respect to the issues in the case, they could not be admitted. What is relevant is the particular act upon the statement and the statement and the act must be so blended together as to form a part of a thing observed by the witnesses and sought to be proved. A.I.R. 1933 Nag. 136=34 Cr.L.J. 505=29 N.L.R. 251=143 Ind. Cas. 17.

——S. 8—Statements accompanying conduct.

Statements accompanying and explaining conduct are admissible provided they really explain the acts they accompany. 34 Bom. L.R. 1087.

——S. 8—Statements before Magistrate—Confession proceedings.

Where an accused person was sent up before a Magistrate under S. 164, Criminal P. C., to have his confession recorded and he gave the police to understand that he would make a confession, but, instead of making a confession he made a statement, though he was told that it was open to him to say that he would make no statement,

Held, that the statement was admissible as evidence of conduct. 106 Ind. Cas. 698=6 Pat. 747=9 A.I.Cr.R. 376=29 Cr.L.J. 106=A.I.R. 1928 Pat. 162.

——S. 8—Statement in answer—Admissibility as complaint.

The mere fact that the statement is made in answer to a question is not of itself sufficient to make it inadmissible as a complaint. If the question merely anticipates a statement which the complainant is about to make it is not rendered inadmissible by the fact that the questioner happens to speak first. 4 L.L.J. 491=A.I.R. 1921 Lah. 258.

——Ss. 8 and 21—Statements after long time.

Evidence regarding the statements made by a person, when they did not accompany any conduct on his part nor made at a time when a document was executed as to the circumstances of execution of document is not relevant under S. 8 or S. 21, Evidence Act. 25 M.L.J. 637=41 Ind. Cas. 543.

——Ss. 8, 25 and 26—Statement to Police officer and complainant in his presence—Admissibility of—Corroboration.

The evidence of police officer and the complainant as to the pointing out of the various places by the accused was a confession of his guilt made while he was in the custody of the police officer and inadmissible under Ss. 25 and 26 of the Evidence Act.

The evidence could not be treated as evidence of conduct, apart from the accompanying statements under S. 8 of the Act.

The statement made by the police officer to the complainant in the presence of the accused that he (the accused) was going to show the various places connected with the theft, was not admissible under S. 8 Expln. 2 because the conduct apart from accompanying statement, was not shown to be relevant and under the circumstances such a statement could not be said to affect the conduct of the accused. 21 Bom. L.R. 724=20 Cr.L.J. 681=52 Ind. Cas. 601.

——S. 9 Synopsis.

1. Absconding accused
2. Charges based on part of a book
3. Chittas
4. Conspiracy
5. Copy of document
6. Evidence of association and joint action
7. Evidence of previous crime
8. Identification of articles
9. Identification of things containing poison
10. Identification proceedings
11. Identification—Duty of Court
12. Identification—Evidentiary value
13. Identification—Object
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15. Identification—Relevancy
16. Identification—Right of accused
17. Identification—Miscellaneous
18. Similar motive, intention or design in subsequent offence.
19. Miscellaneous

1. Absconding accused.

——S. 9—Absconding of accused.

If after the commission of a crime a person whose name is mentioned as a participator in the crime absconds, his conduct implies that he is concerned in the crime. Anything therefore which tends to explain his conduct and furnishes motive other than a guilty conscience is relevant under S. 9. 62 Ind. Cas. 545=22 Cr.L.J. 529=22 Bom. L.R. 1274.

2. Charges based on part of a book.

——S. 9—Charges based on part—Whole book admissible.

Though the charges against the accused were based on only a part of a book but the whole book was given in evidence without objection from the accused, the remaining parts of the book may be used to show the intention, character and object of the poems forming the basis of charge. 34 Bom. 394=12 Bom. L.R. 105=11 Cr.L.J. 264=5 Ind. Cas. 854.

3. Chittas.

——S. 9—Chitta.

The book or chitta which describes the various plots is admissible under S. 9 of the Evidence Act,

as explanatory of the partition papers which, without the **chitta** might be very difficult to understand. 2 Ind. Cas. 367 (Cal.).

4. Conspiracy.

——S. 9—Conspiracy—Evidence of previous association.

Where several persons are charged with committing or conspiring to commit a particular dacoity and evidence is tendered to show that prior to the dacoity the accused were closely and intimately associating with the approver and the object of the association was commission of theft and other discreditable acts,

Held, that as far as the evidence of close association with the approver is concerned corroborating the approver's statement that a conspiracy existed, it is admissible under S. 9 and (or) S. 11 of the Act. 32 Bom. L.R. 324=A.I.R. 1930 Bom. 157.

——S. 9—Conspiracy—Conduct of alleged conspirator.

Where a person is alleged to be also one of the conspirators but who has not expressly been implicated in the case as a conspirator with the accused, his conduct is evidence only under S. 9 and not under S. 10. 91 Ind. Cas. 690=49 Bom. 878=27 Bom. L.R. 1373=27 Cr. L. J. 114=A.I.R. 1926 Bom. 71.

5. Copy of document.

——S. 9—Copy of document—Admissibility of.

Where the prosecution, when trying a person for sedition, brought a copy of a letter written by him and found in his possession which was alleged to have been sent by him along with the objected writing and it was contended on behalf of the accused that it is necessary for the prosecution to prove that such a letter was sent before this document can be admitted.

Held, that (1) the copy of the letter was relevant to show the accused's intention and could be admitted as evidence; and (2) it is not necessary for the prosecution to prove that such a letter was sent before the copy could be admitted as evidence. 180 Ind. Cas. 32 =30 Bom. L.R. 314=29 Cr. L. J. 322=A.I.R. 1928 Bom. 77.

6. Evidence of association and joint action.

——Ss. 9, 12 and 15—Evidence of association and joint action — Admissibility of — Murder and robbery.

On a charge against two persons of murder and conspiracy to rob the victim and for abetment of the offences, the prosecution adduced evidence of their association in connection with other charges of theft in the town, that they used to go about together, under different names, the one taking the other as his durwan and introducing himself as a rich landlord to several rich women who subsequently lost ornaments and cash which were gradually recovered. **Held** that the evidence was improperly admitted. **(Per Mookerjee, J.)** S. 15 Evidence Act is not applicable as there was no question of the act being accidental or intentional or forming part of a series of similar transaction. S. 14 of the Act did not also apply as the defence was a complete denial and no question of the character contemplated in S. 14 did or could possibly arise. 47 Cal. 671=24 C.W.N. 501=31 C. L. J. 402=58 Ind. Cas. 929.

7. Evidence of previous crime.

——Ss. 9 (c) 14 and 54 — Evidence of previous crime—Admissibility.

When a person is charged with an offence, evidence of his participation in an independent crime cannot be received as substantive evidence of the offence on trial; but evidence, may be given to prove the elements mentioned in S. 14 of the Evidence Act such as intention, etc. 18 C. L. J. 578=15 Cr. L. J. 43=22 Ind. Cas. 187.

8. Identification of articles.

——S. 9—Identification of articles—Articles not mixed with similar articles.

Where during the identification of articles recovered from the accused, they were not mixed with similar articles, this omission would not make the identification inadmissible although it would detract from the weight that would otherwise be attached to that evidence. A.I.R. 1940 Nag. 66=41 Cr. L. J. 158=1939 N. L. J. 585=185 Ind. Cas. 310.

9. Identification of things containing poison.

——S. 9 — Identification of things containing poison.

Judges who try cases of murder by poisoning should invariably put beyond the possibility of doubt the identification of every single thing that is suspected to contain any poison. The evidence should be complete as to the history of such articles, and it should be shown that they have been kept in proper custody throughout if they are to be relied on as supporting a conviction and there should be no possibility of any question being raised as to the identity of any such article. 7 Bom. L.R. 640=2 Cr. L. J. 585.

10. Identification proceedings.

——S. 9 — Identification proceedings — Admissibility.

Identification proceedings being facts which establish the identity of the accused persons, are themselves relevant under S. 9 of the Evidence Act. 1934 Lah. 641, diss. from. A.I.R. 1949 E. P. 361=3 A.I.Cr.D. 466=51 P.L.R. 215=51 Cr. L. J. 177.

11. Identification—Duty of Court.

——S. 9—Identification—Duty of Court.

Whenever an accused person disputes the ability of the prosecution witnesses to identify him the Court should direct an identification parade to be held save in the most exceptional circumstances. From the mere fact that the accused and such witnesses live in villages which are said to be about two miles apart, the Court should not pre-judge that the accused has suborned these witnesses and reject the prayer for identification. It is impossible to assume this until those witnesses have not only failed to identify the accused but have also been examined in Court with regard to the matter whether their failure to do so is in collusion with the accused or not. A.I.R. 1943 Lah. 303=45 Cr. L. J. 98=46 P.L.R. 81=209 Ind. Cas. 231.

——S. 9—Identification—Duty of Magistrate.

It is the duty of the Magistrate who conducts identification proceedings to make a note of every objection which is made by an accused at the time of the identification proceedings so that the Court which has to judge the value of the identification evidence may take into consideration the objections and in the light of those objections, may appreciate the evidence of identification. A.I.R. 1942 All. 339=1942 A. L. J. 376=1942 A. W. R. (H.C.) 293=I.L.R (1942) All. 892=43 Cr. L. J. 867=202 Ind. Cas. 586.

——S. 9—Identification—Duty of Magistrate.

In the matter of identification parades, the Magistrate should make a list of the outsiders mixed with the accused for purposes of identification with their names and addresses. Otherwise a great deal of time will be wasted in the endeavour of the defence

to establish that the persons mixed were Police constables.

Further, it is the duty of the Magistrate when a proposed witness identifies any person to note in what connection he identifies him. It is also their duty to note if the proposed witness identifies a wrong person, and it is not sufficient to say that the witness identified no one which is an inaccurate statement if the witness has really identified a person but it is not the person required by the prosecution to be identified. It is also the duty of the Magistrate to record any complaint made by the accused at the time of identification parade. If necessary, he may note that the complaint is false or futile but it would be advisable to leave it to the Court trying the case to determine whether the objection was futile or not, unless it is something within the knowledge of the magistrate. In any event the complaint or objection taken should be recorded. A.I.R. 1935 Lah. 230=35 Cr. L. J. 1180=150 Ind. Cas 1056.

——S. 9—Identification—Duty of Magistrate.

A Magistrate, who is conducting an identification parade, should take an intelligent interest in the proceedings, bearing in mind that the life and liberty of an accused person may depend upon his vigilance and caution and at the same time bearing in mind, that justice should be done in an identification proceeding. A.I.R. 1933 Lah. 946=34 P.L.R. 639=35 Cr.L.J. 79 (2) =146 Ind. Cas. 364.

——S. 9—Identification—Duty of Magistrate.

In criminal trials, as regards identification evidence, apart from seeing that the jail identification proceedings are conducted with proper care and precautions, the Court should consider the number of 'wrong' persons picked out by the identifying witnesses, and the consistency of the identifications made at different times. Other points requiring attention are whether a sufficiently large number of men paraded along with the suspects and whether any witness picked out a large number of men, so as to create a suspicion that he was picking out men at random.

Where a witness while picking out certain persons was only speculating as to their identity, the identification by that witness carries no weight whatever. A.I.R. 1932 Oudh 287=9 O. W. N. 766=34 Cr.L. J. 197=141 Ind. Cas. 511.

12. Identification—Evidentiary value.

——S. 9—Identification—Evidentiary value.

An accused in a case of dacoity was identified by three constables after more than three months. The night of the occurrence was dark and people were scattering here and there. There was a very large number of police constables and of dacoits, and the constables must have been in a state of excitement; they stated that the man they identified was wearing a **pagri** and **galmocha**.

Held, that in the circumstances, there was room for the possibility of a mistake. It would be difficult after so long a period to remember with certainty the face of a stranger only seen for a brief interval under such conditions. A.I.R. 1944 Pat. 373=23 Pat. 278=46 Cr.L. J. 546=11 B.R. 359=219 Ind. Cas. 255.

——S. 9—Indentification—Evidentiary value.

The evidence of identification is not by itself an unsafe basis for conviction. No doubt such evidence is a weak sort of evidence but, it is incorrect to say that it should not be accepted unless it is corroborated by other evidence. A.I.R. 1943 Oudh 16=44 Cr.L. J. 12=1942 O. W. N. 606=1942 A.W.R. (C.C.) 337=203 Ind. Cas. 248.

——S. 9—Identification—Evidentiary value.

The accused was duly identified, as the murderer by a witness at the identification parade. During the committal proceedings, however, the witness stated that he was unable to identify the accused in the Court as some months had elapsed. Accordingly he was only tendered before the Sessions Court for cross-examination and the Sessions Judge assumed that the witne s had in some way "resiled":

Held, that owing to the failure of the prosecution to call the witness before the Sessions Court and to allow him to prove the above mentioned facts, the fact that the witness identified the accused at the identification parade could not be taken into consideration. A.I.R. 1942 Lah. 59=43 P.L.R. 712=43 Cr.L. J. 428=198 Ind. Cas. 796.

——S. 9—Identification—Evidentiary value.

It is highly dangerous to act upon the testimony of witnesses who have seen the accused persons before the test identification parade. Their identification at such parade or in the trial Court is worthless.

Once the evidence of a witness is rejected as dangerous to act upon, it cannot be used to corroborate another witness whom the Court believes. If a Court disbelieves a witness, it cannot use his evidence to corroborate a witness which the Court believes. A.I.R. 1942 Pat. 321=8 B.R. 539=23 P.L.T. 131=43 Cr.L. J. 549=199 Ind. Cas. 317.

——S. 9—Identification—Evidentiary value.

S. 162, Criminal P. C., excludes any evidence about the statements made by the witnesses at the identification parades held by the Police in the course of investigation. The fact that witnesses have identified persons at parades held by the Police may be proved. But that fact can only be considered important evidence against the accused if the Court is satisfied that the parades have been held fairly.

Where the evidence as to the manner in which the identification parade was held is meagre and there is no evidence that the suspected men were kept out of the sight of the witnesses before the parade was held or that the witnesses were prevented from communicating with each other while the parade was being arranged, the evidence of identification does not sufficiently strengthen the testimony of the witnesses who identified the accused. A.I.R. 1941 Mad. 675=54 L.W. 69=42 Cr. L. J. 848=1941 M. W. N. 521=196 Ind. Cas. 342.

——S. 9—Identification—Evidentiary value.

Identification by a single witness is generally considered insufficient by itself to prove an accused person's guilt. A.I.R. 1941 Oudh 130=42 Cr L. J. 165=1941 A. W. R. (C. C.) 59=1941 O. W. N. 133=191 Ind. Cas. 466.

——S. 9—Identification—Evidentiary value.

The fact that the identifying witness had a conviction for cheating 8 or 13 years before, is not sufficient to diseredit him. A.I.R. 1941 Oudh 130=42 Cr.L J. 165=1941 A.W.R. (C.C.) 59=1941 O.W.N. 133=191 Ind. Cas. 466.

——S. 9—Identification—Evidentiary value.

Where witnesses who have no obvious connection with one another furnished lists and in particular long lists of identical people whom they say they have recognized among the looters, there is a possibility that this identification is the result of collaboration between them rather than of actual observation. The true principle to adopt is, while not necessarily discarding their evidence altogether, to regard it, nevertheless with a great deal of suspicion unless it is confirmed from

other reliable sources. A.I.R. 1940 All. 291=1940 A.L.J. 206=41 Cr.L.J. 647=1940 A.W.R. 85=188 Ind. Cas. 649.

——S. 9—Identification—Evidentiary value.

Where the manner in which the identification parades were held throws a lot of suspicion on the conduct of the Police, the evidence of the identification of the accused persons by the prosecution witnesses is not entitled to any weight for determining their guilt. A.I.R. 1940 Lah. 281=42 P.L.R. 229=41 Cr.L.J. 779 =189 Ind. Cas. 672.

——S. 9—Identification—Evidentiary value.

It is not illogical to say that the evidence of identification by itself might be unreliable but that, when substantial evidence is added to it, the identification evidence assumes a totally different aspect. When, therefore, a man is identified as being one of three persons engaged in a murder and when that person states that a jewel produced by him from a hiding place came to his share, it is reasonable to hold that he was concerned in the murder in the absence of any explanation. A.I.R. 1940 Mad. 710=1940 M.W.N. 86= I.L.R. (1940) Mad. 254=52 M.L.W. 981=42 Cr.L.J. 582=194 Ind. Cas. 527.

——S. 9—Identification—Evidentiary value.

The identification by the abducted girl of an accused person who was **shamil-taftish** with her in the earlier stage of the investigation, is perfectly meaningless. A.I.R. 1939 Lah. 180=41 P.L.R. 45=40 Cr.L.J. 684= 182 Ind. Cas. 520.

——S. 9—Identification—Evidentiary value.

The evidence on which the Court has to act is the identification by witnesses at the trial and the question is, are the witnesses to be believed or not. A.I.R. 1939 Pat. 35=19 P.L.T. 801=18 Pat. 82=5 B.R. 53= 39 Cr.L.J. 997=178 Ind. Cas. 130.

——S. 9—Identification—Value of.

It is never safe to rely on the identification of a person by his voice. One is always liable to make a mistake. A.I.R. 1937 Rang. 407=39 Cr.L.J. 34=172 Ind. Cas. 56.

——S. 9—Identification—Value of.

The value of identification depends on two most important factors, namely, that the persons who identify an accused must have had no opportunity of seeing him after the commission of the crime in connection with which the suspect is put for identification, and secondly that no mistake should have been made by those witnesses or the mistakes made by them are negligible. A.I.R. 1936 All. 373=1936 A.W.R. 185= 37 Cr.L.J. 730=162 Ind. Cas. 948.

——S. 9—Identification—Persons identified having distinguishing marks.

It is not always justifiable to infer that identification parades have not been conducted properly because some of the persons who have been identified have very distinguishing marks. But where grave suspicion has been thrown on the prosecution, it is impossible to avoid the further suspicion that advantage has been taken of such distinguishing marks in order to prepare the witnesses. A. I. R. 1935 All. 592=1935 A.W.R. 785 =36 Cr.L.J. 1196=1935 A.L.J. 1070=157 Ind. Cas. 545.

——S. 9—Identification—Three witnesses identifying accused but six others failing to identify.

The trustworthiness of three identification witnesses cannot be reduced by the consideration that six other witnesses were called to identify the appellant at the same proceeding and failed to do so. There is no authority for gauging the trustworthiness of any individual witness in this way. The mathematical standard that is to be observed by a Court of Appeal in testing the trustworthiness of such witnesses is by no means perfect. But it is the only general standard that can be applied. A.I.R. 1935 All. 477=36 Cr.L.J. 569=1935 A.L.J. 479=1935 A.W.R. 457=154 Ind. Cas. 812.

——S. 9—Identification of accused by witnesses in Court.

A witness in Court identified an accused **K** as the man who had rented a **chaubara** and said that he was certain about it. Two days afterwards when the statement after cross-examination was being read out to the witness, he stated that it was over an year since this happened and he might have made a mistake in the Court. When questioned how he came to know that he had made a mistake, he stated that it was from the reading of the note about the identification that he had come to this conclusion because independently in the course of his evidence, he had come to know that the man who rented the house was one **H**:

Held, that this correction was not free from suspicion and apart from the witness's own statement, it appeared that it was the knowledge of the name and not the recollection of the features that made him think that he had made a mistake and that it would not be safe to rely on this evidence. A. I. R. 1935 Lah. 230=35 Cr.L.J. 1180=150 Ind. Cas. 1056.

—S. 9—Identification.—Assault after dark—Only three persons alleged to have participated—Identification parade after five years—Witness deposing that six persons took part but identifying two accused only:

Held, that the accused was entitled to benefit of doubt. A I.R. 1935 Lah. 146.

——S. 9—Identification.

—Jury trial—Witnesses who knew accused for a long time identifying accused in diffused electric troch light —Jury allowed to experiment with such torches in absence of accused—Verdict of jury must be set aside. A.I.R. 1934 Cal. 744=38 C.W.N. 1154=60 C.L.J. 194 =36 Cr.L.J. 129=152 Ind. Cas. 661.

——S. 9—Identification.

The omission of a witness, whose evidence is material so far as the question of identification is concerned, to identify the accused in Court cannot be treated to be a mere immaterial irregularity. A.I.R. 1934 Lah. 873=15 L. 491=36 P.L.R. 346=36 Cr.L.J. 383 (2)= 153 Ind. Cas. 383.

——S. 9—Identification—Evidence—Sufficient for conviction.

It cannot be laid down as a hard and fast rule that identification evidence by itself is an insufficient basis for conviction. The value of identification evidence must vary with the circumstances established in each case.

Identification proceedings held in the jail amount merely to this that certain persons are brought to the jail or some other place and make statements, either express or implied, that certain individuals whom they point out are persons whom they recognize as having been concerned in a particular crime. These statements are not made on oath and are made in the course of extra-judicial proceedings. The law does not allow statements of this kind to be made available as evidence at the trial unless and until the persons who made those statements are called as witnesses. When these persons are called as witnesses, then these previous statements become admissible, not as substantive evidence in the case, but merely as evidence to corroborate or contradict the statements made by these witnesses in Court. When a witness to identity is called in the Sessions Court and states that he can identify no one,

there is nothing to corroborate and the evidence of any previous statements, express or implied, made by him in the course of identification proceedings in the jail is not admissible. A. I. R. 1934 Lah. 641=35 P.L.R. 499=36 Cr. L. J. 121=152 Ind. Cas. 531.

——S. 9—Identification.

Accused being a comparative stranger to all the witnesses—Identification carried out after the Police had other grounds for suspicion, necessarily leaves room for doubt. 1934 M. W. N. 1363.

——S. 9—Identification.

In a criminal trial, identifications made at night during a dacoity or when the people are terrorized, are generally of very little value. A.I.R. 1933 Lah. 299=35 Cr. L. J. 610=148 Ind. Cas. 72.

——S. 9—Identification—Boy identifying witness —Identification of only three suspects against four 'wrong men'—Evidence, if entitled to consideration.

Where an analysis of the identification proceedings in which a boy identifying witness took part, shows that in all, at different times, he identified only three suspects as against four "wrong men", it cannot be said in the circumstances that the identifications made by the boy are sufficient to supplement the rest of the evidence against the accused which evidence was either discarded by the lower Court or regarded as untrustworthy. A.I.R. 1933 Oudh 49=9 O. W. N. 954=34 Cr. L. J. 382=142 Ind. Cas. 831.

——S. 9—Identification.

In considering the value of identification evidence, the Court should examine whether the identification of each accused is sufficient to exclude with reasonable certainty the possibility of mistake. A.I.R. 1933 Pat. 496=35 Cr. L. J. 56=146 Ind. Cas. 460.

——S. 9—Identification—Value of.

On the value of identification by witnesses, each case has to be judged on its own particular facts. Where a long period intervenes between the arrest of the appellants and their identification and it has not been conclusively shown that the witnesses had no opportunity of seeing the appellants before they identified them in the presence of the Magistrate, no ground is made out for discarding such evidence. A.I.R. 1932 Lah. 488=34 Cr. L. J. 379=34 P.L.R. 405=142 Ind. Cas. 699 (2).

——S. 9 — Identification — Evidence of identity based on personal impression.

Evidence of identity based on personal impression should be approached with considerable caution specially where much depends upon such evidence.

The testimony of the senses cannot be implicitly relied on even when the veracity of the witnesses is above all suspicion. A.I.R. 1932 Oudh 99=9 O.W.N. 32=33 Cr. L. J. 381=7 Luck. 552=137 Ind. Cas. 79.

——S. 9—Identification.

The powers of observation and memory of different persons vary and the mere fact that some witnesses have failed to identify a culprit does not necessarily render the identification by other witnesses valueless. A.I.R. 1931 Lah. 178=32 Cr. L. J. 684=131 Ind. Cas. 277.

13. Identification—Object.

——S. 9—Identification—Object.

Identification parades are held to satisfy investigating officers of the **bona fides** of the prosecution witnesses. 1932 M. W. N. 427.

14. Identification—Procedure.

——S. 9—Identification—Procedure—Number of persons to be mixed.

Though the law does not lay down the number of under-trials to be mixed with a prisoner, every effort should be made to minimise the possibility of a chance identification which, in the first instance, can be done by mixing as many under-trials as possible with the suspect. A.I.R. 1945 Oudh 149=1944 O.W.N. 383=1944 A.W.R. (C.C.) 257.

——S. 9—Identification—Procedure — Number of persons to be mixed.

Though no particular proportion is essential, where the proportion of other under-trial prisoners to the accused is less than three to one, identifications have little value because there is an appreciable risk of persons being implicated purely by chance. A.I.R. 1943 Oudh 269=1943 O.W.N. 88=44 Cr. L. J. 389=1943 A.W.R. (C.C.) 21=205 Ind. Cas. 514.

——S. 9—Identification—Procedure—Number of persons to be mixed.

The value of identification depends on the factors which minimize the possibility of chance as much as possible. In cases in which there is only one or two suspects to be put for identification, the proportion of 1 to 5 cannot be regarded as satisfactory. There should be at least 10 under-trials for each suspect in such cases because every effort should be made to minimize the possibility of a chance which, in the first instance, can be done by mixing as many persons as possible with the suspect who is put up for identification. A.I.R. 1936 All. 373=1936 A.W.R. 185=37 Cr. L. J. 730=162 Ind. Cas. 948.

——S. 9—Identification—Procedure—Number of persons to be mixed.

The proportion of five other persons to one accused person for identification is the minimum desirable proportion for the purpose of satisfying a Court that the identification of the accused was not a question of accident. Where, however, the identification had failed to satisfy the above standard, it is not possible to discard these proceedings on that ground. It is only proper to hold that the evidence of identification should, in the circumstances, be subjected to a more rigid scrutiny than if the proper standard had been maintained. A.I.R. 1935 All. 653=36 Cr. L. J. 1130=1935 A. W. R. 801=157 Ind. Cas. 354.

——S. 9—Identification—Procedure—Method.

The practice of having test identification at a Police Station where the Police Officers are in a position to advise the officer under whose guidance the test identification is to be held, deprecated. A. I. R. 1945 Pat. 161=10 Cut. L. T. 87=11 B. R. 408=46 Cr. L. J. 613=219 Ind. Cas. 391.

——S. 9—Identification—Procedure—Delay.

The sooner the identification proceedings are conducted, the better it is. It is not desirable to delay identification proceedings because a delay may affect the ability of a witness to identify an accused. A.I.R. 1942 All. 339=1942 A. L. J. 376=43 Cr. L. J. 867=1942 A.W.R. (H.C.) 293=I. L. R. (1942) All. 892=202 Ind. Cas. 586.

——S. 9—Identification should be held at the earliest possible opportunity.

It is in the highest degree desirable that the identification parade should be held at the earliest possible opportunity so far as the circumstances of the case permit, and that all the available witnesses should be required to attend the very first parade. A. I. R. 1934

Lah. 641=35 P. L. R. 499=36 Cr. L. J. 121=152 Ind. Cas. 531.

——S. 9 — Identification — Procedure — Putting marks on suspects.

In the test identification, the Sub-Registrar who conducted it was apprehensive that if a suspect was picked out by some witness, he might deny that he was a suspect and so cause a good deal of trouble and delay in the proceedings. In order to make it impossible for the suspects to do this, the Sub-Registrar put some kind of mark or stamp on them:

Held, that such a practice had to be deprecated. A.I.R. 1942 Pat. 319=8 B. R. 795=23 P.L.T. 185=43 Cr. L. J. 742=201 Ind. Cas. 486.

——S. 9—Identification—Procedure.

It is not necessary for identification tests to be held in the presence of Magistrate. A.I.R. 1940 Sind 168=41 Cr. L. J. 924=I. L. R. (1940) Kar. 487=190 Ind. Cas. 499.

——S. 9—Identification—Procedure.

It is not necessary that the first informant himself must have identified all the persons who are sent up for trial. It is enough if they are identified by other witnesses as being present. A.I.R. 1937 Pat. 497=18 P.L.T. 416=38 Cr. L. J. 1007=3 B.R. 794=170 Ind. Cas. 785.

——S. 9—Identification—Procedure.

It is desirable that when an identificatiton parade is held, each person who might reasonably be expected to identify an offender should be kept apart from the other prosecution witnesses and not remain present whilst an identification by any other person is proceeding. When one witness has picked out some or all of the supposed offenders, the next witness should be brought upon the scene and invited to pick out the person or persons whom he can identify, without any opportunity of communicating with the first witness who has already done so. This procedure should be followed till every witness has had an independent opportunity of picking out of the identification parade the supposed criminal or criminals. A. I. R. 1937 Rang. 504=39 Cr. L. J. 193=172 Ind. Cas. 865.

——S. 9—Identification—Procedure.

There is no objection to the use of Policemen for identification parade, if proper precautions are adopted. A.I.R. 1936 Lah. 409=38 P.L.R. 1128=37 Cr. L. J. 732=162 Ind. Cas. 969.

——S. 9—Identification—Procedure—Presence of Police.

The presence of Police constables in the room where the identification is held is most objectionable. A.I.R. 1934 Lah. 692=35 P.L.R. 744=36 Cr. L. J. 679=155 Ind. Cas. 263.

15. Identification—Relevancy.

——S. 9—Identification—Relevancy.

The question whether a witness has or has not identified a man during the investigation is not one which is in itself relevant at the trial. Identification parades should be held as a check upon the veracity of people who are believed to know something about the matter. The actual evidence regarding identification is that which is given by the witnesses in Court. It will not be strengthened by proof of the facts that they alleged recognition of an accused at a parade held during the investigation, though on the other hand, its value will be destroyed if it is shown that they have ever failed to identify the accused prior to the trial. A.I.R. 1936 Pesh. 166=37 Cr. L. J. 981=164 Ind. Cas. 578.

16. Identification—Right of accused.

——S. 9—Identification—Right of accused.

It is true that it by no reasons uncommon for persons who have been absconding for a long time to claim an identification parade in the hope that their appearance may have changed sufficiently for them to escape recognition, but this is not by itself a good ground for refusing to allow any sort of test to be carried out. A.I.R. 1945 Lah. 48=I.L.R. (1944) Lah. 236=46 Cr. L. J. 550=219 Ind. Cas. 259.

17. Identification—Miscellaneous.

——S. 9—Identification—Miscellaneous—Accused changing clothes before parade.

The fact that the accused chose to change his clothes before the identification parade, does not suggest a guilty conscience on his part. He has every right to take precautious, if he were an innocent man, to avoid identification on the part of somebody who he might suspect, might have seen him in the company of the Police, and the exercise of his rights affords no ground for suggesting that he has been guilty of suspicious conduct. A.I.R. 1942 Rang. 49=1941 Rang. L. R. 595=43 Cr. L. J. 525=199 Ind. Cas. 147.

——S. 9—Identification—Accused's protest.

Where the accused has made a protest before the identification took place to the effect that he was known to the identifying witnesses from before, much value cannot be attached to the identification evidence, especially when his name was not mentioned in the first information report. A.I.R. 1935 Oudh 226=35 Cr. L. J. 889=11 O. W. N. 765=148 Ind. Cas. 1192.

——S. 9—Identification—Out of Court—Value of.

The evidence that a person has identified another person as having taken part in a particular offence either in jail identification proceedings or elsewhere is admissible though the value of such evidence is weakened perceptibly as a general rule by failure to identify subsequently in Court. 104 Ind. Cas. 626=4 O. W. N. 803=28 Cr. L. J. 850=A. I. R. 1927 Oudh 598.

——S. 9—Identification—Independent evidence.

In order to rely on the evidence of persons who identified the accused in jail but failed to do so in Court, the fact of the jail identification must be stated in the witness's evidence. An identification in jail is in essence a statement by the witness, "I saw this man who is now before me taking part in the offence". That statement can be used to corroborate his evidence given in Court. If the witness says in his evidence: "A number of persons were shown to me at the jail and from among them I pointed out those persons whom I had seen taking part in the offence", it is permissible under S. 9 to call independent evidence, such as that of the Magistrate who conducted the identification, to prove the identity of the persons whom the witness picked out at the jail, even though the witness himself may not correctly remember who they were. 90 Ind. Cas. 444=26 O. C. 258=26 Cr. L. J, 1564=A.I.R. 1926 Oudh. 36.

——S. 9—Identification—Magistrate's evidence—Corroborative value.

For a Magistrate or other officer to come into Court and depose that a particular witness in his presence identified one of the accused as having taken part in the dacoity is nothing more than hearsay evidence but the Magistrate's evidence will be strictly relevant under the provisions of the Evidence Act to corroborate the evidence of a witness saying that he identified certain persons at the jail

and that the persons whom he there identified were persons whom he had seen taking part in the dacoity. 95 Ind. Cas. 756=47 All. 39=27 Cr. L. J. 836=5 L.R.A.Cr. 193=A.I.R. 1925 All. 223.

18. Similar motive, intention or design in subsequent offence.

——Ss. 9, 11, 14, 15—Similar motive intention or design in subsequent offence—Evidence of—inadmissible.

In a trial an evidence of design motive and intention in a theft which occurred subsequently under the circumstances similar to those that were at the time of the offence in the trial, was admitted by a Judge, to which due objection was taken. **Held**, the piece of evidence was inadmissible under Ss. 9, 11, 14 and 15 of Evidence Act and as cl. 25, 26 did not authorise the court hearing the reference to direct a new trial; a final disposal by the Judge after rejecting improperly admitted evidence was asked. 47 Cal. 671=24 C.W.N. 501=31 C. L. J. 402=50 Ind. Cas. 929. (F.B.)

19. Miscellaneous.

——Ss. 9, 11 and 34—Miscellaneous—Omission of entry of payment in account book.

The absence of an entry of payment in an account book is a relevant fact under Ss. 9 and 11 of the Evidence Act. 19 C. W. N. 611=28 Ind. Cas 705.

——S. 9—Miscellaneous—Statement by brother of kidnapped woman that she denounced accused as one of abductors.

When **A** says in Court on oath that **B** made a statement although **B** on oath subsequently denies it, the fact that **A** says the statement was made by **B**, that he heard **B** make it, is admissible and if the Judge believes **A** in preference to **B** as to the making of the statement, he is entitled to do so. But it does not follow that the statement though admissible is admissible for the purpose of proving the truth of the facts contained in the statement and is evidence other than evidence that the statement itself was made, thus coming within the provisions of S. 9, Evidence Act as explaining or introducing facts in issue or relevant facts or supporting or rebutting inferences, suggesting fact in issue or relevant facts or establishing the identity of any thing or person. Therefore, the statement made by the brother of the kidnapped woman that his sister denounced the accused as one of the abductors, is admissible under S. 9 as explaining the circumstances of the accused's arrest and also for the purpose of establishing his identity. But this does not carry the prosecution case very much further, because they then have to prove, by other evidence beyond this mere statement, the truth of the facts contained in the statement that the accused was one of the abductors, which fact the woman in her evidence in the Court denies. A.I.R. 1944 Sind 38=45 Cr. L. J. 393=I.L.R. (1944) Kar. 86=211 Ind. Cas. 403.

——S. 9—Miscellaneous.

Evidence afforded by return or assessment of neighbouring premises is admissible under S. 9, Evidence Act. A.I.R. 1940 Cal. 47=I.L.R. (1940) 1 Cal. 168=44 C. W. N. 165=189 Ind. Cas. 717.

——S. 9—Miscellaneous.

—Murder of mother—Child's cries attracting passer-by—Witnesses can speak not only of nature of cries of child but also what it said so far as it explains their conduct—Child's evidence is not admissible as evidence of the truth of what it says but as explaining the conduct of other witnesses. A. I. R. 1938 Sind 97=39 Cr. L. J. 618=32 S.L.R. 709=175 Ind. Cas. 324.

——S. 9—Miscellaneous.

In prosecution for cheating the customs at Karachi the evidence of the closely connected visits of the accused at two places could be admitted under S. 8 or S. 9, Evidence Act. A.I.R. 1937 Sind 293=39 Cr.L. J. 123=32 S.L.R. 87=172 Ind. Cas. 374.

——S. 9—Miscellaneous—Evidence as to what Court proposed.

Where an attempt was made to prove that a proposal to refer a case to arbitration emanated from the Judge himself:

Held, that the question was perfectly admissible. A.I.R. 1933 Pat. 306=12 Pat. 359=14 P.L.T. 1 Sup. =145 Ind. Cas. 1.

——S. 9—Miscellaneous.

A recital in a Judgment not **inter partes** of a relevant fact is not admissible to prove the fact in another case. A.I.R. 1932 Lah. 50=32 P.L.R. 763=135 Ind. Cas. 202.

——S. 9—Miscellaneous.

Ss. 9 and 11 read along with S. 21 of the Evidence Act amply justify a court in admitting into evidence all previous statements made by the accused which have a bearing on the question of his guilt and whether the previous statement is made to a police officer or to an officer or to a third party is immaterial if the statement is relevant to the fact in issue. These sections are not controlled by the Cr. P. Code. 73 Ind. Cas. 963=24 Cr.L. J. 723=4 Pat. L.T. 381.

——Ss. 9, 11—Miscellaneous—Statement by lessor in lease—If evidence against third parties.

A statement by the grantor of a lease regarding the ownership of certain property situate on the boundary of the land demised can be used as evidence against persons not parties to the lease transaction. The absence of recitals in a document may also be used in evidence against a person not a party to a document. 15 C.L.J. 7=17 C.W.N. 108=13 Ind. Cas. 120.

——S. 9—Miscellaneous—Departmental inquiry—Statements at the inquiry—Admissibility of Statements:—The answers to his superior officer given by an accused person in explanation of an official irregularity can be proved against him if subsequently ascertained to be false. The subordinate is under no legal obligation to attend an official inquiry, but if he does attend and answers the questions put to him, the answers that he gives fall under the category of statements which accompany and explain act other than statements. 4 Bom. L.R. 284.

——S. 10. Synopsis.

1. Accessory after fact
2. Admissibility of evidence
3. Applicability
4. Approver
5. Cipher Code
6. Common intention
7. Confession after conspiracy came to end
8. Confession of co-accused
9. Connection with acts
10. Conspiracy
11. Document found in possession of accused
12. Document of which writer is not known
13. Letter by one of accused after arrest to third person
14. Previous conduct
15. Principle
16. Scope

17. Signature in note-book
18. Statement to third party
19. Statements in furtherance
20. Statements made during trial
21. Stranger referring to accused as conspirator

1. Accessory after fact.

——S. 10—Accessory after fact.

Where a witness is admittedly an accessory after the fact and if he was not privy to the plot beforehand he must certainly have suspected that something sinister was afoot, his evidence cannot be put on a higher level than that of an approver. A.I.R. 1941 Oudh 130=42 Cr. L. J. 165=1941 A.W.R. 59=1941 O.W.N. 133=191 Ind. Cas. 466.

2. Admissibility of evidence.

——S. 10—Admissibility of evidence—Conditions binding on the trial and Appellate Courts. See Cr. P. Code (V of (1898), S. 197 and Government of India Act. (1935), S. 270. (1948) 2 M.L.J. 6=75 I.A. 41=A.I.R. 1948 P.C. 128 (P.C.).

3. Applicability.

——S. 10—Applicability.

Application of S. 10 follows and does not precede the finding that there is reasonable ground to believe that a conspiracy exists and certain persons are conspirators. It is only on the basis of a conspiracy between accused persons that S. 10 applies and the act or statement of one can be regarded as the act or statement of all, on the principle of agency. A.I.R. 1945 Sind 188= I.L.R. (1945) Kar. 129.

——S. 10—Applicability—Statement indicating complicity of third conspirator.

There is no authority for the proposition that evidence which is of a hearsay nature should not be admitted under S. 10. Any statement made by one conspirator to another indicating in any way the complicity of a third conspirator is a relevant fact and as such may be admitted. There is naturally no corroborative evidence of such statements, but such evidence may be treated in the same way as the other evidence given by accomplices. A.I.R. 1941 Oudh 130=42 Cr.L.J. 165=1941 O.W.N. 133=1941 A.W.R. 59=191 Ind. Cas. 466.

——S. 10—Applicability.

Where there is reasonable ground to believe that there was a conspiracy to commit an offence and that the accused were members of it, S. 10 Evidence Act is applicable to the case. A.I.R. 1941 Oudh 130=42 Cr. L. J. 165=1941 O.W.N. 133=1941 A.W.R. 59=191 Ind. Cas. 466.

——Ss. 10, 25—Applicability—S. 10, if avoids operation of S. 25, Evidence Act, or S. 162, Criminal P. C.

S. 10, Evidence Act does not apply to incriminating statements made by accused to the police in the course of the investigation whether they incriminate themselves or others unless the special provisions of S. 27 let in part of a confession to a Police Officer.

S. 10, Evidence Act, is not intended to remove those restrictions which the Evidence Act and the Criminal P. C. place upon the admissibility of statements made to the Police. S. 10 does not avoid, in appropriate cases, the operation of either S. 25, Evidence Act, or S. 162, Criminal P. C.

It makes no difference if, because a man is deaf, these statements are written. A.I.R. 1939 Sind 185=I.L.R. (1939) Kar. 449=40 Cr.L.J. 882=184 Ind. Cas. 145.

——S. 10—Applicability.

Statements relating to a conspiracy are admissible as against persons who are parties to the conspiracy. The statements cannot be regarded altogether independently of the rest of the evidence because they are only admissible if there is reason to believe that the persons named have been engaged in conspiracy. Existence of conspiracy need not be proved before admitting such statements. The provisions of S. 10 framed for the purpose of preventing purely technical objections, would appear to bar out the objection that the evidence could not be admitted until the conspiracy had been proved, because the section provides that the statements may be used to prove the existence of the conspiray. With these very wide provisions of S. 10, applying to acts done in connection with the conspiracy, an act done by the third person may possibly in certain circumstances be actually treated as evidence of the existence of the conspiracy, as for instance, when an act is done or something is said in the presence of the person implicated. These mere statements of third parties made in the absence of the person implicated form a class by themselves of no probative value whatever standing alone and the independent evidence required as corroboration of such a statement must be something very much more than the evidence which may ordinarily be regarded as corroborating the evidence of an accomplice. It may be circumstantial evidence or direct evidence. It must be evidence which standing alone, would be properly treated as evidence for a jury of proved intention, so that there would be evidence for a jury, apart from the statement of the alleged fellow conspirator, incriminating the person charged. The evidence must be proof of intention, and not merely proof of a possible motive for the intention. A.I.R. 1938 Pat. 497=5 B. R. 82=40 Cr.L.J. 27=178 Ind. Cas. 324.

——S. 10—Applicability.

There must be evidence to show that accused had conspired together to commit an offence or actionable wrong. Existence of agreement should be proved by evidence direct as well as inferential. 1936 M.W.N. 627.

——S. 10—Applicability.

For S. 10, Evidence Act to apply, it is not enough to find simply that there must have been a conspiracy without coming to a prima facie conclusion as to who were the members of it; but reasonable ground must be shown to believe that the persons whose statements or actions are to be used had conspired together. A.I.R. 1936 Nag. 97=I.L.R. (1936) Nag. 152=38 Cr.L.J. 106=165 Ind. Cas. 913.

——S. 10—Applicability.

Charge under Ss. 420 and 120- B. I. P. C.—Accused inducing Insurance Company to accept proposal by securing false medical report—Statement of doctor was admissible in evidence under S. 10 seeing that other evidence in the case disclosed reasonable grounds for believing that there was a conspiracy and that the doctor was a

conspirator. A.I.R. 1935 Cal. 26=38 C.W.N. 1015=36 Cr.L.J. 678=155 Ind. Cas. 261.

——S. 10—Applicability.

Before anything said, done or written by any one alleged member of a conspiracy can be used as evidence against another or against all, the Court must have reasonable ground for believing that the conspiracy between them existed, that is, an agreement among them that unlawful acts should be committed. 1930 M.W.N. 1264.

4. Approver.

——S. 10—Approver — Conspirator becoming approver.

The act of one conspirator is the act of all, each conspirator is deemed the agent of his fellow conspirator, and S. 10, Evidence Act, does not cease to apply to "anything said, done or written" by a conspirator simply because that conspirator gives evidence as an approver. The evidence of a conspirator becoming appover must be read subject to the rules of prudence and corroboration, which apply to the evidence of approvers generally, but once the Court is satisfied that the approver is speaking the truth, his evidence can be accepted as to anything he has "said, done or written" as in the case of any other conspirator.

D was being tried along with others for conspiracy to commit offences under the Explosive Substances Act. His conviction rested on the evidence of approver **J** corroborated by two telegrams. One telegram was sent by **J** to **D** and this evoked a reply by telegram alleged to have come from **D**. The originals of the telegram were produced by the Check Office, Calcutta. **D** denied to have sent or received any telegrams. There was no suggestion that **J** was an enemy of **D**:

Held, that there was sufficient evidence which beyond all reasonable doubt, connected **D** with the conspiracy. A.I.R. 1944 Sind 1=I. L.R. (1943) Kar. 449=45 Cr. L. J. 471=212 Ind. Cas.56 (F.B).

——S. 10—Approver's letters connecting members of conspiracy.

S. 10, Evidence Act, renders admissible in cases of conspiracy such evidence which is not ordinarily admissible under the English law, or under the Indian law. Direct evidence is not essential to prove a conspiracy. From the very nature of cases of this description, it can be seen that it is not possible for the prosecution to produce a written agreement to show that certain persons entered into a conspiracy. The question as to whether or not there was a conspiracy has to be decided in reference to the circumstances which might be proved in the case. (Rules for proving a conspiracy narrated.) A.I.R. 1939 All. 567=1939 A. L. J. 785= 1939 A. W. R. 464=40 Cr. L. J. 856=I.L.R. (1939) All. 736=184 Ind. Cas. 191.

——S. 10—Approver—Confession by.

Admission of an approver that he accepted a sum after the dacoity is not a circumstance incriminating him that he committed the dacoity. 88 Ind. Cas. 458=42 C. L. J. 496=26 Cr. L. J. 1146= A. I. R. 1926 Cal. 374.

5. Cipher code.

——S. 10—Cipher code.

Where ciphers or cipher lists are discovered in searches, the ciphers, provided they were properly decoded, cannot be treated as acts, words or deeds of any particular person; but the fact that they existed and that the names and addresses of a number of persons who were alleged to be parties to a conspiracy as charged, are mentioned in them; the fact that they were in peculiar forms, such as was not likely to be used for any lawful purpose, taken along with other matters brought out in evidence, gives rise to a legitimate inference that the ciphers were prepared in connection with some unlawful purpose requiring secrecy; and in the absence of evidence that the matters appearing from the secret documents were associated with some legitimate or lawful purpose, the ciphers are themselves materials affording good reasons for inferring that the names, addresses and other matters appearing in the ciphers were connected with the furtherance of the objects of the conspiracy and as such evidence under S. 10, Evidence Act. A. I. R. 1937 Cal. 99=38 Cr.L.J. 818=169 Ind. Cas. 977 (S. B).

——S. 10—Cipher Code—Inference.

In a trial of several accused for sedition an exercise book containing a Cipher Code was put in evidence,

Held, that the Cipher Code book was not to be treated as 'the act, word or deed of a particular individual, but the fact that it existed, the fact that it set forth the names and addresses of a substantial number of persons charged, the fact that it was in a peculiar form such as is not likely to be found in any Code intended to be used for lawful purposes, and many internal indications such as grouping of the names and the use of words and names having a revolutionary significance all gave rise to a probability, amounting almost to certainty that the persons named in the Code were associated for some unlawful purposes whose interests demanded that it should be kept secret and in absence of evidence that the persons named in it were associated for some legitimate purposes to be kept secret for some legitimate reason, the Cipher Code was in itself a good ground for supposing that the person named had conspired to commit an offence and any other acts or writings of individual conspirators in furtherance of the common design became admissible under S. 10. 116 Ind. Cas. 756=30 Cr.L.J. 646=11 P.L.T. 45=13 A.I.Cr.R. 80=A.I.R. 1929 Pat. 145 (F. B.),

6. Common intention.

——S. 10—Common intention — Letter written after failure of plot to carry out common intention.

——Accused **X** supplying to accused **Y** explosive for blowing up a certain bridge—Accused **Y** making unsuccessful attempt to blow up bridge—All accused arrested —Letter by accused **Y** to accused **X** asking for more explosives after attempt, held was not admissible against accused **X**. A.I.R. 1944 Mad. 302=57 L.W. 100=1944 M.W.N. 57=(1944) 1 M L.J. 91=46 Cr.L.J. 667=220 Ind. Cas. 129.

——S. 10—Common intention.

When S.10, Evidence Act, refers to the common intention of the conspirators, it refers to the common intention in the future, not past. A.I.R. 1939 Sind 185=I.L.R. (1939) Kar. 449=40 Cr. L. J. 882=184 Ind. Cas. 145.

——S. 10—Common intention.

Under S. 10, Evidence Act, anything said done or written by any conspirator in reference to the common intention of the conspiracy after the time when such intention was first entertained by any

conspirator is a relevant fact as against each of the persons believed to be so conspiring as well for the purposes of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it; the question whether the person who made the statement is dead or alive does not affect the application of S. 10. A.I.R. 1936 Oudh 164=11 Luck. 687=37 Cr. L. J. 182=1936 O.W.N. 28=159 Ind. Cas. 919.

——S. 10—Common intention.

Under S. 10, Evidence Act, narratives coming from the conspirators as to their past acts cannot be said to have a reference to their common intention. The word 'intention' implies that the act intended is in the future and the section makes relevant only statements made by a conspirator, with reference to the future.

Where in a charge for conspiracy the prosecution sought to prove an alleged statement of an absconding accused to the approver that they had shot a Police Officer and that a pamphlet should be written and distributed to start a propaganda in furtherance of the objects of the conspiracy:

Held, that the narrative as to the shooting incident was not admissible, but it was permissible to prove what the conspirators intended to do in the future by publishing the pamphlet and what the version of the incident was if the pamphlet was to contain an account of the incident. A.I.R. 1932 Bom. 56=33 Bom. L.R. 1159=55 Bom. 839=33 Cr.L.J. 76 =134 Ind. Cas. 1238.

7. Confession after conspiracy came to end.

——S. 10—Confession made after conspiracy has come to an end—Admissibility.

Under S. 10 of the Evidence Act, a statement made by one conspirator may be admissible as against the other conspirators if it merely shows the existence of a conspiracy, although it may not have been made with a view to furthering the object of the conspiracy as is the rule under the English law. The section, however, pre-supposes the existence of a conspiracy at the time the statement is made and does not contemplate confessional statements made after the conspiracys has come to an end and some of the conspirator have already been apprehended and are being or about to be prosecuted. Hence a statement by a conspirator made after the conspiracy has come to an end is not admissible under S. 10. 25 Pat. 347=228 Ind. Cas. 567=48 Cr.L.J. 242=13 B.R. 250=A.I.R. 1947 Pat.90=27 Pat.L.T. 298.

——Ss. 10, 30—Confession made after conspiracy ended.

Where the object of the conspiracy had been carried out and the confession made thereafter has no reference to the common intention of the conspirators, the confession is not admissible under S. 10, Evidence Act.

The confession may, however, be taken into consideration against a co-accused under S. 30, Evidence Act. It may not stand on the same level as substantive evidence but it may be used to supplement the substantive evidence. A.I.R. 1939 Nag. 295=40 Cr. L.J. 937=1939 N.L.J. 442=I.L.R. (1941) Nag. 506=184 Ind. Cas. 274.

——S. 10—Confession made after conspiracy ended.

Confession made by one of the accused who is dead and never brought to the trial is not admissible under S. 30, Evidence Act as the confession of the co-accused. Nor, if it is admitted, can it be admitted under S. 10, because S. 10 applies to acts done in furtherance of a conspiracy or which bear some relation to the conspiracy and cannot be said to apply to a confession made after the conspiracy and the acts done in pursuance thereof were at an end. The words of S. 10 cannot be extended to cover the case of the confession of a person who was co-accused or who might have been a co-accused on the charge of conspiracy and the offences which were its purpose or committed in pursuance of it. A.I.R. 1938 Sind 94=39Cr. L.J. 545=175 Ind. Cas. 99.

——S. 10—Confession after conspiray ended.

A confession of a co-accused implicating himself and others is admissible in evidence against all the accused under S. 10. It can also be taken into consideration against them under the provisions of S. 30. 106 Ind. Cas. 721=2 Luck. 631=1 L C. 339= 8 A.I Cr. R. 449=A.I.R. 1927 Oudh. 369.

8. Confession of co-accused.

——Ss. 10 and 30—Confession of co-accused.

Under S. 10 communications between different conspirators during the progress of conspiracy with reference to the conspiracy are relevant. The confession of co-accused is not on the same footing as a communication passing between conspirators, or between conspirators and other persons with reference to the conspiracy but it is relevant under S. 30, though its value is discounted by the fact that it cannot be tested by cross-examination. It is nothing more than the statement of an accomplice, and the Court should not be influenced by the statements except where they are corroborated by independent testimony. 38 Cal. 169=15 C.W.N. 25=11 Cr. L.J. 710=8 Ind. Cas. 770.

9. Connection with acts.

——S. 10—Connection with acts.

Connection has to be established with the conspiracy and not with the separate acts of different conspirators which are the overt acts of the different individvals in proof of the conspiracy. 90 Ind. Cas. 706=26 Cr. L.J. 1602=2 O.W.N. 760=A.I.R. 1926 Oudh. 161.

10. Conspiracy.

——S. 10—Conspiracy—Evidence of.

Whenever evidence is sought to be let in under S. 10, the accused is entitled to insist on strict compliance with its provisions namely proof of reasonable ground for belief that the persons named have conspired together. On a charge of conspiracy, particular facts are proved to show that one or more of the accused took part in it, after general evidence of the existence of conspiracy is first given. 42 Cal. 957=19 C.W.N. 676= 16 Crl. L.J. 497=21 C.L.J. 331=29 Ind. Cas. 513.

——Ss. 10 and 54—Conspiracy—Gambling and cocaine cases prior to conspiracy charged—Admissibility of.

Evidence showing that some of the accused ran cocaine and gambling dens, before existence of the conspiracy charged, was held admissible, the prosecution case being that some of the accused were at first thrown together by frequenting or running such dens and that they continued to meet at such places for the purposes of the conspiracy charged. The evidence of an Excise Inspector of

raids on the dens was admissible as leading up to the admissions made to him. 46 Cal. 710=30 C.L.J. 255=21 Cr. L.J. 5=54 Ind. Cas. 53.

——S. 10—Conspiracy—Proof of.

Possession of seditious literature by one member is evidence against the others for finding out the object of the association, even where such possession was obtained or such essays written before the association was formed or before other members joined the association. 46 Cal. 215=28 C.L.J. 25=23 C.W.N. 193=19 Cr. L.J. 696=46 Ind. Cas. 152.

——S. 10—Conspiracy—Proof of.—A conspiracy may be proved by other than oral evidence. It may be proved by the evidence of surrounding circumstances and the conduct of the accused both before and after the alleged commission of the crime. 9 Bom. L.R. 347=5 Cr. L.J. 329.

11. Document found in possession of accused.

——S. 10—Document found in possession of accused.

S. 10, Evidence Act, lays down not only the rule for leading evidence in conspiracy cases but also is a part of statute law in the matter of proof of existence and objects of a conspiracy.

So far as documents found in possession of a party are concerned, possession and conduct create an inference that he was aware of its contents. Documents found in possession on search or otherwise are admissible in evidence if they satisfy any of these conditions, namely (i) they are in the handwriting of the party concerned, and (ii) they fall within the scope and operation of S. 10, Evidence Act.

A document of which the writer is not known, if found in the possession of a conspirator, would not by itself be admissible for the purpose of proving the truth of its contents as against other accused. The fact of possession would be evidence to show that the conspirator in whose possession it was found, had received and preserved it. A.I.R. 1937 Cal. 99=38 Cr. L.J. 818=169 Ind. Cas. 977 (S. B.).

12. Document of which writer is not known.

——S. 10—Document of which writer is not known.

Before the provisions of S. 10, Evidence Act, can be invoked, it has to be established from independent evidence that there is reasonable ground to believe that two or more persons have conspired together to commit an offence.

In S. 10, "anything said" would include the statements made speeches delivered, or declarations made; "any thing done" must be some act done, and not merely the intention or knowledge of the person. Anything written would include, (1) manuscript whether signed or unsigned written by the person and (2) matter transcribed by him on a typewriter.

But a document, of which the writer is not known, found in the possession of a conspirator, would not by itself be admissible for the purpose of proving the truth of its contents as against the other accused. A.I.R. 1933 All. 690=45 All. 1040=1933 A.L.J. 799=34 Cr. L.J. 967=145 Ind. Cas. 481.

13. Letter by one of accused after arrest to third person.

——S. 10—Letter by one of accused after arrest, to third person.

Whether a letter written by an accused person after arrest, is admissible as evidence against a co-accused, depends on whether or not the provisions of S. 10, Evidence Act have been complied with, that is, whether there is reasonable ground to believe that the writer of the letter and the other accused conspired together to commit an offence.

The fact that the writer of the letter was under arrest at the time when he caused the letter to be written would be an important point only if the document was in the nature of a mere confession. A.I.R. 1932 Cal. 557=33 Cr. L.J. 456=137 Ind. Cas. 317 (1).

14. Previous conduct.

——S. 10—Previous conduct — Offence under S. 222, Penal Code.

The accused who was a warder in the jail was being tried under S. 222, Penal Code in respect of intentionally aiding the prisoners under sentence of death in attempting to escape from confinement in jail. He procured saw blades and loosened the rivets of the grates. Previously he was seen by some witness warders conversing and carrying on negotiations with certain fellow-caste-men of the convicts. A constable who was called in as witness and had escorted the convicts while under trial, deposed that after the death sentence was pronounced and the convicts were brought out, one of the convicts called out to his follow-man and told him to give the accused Rs. 100. The request was repeated twice.

Held, that the evidence of the constable was admissible under the circumstances under S. 10. 119 Ind. Cas. 762=30 Cr. L.J. 1103=1929 Cr. C. 190=A.I.R. 1929 Lah. 631.

15. Principle.

——S. 10—Principle.

Where the evidence of a conspirator is admissible against his fellow conspirator, it is on the principle that the thing done, written or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy; or the words written or spoken may in themselves be acts done in the course of the conspiracy. This being the principle the words of S. 10, Evidence Act, must be construed in accordanae with it and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. The words "common intention" signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statemeut or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. Section 10 embodies this principle. A.I.R. 1940 P. C. 176=1940 A.W.R. 175=73 C.L.J. 252=41 Cr.L. J. 871=1940 M.W.N. 1112=52 L.W. 662=7 B.R. 118=1940 A.L. J. 778=

(1940) 2 M.L.J. 811=43 Bom. L.R. 20=43 P.L.R. 69=1941 O.W.N. 43=I.L.R. (1940) Lah. 612=I.L.R. (1940) Kar. (P. C.) 302 Sup.=45 C.W.N. 269=67 I. A. 336=190 Ind. Cas. 233 (P. C.)

16. Scope.

——S. 10—Scope.

S. 10 renders admissible in cases of conspiracy much evidence which is not otherwise ordinarily admissible under the Indian law. The provisions of the section are wider than those of English law. 106 Ind. Cas. 721=2 Luck. 631=1 L.C. 339=8 A.I.Cr.R. 449=A.I.R. 1927 Oudh 369.

——S. 10—Scope and effect—Existencc of conspiracy and joining therein—Proof of, necessary.

S. 10 of the Evidence Act means this: if two persons conspire together to commit an offence, each is regarded as being the agent of another and just as the principal is liable for the acts of the agent, so each conspirator is liable for what is done by his fellow conspirator in furtherance of the common intention which they had both entertained. First, you must find, that there was a conspiracy and, secondly, that the person to whom the doctrine is to apply should have joined the conspiraey before they can be made liable for anything said or done by others. 31 Bom. L.R. 515.

——S. 10—Scope.

S. 10 of the Evidence Act is wider than the English Law. As soon as it is shown with regard to an individual conspirator, that he was in privy with the combination and its objects and adopted the acts already performed, he as a conspirator becomes bound by the antecedent and the consequent acts of his fellow conspirators. There is a considerable inconsistency between S. 10 of the Evidence Act and the illustration thereto. It is not necessary to establish by direct evidence that the accused persons did enter into an agreement to commit an offence to attract the operation of S. 10 of the Evidence Act, against the accused. The finding of closed covers relating to the conspiracy in possession of one of the conspirators is relevant against the other under S. 10. 246 P.L.R. 1915=17 P.R.Cr. 1915=11 P.W.R.Cr. 1915=16 Cr.L.J. 354=28 Ind. Cas. 738.

17. Signature in note book.

——S. 10—Signature in note books.

Note books of **Jamakharch,** wherein the accused has signed his name, are admissible to prove abetment of conspiracy. 20 C.W.N. 292=17 Cr.L.J. 439=35 Ind. Cas. 999.

18. Statement to third party.

——S. 10—Statement by alleged conspirator to third party.

Statements by an alleged conspirator to a third person about the existence of a conspiracy between the plaintiff and others in connection with the alleged forgery of a will are not relevant and cannot be used to prove: (1) the existence of the conspiracy as to which there is no issue; or (2) that plaintiff was a party to the conspiracy. 30 C. 983=7 C.W.N. 808.

19. Statements in furtherance.

——S. 10—Statements in furtherance—Conspiracy case.

If **prima facie** evidence of the existence of a conspiracy is given and accepted the evidence of statements made by any one of the conspirators in furtherance of the common object is admissible against all. 81 Ind. Cas. 817=20 M. L. W. 202=25 Cr.L.J. 1041=A.I.R. 1924 Mad. 805.

20. Statements made during trial.

——Ss. 10, 30—Statements made during trial.

S. 10 Evidence Act refers to things said or done by a conspirator in reference to the common intention. Statements made by an accused person during the trial can hardly be regarded as statements by him as a conspirator in reference to the common intention of the persons who were members of the conspiracy and are therefore, not admissible under S. 10. S. 30 applies only to statements made before and proved at the trial. A.I.R. 1933 Oudh 86=9 O.W.N. 1136=34 Cr.L.J. 124=8 Luck. 286=141 Ind. Cas. 192.

21. Stranger referring to accused as conspirator.

——S. 10—Stranger referring to accused as a conspirator.

A document written by a woman since deceased in which she described her conversations with a third person in which she said that he told her that among his revolutionary friends was the accused, to whom he was accustomed to turn for guidance, is admissible under S. 10, Evidence Act, as the statement if proved is itself a relevant fact by virtue of S. 10. The statement by the writer is a relevant fact and being admissible under S. 10 is evidence of all the conspirators including the accused, to the effect that the third person made his statement concerning the accused.

The former association of an accused person with proved conspirators must be construed in the light of his subsequent actions. A.I.R. 1934 Cal. 221=35 Cr.L.J. 334=147 Ind. Cas. 32 (F.B.).

——S. 11. Synopsis,

1. Alibi
2. Chittas
3. Collateral facts
4. Document evidencing construction of houses
5. Entry in hospital register
6. Evidence on question of conversion
7. Facts disclosing similar transactions
8. Finding in previous suit
9. First information report
10. Former Judgment
11. Habitual cheating
12. "Highly probable or improbable"
13. Hindu muslim riot
14. Law on migration
15. Legitimacy of children
16. Letter written by accused
17. Murder—Identification of body
18. No entry in accounts
19. Other seditious articles in same paper
20. Ownership of stolen property
21. Partnership
22. Police report
23. Preparation
24. Previous acts
25. Probate proceedings
26. Question as to dedication to religious endowment
27. Recitals in deeds
28. Recitals in Batwara papers
29. Recital in certificate or proclamation of sale
30. Relevant fact
31. Religion
32. Rent decree
33. Rent suit
34. Scope

35. Self-serving statements
36. Statement as to date of Birth
37. Statement made in transaction of private business
38. Statement of deceased persons
39. Statement of living persons
40. Statement of wounded person
41. Title—proof
42. Unregistered deed
43. Writ of attachment—Non mention of tenancy.

1. Alibi.

——**S. 11—Alibi—Master and servant committing** offence together—Master's plea of **alibi** accepted—Servant's conviction.

Where the case for the prosecution is that both master and servant committed the offence and that the servant did what the master directed, it is not possible to convict the servant if the master's plea of **alibi** is accepted. 1937 M.W.N. 96.

——**S. 11—Alibi—Value.**

Although it is easy to give evidence of **alibi**, but where the case for the prosecution depends entirely on the identification of the accused in somewhat doubtful circumstances, the evidence of **alibi** cannot be lightly brushed aside. A.I.R. 1937 Rang. 267=38 Cr.L.J. 890=170 Ind. Cas. 273.

——**S. 11—Alibi—Murder case.**

The weakness or falsity of an **alibi** is not a sufficient ground for holding that the case for the prosecution is thereby improved in a charge for murder. Where the prosecution case amounts merely to an identification and denunciation of the accused, it cannot be said with certainty that the **alibi** must necessarily be a false one. A.I.R. 1937 Rang. 10=38 Cr.L.J. 279=166 Ind. Cas. 605.

——**S. 11—Alibi.**

Charge under S. 302, Penal Code—Evidence strong against accused—Accused found to have motive—Recovery of blood-stained garments and knife—Held, **alibi** evidence was not to be treated seriously. 164 Ind. Cas. 154=1936 O.W.N. 603=37 Cr.L.J. 932.

——**S. 11—Alibi, Stage for.**

A defence of **alibi**, if true, ought to be raised at the earliest possible moment. A.I.R. 1936 Lah. 233=37 Cr.L.J. 751=38 P.L.R. 695=163 Ind. Cas. 143.

——**S. 11—Alibi—Benefit of doubt.**

In the trial for an offence under S. 147, Penal Code, the accused, although he failed to establish his plea of **alibi** yet had put it forward at an early stage of the investigation and from the evidence his presence at the affray appeared somewhat doubtful:

Held, that he was entitled to the benefit of the doubt which would not have arisen if the Police whom the accused had cited as witnesses had given their evidence frankly. A.I.R. 1936 Lah. 473=37 Cr.L.J. 748=38 P.L.R. 680=163 Ind. Cas. 135.

——Alibi—**Benefit of doubt.**

Where the Crown case was not very satisfactory and the **alibi** evidence was considerably better than that usually put forward in criminal cases though not entirely satisfactory:

Held, that there was an element of doubt as regards the guilt of the accused and hence an acquittal was proper. A.I.R. 1933 Rang. 423=35 Cr.L.J. 434=147 Ind. Cas. 440.

——**S. 11—Alibi—Testing of.**

Witnesses to establish anything in the nature of an **alibi** ought to be called by the accused person who takes that line of defence. Unless evidence of that character is tested by cross examination on behalf of the Crown, it is very difficult for any one to say, what value should be attached to it. A.I.R. 1935 Cal. 513=62 C. 238=39 C.W.N. 744=36 Cr.L.J. 1115=157 Ind. Cas. 387 (S.B.).

——**S. 11—Alibi—Material irregularity.**

When the accused is convicted for committing an offence on a day different from that entered in the charge-sheet, and the defence is that of **alibi**, a material irregularity is committed and the conviction cannot stand. A.I.R. 1934 Lah. 455=36 Cr.L.J. 282 (2)=35 P.L.R. 449=153 Ind. Cas. 32.

——**S. 11—Alibi—Duty of prosecution—Murder case**—Witness supporting plea of **alibi** should be produced—Reliability of witness to be decided by Court.

There is no duty upon those who are charged with the preparation of a prosecution case to produce in Court every person examined by the Police. But in a murder case where a witness has given evidence which supports a plea of **alibi** taken by one of those who have been charged with the murder, that witness ought to be produced. In no circumstances should the fact of his statement be withheld from the Court. The prosecution authorities have no right to take it upon themselves to decide whether a witness who gives vital evidence of this sort is or is not a reliable witness but to decide it is the function of the Court. The prosecution has no right to usurp the function of the Court and the conduct of the prosecuting authorities in keeping back such evidence deserves the strongest condemnation. A.I.R. 1934 All. 908=4 A.W.R. 5=36 Cr.L.J. 152=57 A. 267=152 Ind. Cas. 741.

——**S. 11—Alibi.**

Whenever a defence of **alibi** is set up and that defence utterly breaks down, it is a strong inference that if the prisoner was not in fact where he says he was then in all probability, he was where the prosecution say he was. A.I.R. 1934 Cal. 719=35 Cr.L.J. 1335=151 Ind. Cas. 473 (S.B.).

——**S. 11—Alibi—Practice in Punjab.**

Obiter.—Alibi evidence is generally viewed with suspicion. It has unfortunately become usual in the Punjab for friends and relatives of the accused to come forward with false statements tending to prove an **alibi**. So far has this practice gone that it is not even considered reprehensible among the average run of people in this province to do so. The only result of this is that Courts now look on all **alibis** with great suspicion. A.I.R. 1935 Lah. 230=35 Cr.L.J. 1180=150 Ind. Cas. 1056.

——**S. 11—Alibi, when can be accepted.**

Where there is satisfactory evidence that a man committed a crime at a certain place and at a certain time, a Court will never find any difficulty in rejecting an **alibi** he may seek to establish, even if that **alibi** be supported by what, on the surface, would appear to be satisfactory evidence. A.I.R. 1933 Oudh 369=10 O.W.N. 753=34 Cr.L.J. 1146=145 Ind. Cas. 817.

2. Chittas.

——**Ss. 11, 13, 35, 36—Chitta.**

When a **chitta** prepared by a **zamindar** produced in a prior suit had been found to be genuine and corroborated by a mass of documentary and oral evidence:

Held, that it did not come under Ss. 35 or 36, Evidence Act, but it could still be admissible under S. 11 or S. 13, Evidence Act. 164 Ind. Cas. 603=39 C.W.N. 330.

3. Collateral facts.

——S. 11—Collateral fact—Relevancy—Collector's books.

In order that a collateral fact may be admissible as relevant under S. 11 of the Evidence Act the requirements of the law are: (1) that the collateral fact must itself be established by reasonably conclusive evidence; and (2) that it must, when established, afford a reasonable presumption or inference as to the matter in dispute. The Collector's books are intended only for the purpose of revenue; they are evidence neither of title nor of possession 6 Bom. L.R. 983.

4. Document evidencing construction of houses.

——S. 11—Document evidencing construction of houses—Value of.

Old documents mentioning persons who built certain very old houses may be admitted in evidence under S. 11, Cl. 2 and S. 13, Cl. (b) where direct evidence about the construction may not be earsily available. 82 Ind. Cas. 582=5 L.R.A. Civ. 231=A.I.R. 1924 All. 526.

5. Entry in hospital register.

——S. 11—Entry in hospital register—Admissibility of.

An entry made in a register of in-door patients in a hospital is admissible in evidence to prove that the person mentioned in the entry was in the hospital on a certain date. 56 P.L.R. 1918=13 P.W.R.Cr. 1918=19 Cr.L.J. 141=43 Ind. Cas. 429.

6. Evidence on question of conversion.

——S. 11—Evidence on question of conversion.

Upon the question whether the taluqdar was a convert to Islam or was the Chief of a Rajput clan, it is permissible and important to prove that the fact of such conversion was unknown to the District and local officers and was not ascertainable from anything to be found in official publications. It is of the utmost relevance and importance to learn from the conduct and statements of his Hindu wife whether she thought herself to be the wife of a Rajput Chief or of a Muhammadan. Such matters, however, must be proved in manner permitted by the Evidence Act. A.I.R. 1939 P.C. 249=6 B.R. 1=I.L.R. (1940) Kar. (P.C.) 1 Sup.=44 C.W.N. 66=183 Ind. Cas. 662 (P.C.).

7. Facts disclosing similar transactions.

——Ss. 11, 14 and 15—Facts disclosing similar transaction—Admissibility.

Where the accused were charged with having cheated the complainants by receiving the money for them under the pretext that they were the agents of a rich lady anxious to lend money at low rates and that they would get for the complainants a loan from her at an extermely low rate of interest evidence to the effect that at or about the same time they were making precisely the same representation to third persons is admissible under Ss. 11 and 14 to corrobarate the story of the prosecution and to prove the intention of the accused. 39 All. 273=15 A.L.J. 241=18 Cr.L.J. 529=39 Ind. Cas. 673.

8. Finding in previous suit.

——S. 11—Finding in previous suit—Probative value of.

The question as to the probative value of a finding in a previous suit depends on the nature of the finding and of the issues involved in the two different suits. A.I.R. 1940 Pat. 341=6 B.R. 336=19 Pat. 172=21 P.L.T. 577=185 Ind. Cas. 685.

9. First information report.

——S. 11 (2)—First information report.

First information report, when duly proved, becomes a relevant fact within the meaning of S. 11 (2), Evidence Act, and as such, retains some evidential value even after being sworn against by the author thereof. Besides its use as a corroborative or contradicting piece of evidence, its own value under S. 11 (2) is not negligible. Where a report is made by a person who is stabbed, immediately after the occurrence and factum of such a report in connection with other facts makes it highly probable that the person who stabbed the deceased and the reporter could be no other than the accused, the report must be regarded as a relevant fact. 190 Ind. Cas. 322. (Bhopal.)

10. Former judgment.

——S. 11—Former judgment—Case under S. 153-A, I. P. C.—Procedure.

During the prosecution of an author of a book under S. 153-A, I.P.C. the book was proscribed by an order of Government under the criminal P. C., (amended 1926) S. 99-A on the ground that the book contained matter the publication of which is punishable under S. 153-A, I. P. C. The author applied under S. 99-B and his application was dismissed by a bench of the High Court. There upon the trial Magistrate without recording any defence evidence or allowing further cross-examination of prosecution witnesses convicted the accused,

Held, that the conviction was legal and the judgment of the Bench of the High Court was admissible under Ss. 11 and 13, Evidence Act. 104 Ind. Cas. 225=8 A.I.Cr.R. 204=8 L.R.A.Cr. 124=25 A.L.J. 846=28 Cr.L.J. 785=A.I.R. 1927 All. 654.

——S. 11—Former Judgment—Admissibility—Case under S. 401, I. P. C.

When offence charged against an accused is that of belonging to a gang of thieves, a former judgment more than 25 years old and convicting him of dacoity is admissible in evidence, though the former judgment is useful only for the purpose of proving that the accused is a person of criminal tendencies to commit theft who may be a member of the alleged gang. The judgment by no means goes to show that he had any habit of committing theft in the period under consideration. 89 Ind. Cas. 527=26 Bom. L.R. 1223=26 Cr.L.J. 1391=A.I.R. 1925 Bom. 195.

——S. 11—Former judgment—Judgment in civil suit.

A judgment in a civil suit is relevant under S. 11. 37 Mad. 238=23 M.L.J. 447=12 M.L.T. 615=(1912) M.W.N. 1029=13 Cr.L.J. 800=17 Ind. Cas. 544.

——Ss. 11, 42—Former Judgment—Judgments not inter partes.

Judgment not inter partes relating to a right or custom is proof of an instance or transaction in which the custom has been recognised or departed from and is thus admissible under Ss. 11 and 42. 4 S.L.R. 88=8 Ind. Cas. 897.

11. Habitual cheating.

——S. 11—Habitual cheating.

The fact that a person belongs to a gang of persons united for habitually cheating in concert,

is relevant if the question is whether the man is a habitual cheat. 37 Cal. 91=14 C.W.N. 49=11 Cr.L.J. 23=5 Ind. Cas. 29.

12. "Highly probable or improbable".

——S. 11—"Highly probable or improbable" significance.

S. 11, Evidence Act, does not make all documents, which make the existence or non-existence of a relevant fact probable or improbable, relevant. The expression "highly probable or improbable" indicates that the connection between the facts in issue and the collateral facts sought to be proved must be immediate as to render the co-existence of the two highly probable.

Copies of printed newspapers containing an account of some proceedings, found in possession of one accused, are evidence of the fact of the publication of such an account in that paper; but are not by themselves evidence of the truth of the facts stated therein, unless in connection with other facts they make the existence or non-existence of the facts mentioned highly probable or improbable. A.I.R. 1933 All. 690=55 A. 1040= 1933 A.L.J. 799=34 Cr.L.J. 967=145 Ind. Cas. 481.

——S. 11—Highly probable—Scope of.

The words 'highly probable' in S. 11 are of great importance inasmuch as the section makes only those facts admissible, which, assuming that they are admitted in evidence will be of great weight in bringing the Court to a conclusion one way or other regarding the facts in question. 13 M.L.T. 282=18 Ind. Cas. 997.

13. Hindu Muslim riot.

——S. 11—Hindu Muslim riot—Previous attempt to convert—Admissibility of.

When the charges against the accused are of dacoity and rioting, evidence that on the day after the occurrence the accused who was a Mussalman wanted another, a Hindu, to embrace Islam and threatened to beat him if he did not, is wholly irrelevant to either of the charges and should not be admitted notwithstanding that the riots in which accused was involved were due to Hindu-Muslim dissensions. 88 Ind. Cas. 733=52 Cal. 499=26 Cr.L.J. 1213=A.I.R. 1925 Cal. 831.

14. Law on migration.

——S. 11—Law on migration—Proof of adoption.

Where the question is whether a migrating family has adopted the law of the new place, the fact that in the allied or connected families, the new law has very widely been adopted and the rites and ceremonies of the new place have been generally recognised, renders it probable within the meaning of S. 11 that the family in question has adopted the new law.

Where the fact in issue is whether the migrating family has adopted the law of the new place a previous judgment, in which the ancestors of the family in question were on one side, is relevant. The observance of rites and ceremonies at marriages, deaths and births are also relevant. 77 Ind. Cas. 450=37 C.L.J. 233=50 Cal. 370=A.I.R. 1923 Cal. 485.

15. Legitimacy of children.

——S. 11—Legitimacy of children.
——Previous case—Absence of cross-examination on illegitimacy—Admissibility.

Where the question is whether a particular person is the illegitimate son of a certain man and a certain woman, the fact on a previous occasion, when giving evidence on behalf of the woman the man was asked questions in cross-examination in order to show his partiality to her, including the question whether she had been his wife before another man took her in marriage, but that no question was asked him as to her bearing him illegitimate children, is admissible in evidence under S. 11 (2) as it makes highly improbable the allegation that the illegitimacy was well-known. 65 Ind. Cas. 308=8 O.L.J. 569=A.I.R. 1921 Oudh 242.

16. Letter written by accused.

——S. 11—Letter written by accused—Admissibility in evidence—Conditions.

A letter written by the accused where it is self condemnatory is prima facie evidence against him and is admissible in evidence; it is not necessary that the letter should have been signed by the accused and it is enough if it can be traced to the writer; it is admissible though it was intercepted or surreptitiously detained and opened. 41 Cal. 545= 18 C.L.J. 567=18 C. W. N. 386=15 Cr.L.J. 35=22 Ind. Cas. 179.

17. Murder—Identification of body.

——S. 11—Murder—Identification of body by clothes.

Satisfactory proof that clothes found on the body of murdered, belong to him and were worn by him immediately before disappearance, is sufficient to find that the corpse is of that person although it is too decomposed to be identified otherwise. 38 P.W.R. Cr. 1910=24 P.R.Cr. 1910= 193 P.L.R. 1910=11 Cr.L.J. 604=8 Ind. Cas. 250.

18. No entry in accounts.

——S. 11—No entry in accounts.

The absence of an entry in an account book is a relevant fact, under either S. 7 or S. 8 or S. 11 of the Evidence Act. 76 Ind. Cas. 327=A.I.R. 1924 Nag. 22.

——S. 11—No entry in accounts.

Evidence that there is no entry in the account books, though not admissible under S. 34 may be admissible under Ss. 9 and 11.

The fact of absence of entry is relevant; its effect is to be determined in the light of the general evidence in the case. 74 Ind. Cas. 383=36 C.L.J. 389 =A.I.R. 1923 Cal. 261.

19. Other seditious articles in same paper.

——S. 11—Other seditious articles published in the same news paper.

Proof of the seditious articles appearing in the same news paper is admissible to show the seditious character of an article appearing in the same news paper. 32 Mad. 338=5 M.L.T. 415=9 Cr.L.J. 506=2 Ind. Cas. 193.

20. Ownership of stolen property.

——Ss. 11 and 32—Ownership of stolen property —Statement of deceased.

Statement of a person regarding the ownership of property alleged to be stolen as to what the deceased had said to him is inadmissible either under S. 11 or under S. 32. 16 Cr.L.J. 640=30 Ind. Cas. 464.

21. Partnership.

——S. 11—Partenership—Proof of agency.

Where a plaintiff sues a firm on foot of a transaction made by one member of the firm, it is for the plaintiff to show that either by the course of dealings between him and the defendants or by some overt acts of the defendant firm, that member was acting as their authorized agent in those transactions in such a manner as to bind the firm. 109 Ind. Cas. 327=9 L. L. J. 518=29 P. L. R. 276= A.I.R. 1928 Lah. 105.

22. Police report.

——S. 11—Police report—Value of.

Where the lessee sets up forcible re-entry by the lessor, the fact that a report complaining of the use of force or criminal intimidation was made to the police soon after the occurrence, is a relevant fact under S. 11 of the Evidence Act and admissible in evidence. 2. O.L.J. 299=30 Ind. Cas. 292.

23. Preparation.

——S. 11—Preparation.—Accused showing revolver to companion.

Where the accused are charged under the Arms Act for possession of arms and for conspiracy to commit a dacoity, the fact that one of the accused was seen showing a revolver to another with whom he was alleged to be conspiring to commit a dacoity is relevant under S. 11, Evidence Act, as being evidence of preparation. A.I.R. 1932 Cal. 474=55 C.L.J. 439=59 Cal. 1361=33 Cr.L.J. 854=139 Ind. Cas. 873.

24. Previous acts.

——S. 11—Previous acts—Evidence of—Admissibility.

The admissiblity of a particular evidence under S. 11 in each case must depend on how near is the connexion of the facts sought to be proved with facts in issue, to what degree do they render facts in issue, probable or improbable, when taken with other facts in the case and to what extent would the admission of the evidence be inconsistent with principles enunciated elsewhere in the Act.

Where A was charged with entering into a conspiracy to bring false evidence against B and C and all the previous acts of which evidence was to be given were acts in which he acted against B or C, or both,

Held, that such evidence was admissible under S. 11 but not under Ss. 10 and 15. 109 Ind. Cas. 491 =6 Rang. 6=29 Cr.L.J. 555=10 A. I. Cr. R. 249= A.I.R. 1928 Rang. 118.

25. Probate proceedings.

——S. 11—Probate proceedings—Statement of testatrix before death—Disposition of property —Relevancy:—The statement of a testatrix before her death as to her disposition of property, which suggests an inference as to the execution of the will is admissible as evidence against her representatives under S. 11 of the Evidence Act. 3 Bom. L. R. 465.

26. Question as to dedication to religious endowment.

——S. 11—Question as to dedication to religious endowment—Circumstances under which gift of one item was made—Same throwing light on question of dedication.

Where the suit related to rights to properties belonging to a math and the question as to dedication was put in issue and the gift of certain item of property belonging to the institution was sought to be relied on as throwing light on the general question, Held, that it was admissible under S. 11 (2) of the Evidence Act. 1930 A.L.J. 964.

27. Recitals in deeds.

——S. 11—Recitals describing property.

Where the recitals in deeds in respect of properties by owners thereof state that the lane on which their houses abut is a private street, the recitals are relevant under S. 11, Evidence Act. A. I. R. 1937 Lah. 120=38 P.L.R. 969=169 Ind. Cas. 259.

——Ss. 11 and 13—Recital in deed—If evidence against third parties.

Where in a sale-deed executed by husband to his wife, the recital was that the transfer was in consideration of the dower debt it was held that that recital was not evidence against third parties. 37 P. L. R. 777.

——S. 11—Recitals in sale-deed between third parties referring to property in dispute as boundary.

Recitals in sale-deeds between third parties which refer to the property in dispute as one of the boundaries are admissible in evidence showing a recognition of the right of the person alleging himself to be owner of boundary lands. A.I.R. 1935 All. 351=1934 A.L.J. 597=4 A.W.R. 760=150 Ind. Cas. 868.

——S. 11—Recitals in deed between strangers.

A document between strangers to the suit, in which mention is made of one of the parties to the suit or their predecessors-in-interest as holding the land as belonging to the executants of the document is not admissible in evidence. 111 Ind. Cas. 361=A.I.R. 1929 Lah. 78.

——S. 11—Recitals in deeds as to boundaries—When admissible.

Recitals in documents regarding boundaries executed by third parties in favour of the plaintiffs are not admissible in evidence if the executant is not dead and does not come to corroborate them. 109 Ind. Cas. 728=10 L. L. J. 370=A.I.R. 1928 Lah. 428.

——S. 11—Recitals in deed between strangers.

A document between strangers to the suit in which mention is made of one of the parties to the suit or their predecessors as holding the land lying on the boundaries of the lands belonging to the executants of the document is not admissible in evidence. 103 Ind. Cas. 889=8 Lah. 651=29 P. L. R. 74=A. I. R. 1927 Lah. 448.

——S. 11—Recitals in deeds of boundaries.

Where the executants of documents containing recitals of boundaries of land in dispute are alive and do not give their evidence, such documents are not admissible either under S. 11 or S. 13. 99 Ind. Cas. 907=44 C.L.J. 582=A.I.R. 1927 Cal. 230.

——S. 11—Recitals in deed between strangers.

A document between strangers to the suit in which mention is made of one of the parties or their predecessors as holding the land lying on the boundaries of the lands belonging to the exe-

cutants of the document is not admissible in evidence. 86 Ind. Cas. 734=41 C. L. J. 374=A.I.R. 1925 Cal. 1034.

——S. 11—Recital in deed as to boundary—Description in lease—Value of.

The right to possession by lessee of a plot of land was in controversy. The right was denied on the ground that the alleged lessor was not entitled to the plot. A pattah executed by the lessor in respect of another plot of land, a year previous to the granting of the lease in question, contained a description of the boundary of the land demised by that pattah. This description clearly evidenced his title to the other plot which formed the subject of the lease in question,

Held, that the lessor's statement in the pattah previously granted could not be said to be a "fact" within the meaning of S. 11 and that that section could not be invoked for admitting the statement. 86 Ind. Cas. 674=29 C. W. N. 469=A.I.R. 1925 Cal. 684.

——S. 11—Recitals in deed—If evidence against third parties.

A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence as against the parties who make it. But it is no more evidence as against third persons than any other statement would be. 84 Ind. Cas. 420=28 C.W.N. 1092=A.I.R. 1924 Cal. 1067.

——S. 11—Recitals in deeds—When admissible.

Recitals in the boundaries of other lands in documents between the third parties, are not admissible in evidence under S. 11 or S. 13. But they might be admissible under Cl. (3) of S. 32 when they are the statements made by persons of the character described in the opening sentence of that section; that is to say, persons who are dead or who cannot be found or for other reasons therein stated cannot be examined as witnesses. 68 Ind. Cas. 329=A.I.R. 1923 Cal. 299.

——S. 11—Recitals in deeds.

Recitals of boundaries of lands in documents between third parties are not admissible in evidence under S. 11 or S. 13 but are admissible under S. 32 (2) of the Evidence Act. 68 Ind. Cas. 314=A.I.R. 1923 Nag. 22.

——Ss. 11 and 13—Recitals in deeds—Admissibility of.

A recital in a kabuliyat by a tenant that his landlord is in possession of a piece of land may not be sufficient evidence of the latter's possession unless the executant of the kabuliyat is examined in Court. 51 Ind. Cas. 797 (Cal.).

——Ss. 11 (b) and 13—Recitals in documents.

Documents not inter partes containing recitals as to a fact in issue are admissible under S. 11 (b) or S. 13 of the Act. 132 P.W.R. 1918=46 Ind. Cas. 119.

——S. 11—Recital in document not inter partes—Admissibility.

Documents not inter partes which are admissible under S. 11, must relate to the existence of facts which make any fact relevant to the decision of the caae, highly probable or improbable. I.L.W. 197=22 Ind Cas. 369.

——Ss. 11 (b), 13—Recitals in deed if and when admissible, against persons not parties to deeds.

Per Rampini J.—Documents, for instance a deed of sale and a mortgage deed, as in this case, though not inter partes containing recitals that a particular howla which is in question are admissible in evidence under either S. 11 (b) or 13 of the Evidence Act, although they are not conclusive or binding evidence and may be very weak evidence or even of no weight at all. Per Geidt J.—Documents containing recitals that a particular plot of land is included within a particular howla though inter partes are admissible in evidence under S. 13 of the Evidence Act as transactions by which the right to hold the land as part of the howla is recognised and particularly when the existence of that right is a question raised in a case and is a relevant fact. 5 C. L. J. 55.

28. Recitals in Batwara papers.

——S. 11—Recitals in Batwara papers.

The presumption which arises as to the correctness of an entry in the record-of-rights under S. 103-B of the Bengal Tenancy Act would not attach to an entry in the batwara papers, prepared by the Collector under the Bengal Estates Partition Act 5 of 1897. Where certain lands are entered in those papers ar chowkidari chakran lands, so far as a stranger is concerned, the only way in which those papers can be treated as evidence would be under S. 11 of the Evidence Act on the ground that in the partition proceedings the lands were claimed as chowkidari chakran lands. The entries in those papers could not be in any way binding upon a stranger to those proceedings. 87 Ind. Cas. 694=A.I.R. 1926 Cal. 115.

29. Recital in certificate or proclamation of sale.

——S. 11—Recitals in certificate or proclamation of sale.

Recitals in a sale certificate or a sale proclamation are not admissible under Ss. 11, 13 and 32, Cl. 3. 110 Ind. Cas. 521=A.I.R. 1928 Cal. 893.

30. Relevant facts.

——Ss. 11 and 13—Relevant facts—Lease—Nature of contract with some tenants, if evidence of nature of contract with others.

The fact that A made a contract of tenancy with B on certain terms in respect of certain lands is no evidence of the nature of the contract of tenancy made by A with C in respect of different lands, except perhaps where all the lands are subject to the same custom or tenure. 17 C.W.N. 1159=19 C.L.J. 348=20 Ind. Cas. 171.

——S. 11, cl. 2—Relevant facts—Lease, nature of—Proof of other leases.

Where the question was whether a lease was perpetual or not, and it was proved that the lease was one of several executed at one and the same time on similar terms to the same landlord, though by different persons, facts indicative of an intention to treat the other leases as perpetual ones will be relevant to prove the nature of the suit lease under cl. 2 of S. 11 of the Indian Evidence Act, only if those facts relate to a fairly large number of leases, and not otherwise. 30 C. 883.

——S. 11—Relevant facts—Terms of a grant—Evidence as to other grants by same person.

Where the question is as to the terms of a grant made by A to B, whether it may be subject to a

condition or not, evidence of other grants by A to others with the condition is inadmissible. Even if admissible its weight is small. 18 C.L.J. 277=18 C.W.N. 297=21 Ind. Cas. 481.

31. Religion.

——S. 11—Religion—Admission in will—Value of.

Where the religion of a deceased person is a fact in issue, any solemn declaration made by him as to his religion is relevant and if such a declaration is made in a formal document for example in his will, it is relevant as an admission under the provisions of S. 11 (2), 14 and 21 (2) and is entitled to very great weight in deciding the question. 121 Ind. Cas. 796=7 Rang. 720=A.I.R. 1930 Rang. 42.

32. Rent decree.

——S. 11—Rent decree—Admissibility—Proof of tenancy.

When an ex parte rent decree is satisfied by payment of the decretal amount, it is admissible in evidence to show the relevant fact of the existence of the tenancy till the date of the decree and the land-lord's rights as arising from such tenancy. 67 Ind. Cas. 787=A.I.R. 1923 Cal. 270.

33. Rent suit.

——S. 11—Rent suit.

Where, in a suit for recovery of rent, the defendant pleads that there was no lease and that the sale-deed executed by him in favour of the plaintiff is bogus, the evidence about the nature of the sale-deed is admissible. A.I.R. 1943 Nag. 265=I.L.R. (1943) Nag. 340=1943 N.L.J. 318=207 Ind. Cas. 472.

——S. 11—Rent suit—Statement as to rent in order for delivery of possession is inadmissible.

A statement in an order for delivery of possession as to the rent payable in respect of the land is inadmissible in evidence in a suit between the land-lord and the tenant in which the rent payable is in dispute. 87 Ind. Cas. 512=A.I.R. 1926 Cal. 415.

34. Scope,

——Ss. 11, 8 and 14—Scope.

The fact to be proved was that the fire in soap factory in 1940 was intentional and the evidentiary fact sought to be tendered in evidence was the fire at a mill in 1932, the accused being concerned in both the facts because he was the principal share-holder in both the companies:

Held, that the evidentiary fact was inadmissible under Ss. 14, 11 and 8, Evidence Act. A.I.R. 1941 Rang. 324=1941 Rang. L.R. 566=43 Cr. L. J. 373=198 Ind. Cas. 455.

——S. 11—Scope.

S. 11 is to be read subject to the other provisions in the Act. A statement not satisfying the conditions laid down in S. 32 cannot be admitted merely on the ground that, if admitted, it may probabilize or improbabilize a fact in issue or a relevant fact. A.I.R. 1940 Mad. 273=1939 M.W.N. 841.

——S. 11—Scope.

If a statement does not fall within S. 32, it cannot be admissible under S. 11. There is a difference between the existence of a fact and a statement as to its existence. S. 11 makes the existence of facts admissible, and not statements as to such existence unless, of course, the fact of making that statement is itself a matter in issue. A.I.R. 1934 All. 406=3 A.W.R. 529=1934 A.L.J. 318=56 A. 766=149 Ind. Cas. 781. (F.B.).

——Ss. 11, 6, 8 and 9—Scope.

Under S. 37, U. P. Court of Wards Act, consent of Court of Wards in case of wills must be in writing.

In order to consider whether the consent of Court of Wards was accorded or not to a will, the whole of the correspondence between District authorities the Commissioner and the Board of Revenue on the matter should be considered according to the priniciples laid down in Ss. 6, 8, 9 and 11, Evidence Act, as being parts ot the res gestae. A.I.R. 1933 Oudh 491=10 O.W.N. 1041=147 Ind. Cas. 160.

——S. 11—Scope.—S. 11 is controlled by S. 32.

As a general rule, S. 11 is controlled by S. 32 when the evidence consists of statements of persons who are dead and the test whether such statement is relevant under S. 11, though not relevant under S. 32, is that it is admissible under S. 11 when it is altogether immaterial whether what was said was true or false but highly material that it was said. 110 Ind. Cas. 521=A.I.R. 1928 Cal. 893.

35. Self-serving statements.

——S. 11—Self-serving statement—Admissibility.

Where the question is whether a person is a benamidar or real owner of property.

Per Dawson Miller, C. J.—Even self-serving statements made by the person are admissible under S. 11 if they render fact in issue highly probable or highly improbable.

Per Mullick, J.—Admission made by the person in his own favour are not admissible.

Per Foster, J.—Where the statements are made by the person in the course of his instructions to his local agent who assists him in acquiring the property they are admissible as res gestae. 93 Ind. Cas. 454=5 P.H.C.C. 1=A.I.R. 1925 Pat. 68.

36. Statement as to date of birth.

——Ss. 11, 35 (5)—Statement as to date of death of deceased.

A statement in a petition for grant of probate as to the date of the death of the deceased made shortly after death by a person in a position to know the fact is admissible in evidence to prove such date, when made in circumstances free from suspicion. Such a statement is admissible, if not under S. 32, then under S. 11, Evidence Act. A.I.R. 1931 Pat. 224=12 P.L.T. 891=131 Ind. Cas. 788.

37. Statement made in transaction of private business.

——Ss. 11, 13, 21, 32(2)—Statements made in the transaction of private business.

Where the point in issue was whether there was a family settlement which was binding on the plaintiff, and a letter written by the defendant to his wife making reference to a settlement and asking her to do certain acts to forward the settlement was adduced in evidence to prove the settlement.

Held, that the document was not admissible under Ss. 11 and 13 but was admissible under S. 32 (2) of the Evidence Act, read with S. 21. A.I.R. 1937 Mad. 19=44 L.W. 681=167 Ind. Cas. 30.

38. Statement of deceased persons.

——Ss. 11, 32 and 33—Statements of deceased persons—Admissibility—Evidence.

If a statement of a relevant fact made by a deceased person is inadmissible under Ss. 32 and 33, it will not be admissible under Sec. 11. 34 All. 341 =9 A.L.J. 351=14 Ind. Cas. 116.

39. Statement of living persons.

——S. 11—Statements of living person.

Before a fact can be considered to be relevant under S. 11, it must be shown that it is admissible. It would be absurd to hold that every fact, which even if it be inadmissible and irrelevant, would be admissible under S. 11. If a particular deposition could not be admitted under S. 32, it could not be admissible under S. 11: 34 All. 341, Foll.

Statements of living persons not examined as witnesses are inadmissible in evidence to prove the allegation that the executant was a major at the time when he executed the document. 114 Ind. Cas. 801=5 O.W.N. 1111=A.I.R. 1929 Oudh 113.

40. Statement of wounded person.

——S. 11—Statement of wounded person on the day of occurrence.

Accused was charged with having caused grievous hurt to one of his wives and having killed another. The wounded woman on the day of the occurrence, on her arrival in hospital made a statement to a Magistrate to the effect that it was the accused who had attacked herself and her co-wife. **Held**, S. 11 of the Evidence Act does not justify the admission of the contents of the statements. 23 C.W.N. 933=54 Ind. Cas. 887.

41. Title—Proof.

——S. 11—Title—Proof of—Assertion by one party—Sketch.

A sketch prepared by one of the parties at a time when the Government proposed to acquire those lands before there was any controversy, is strong cogent evidence to prove ownership. 29 Ind. Cas. 729. (Mad).

42. Unregistered deed.

——S. 11—Unregistered deed—Admissibility.

A deed which is not admissible in evidence on account of its being barred under S. 49, Registration Act, can be admitted in evidence under S. 11 if it is inconsistant with fact in issue. 122 Ind.Cas. 895=A.I.R. 1930 All. 130.

43. Writ of attachment—Non-mention of tenancy.

——S. 11—Writs of attachment—Non-mention of tenancy—Effect of.

Where writs of attachment issued in 1792 and 1797 must have been prepared when the Collector took possession of the zamindari upon default in payment of revenue by the proprietor and the documents might be relevant in connectin with the history of the estate and might be used to show that the proprietor defaulted and the Collector went into possession but there was nothing to indicate that the duty was cast upon the Collector to prepare a complete record of all the tenures then in existenee,

Held, that in view of the scope of the two attachment writs no inference favourable to the land-lord can be drawn therefrom, and they cannot be treated as relevant under S. 11. 74 Ind. Cas. 383=36 C. L. J. 389=A.I.R. 1923 Cal. 261.

——S. 12—Scope.

The words complained of were to the effect that the plaintiff was not fit to be a member of a Municipal Committee and that no one ought to have voted for him because he was a man who made his daughter his wife; the imputation in fact referred to his conduct towards his step-daughter. It was not denied that the words alleged to have been used were defamatory and, defence to this action was threefold, firstly that the statements were not made by the defendant, secondly that if made they were true, and thirdly that they were made on a privileged occasion.

Held, that as defendant set up that she did not make the statements and alternatively, that if they were made, they were true statements, it was her duty to call the step-daughter and examine her as to whether anything of the kind alleged had ever occurred and no presumption could be drawn against plaintiff if he fails to examine his step-daughter and this evidence in regard to the staremenis made by the step-daughter hereself to a considerable number of persons was relevant under S. 12, Evidence Act, in order to assist the Court in assessing the damages to be awarded. A.I.R. 1936 Rang. 332=164 Ind. Cas. 385.

——S. 13. Synopsis.

1. **Acts and conduct**
2. **Applicability**
3. **Batwara**
4. **Benami transactions**
5. **Chittas**
6. **Custom**
7. **Decrees**
8. **Documents**
9. **Essentials of assertion**
10. **Former statement as to date of birth**
11. **Judgments**
12. **Maps**
13. **Transaction**
14. **Wills**
15. **Written statement**
16. **Miscellaneous**

1. Acts and Conduct.

——S. 13 — Acts and Conduct — Transaction between two persons—Rights of third person—Whether transaction admissible against third.

A private transaction between persons, having no power to bind the person sought to be affected, is no evidence against him under S. 13. 19 C.W.N. 468=21 Ind. Cas. 618.

——S. 13 (a)—Acts and conduct—Right to well— Transactions by party—Evidence of title.

The ownership in a well may vest in different persons though it might stand on property belonging to one. Transactions by a party, dealing with the property to which he lays a claim are important evidence of his title; and sometimes, they constitute the only evidence of title available. 23 M. L. J. 327=16 Ind. Cas. 746.

2. Applicability.

——Ss. 13 and 11—Applicability.

Where the question of the genuineness of a transfer by a judgment-debtor to his children was directly in issue in the original civil suit, and the issue was contested very strongly, the fact that there was this contest, and that it was decided against judgment-debtor becomes relevant in the enquiry before the executing Court under Ss. 13 and 11, Evidence Act. A.I.R. 1934 Rang. 212=154 Ind. Cas. 123.

——S. 13 — Applicability — Police orders are admissible.

Police orders made under various sections of the Criminal Procedure Code, deciding who was in

possession of the disputed land are admissible in evidence under S. 13 of the Indian Evidence Act to show the fact that such orders were made. 65 Ind. Cas. 398=8 O. L. J. 609=A.I.R. 1922 Oudh 98.

3. Batwara.

——S. 13—Batwara papers—Whether admissible in evidence.

Batwara papers are undoubtedly admissible under S. 13 of the Evidence Act as instances in which the right in question was claimed and recognized. The section does not say that they are admissible only where the documents are **inter partes**. They are admissible to show that a particular right was asserted or recognised, irrespective of who the parties may have been at the time. They are of course not binding against tenants who were not parties in the **batwara** proceedings. They also carry no presumption of correctness. A.I.R. 1947 Pat. 475

——S. 13—Batwara, prepared under provisions in presence of proprietor—Admissibility.

A **Batwara** signed by the partition Deputy Collector and containing entries required by the provisions of Ch. 7 of the Bengal Estates Partition Act would be evidence against the proprietors under S. 13, Evidence Act because they were made in their presence. 114 Ind. Cas. 479=7 Pat. 85=10 P.L.T. 399=A.I.R. 1929 Pat. 32.

——S. 13—Batwara Khasra.

Where **Batwara Khasra** was used to show the past history of the plots long before the landlords predecessors-in-interest obtained a settlement and to show that in 1866 the land was raiyati land,

Held, that there is no reason why the document should not be held admissible under S. 13. 68 Ind. Cas. 676=A.I.R. 1923 Pat. 163.

——S. 13—Batwara khasra.

The **Batwara Khasra**, prepared by an Amin and not signed by any gazetted officer, cannot be held to be a public document under S. 35, though, on proper proof, it may be evidence either under S. 18 or 13. 114 Ind. Cas. 479=7 Pat. 85=10 P.L.T. 399 =A.I.R 1929 Pat. 32.

4. Benami transactions.

——S. 13—Benami transaction is not admissible.

Per Cuming and Mookerjee, JJ. — A benami transaction is a fictitious transaction and as such cannot be let in evidence under S. 13. 99 Ind. Cas. 189=31 C.W.N. 32=A.I.R. 1927 Cal. 1.

5. Chittas.

——Ss. 13, 11, 35, 36—Chitta produced by **Zamindar** in prior suit and found to be genuine and corroborated by other evidence does not come under Ss. 35 or 36, Evidence Act but is admissible under Ss. 11 or 13, Evidence Act. 164 Ind. Cas. 603=39 C.W.N. 330.

——S. 13—Chittas made by Government for private use in connexion with resumption proceedings are not admissible.

Chittas made by Government for its own private use in connexion with resumption proceedings are nothing more than documents prepared for the information of the Collector, and are not evidence against private persons for the purpose of proving that the lands described therein are or not of a particular character or tenure. They are admissible neither under S. 83 nor under S. 13 where it is not known whether they were acted on for the purpose of the resumption proceedings or if in fact reliance was placed upon them by Government for the purpose of resumption proceedings. 98 Ind. Cas. 85= A.I.R. 1927 Cal. 189.

——S. 13—Chittas — Rent suit — Chittas are admissible.

Chittas or the zemindar's private survey papers though prepared in the absence of the tenants, are not wholly inadmissible in evidence in a rent suit by the zemindar: but there may be a great deal of difference in their probative value, which may range from zero to hundred according to the facts of the particular case. 88 Ind. Cas. 548=A.I.R. 1925 Cal. 1104.

——S. 13—Chittas, Private—Admissibility of.

Semble: Private **Chittas** however old are not admissible in evidence under S. 13. 41 Ind. Cas. 726 (Cal).

6. Custom.

——Ss. 13, 33—Custom—Report recognising.

Where the evidence of the existence of custom is given in proceedings before the Settlement Deputy Collector in a dispute in respect of the boundary between two villages for fiscal purposes S. 33, of Evidence Act would not make the statements admissible in proof of the custom sought to be established in subsequent proceedings, for the proceedings before the Settlement Deputy Collector cannot be considered to be 'judicial proceedings'. At the same time, the statements in the Deputy Collector's report and in the order of the Settlement Officer recognising the existence of the custom cannot be excluded altogether. They may not be admissible by themselves as evidence of the custom in controversy in subsequent proceedings but they can be looked into to assess the value of the Deputy Collector's report and of the Settlement Officer's order which recognised the existence of the custom. The report and the order are admissible in evidence under S. 13, Evidence Act, as recognising the custom in dispute. A.I.R. 1935 All. 187=1935 A. L. J. 235=57 A. 588=4 A.W.R. 1208=153 Ind. Cas. 708.

——S. 13—Custom—Customary user damming up channel—Right common to all villagers.

A prescriptive and customary user of the water of a channel for irrigation by throwing a dam across a river held established on behalf of a whole village by proof of user by several of the villagers where the right claimed was similar. 29 C. 100.

——S. 13—Custom—Instances of.

A certified copy of a plaint filed in a prior suit containing an assertion of the existence of a custom in dispute, is relevant under S. 13 of the Evidence Act. Its probative value is, however, negligible if it is not known what happened later in the case. A.I.R. 1949 Ajmer 2=1949 A. M. L. J. 128.

——S. 13—Custom—Instances of.

It is open to a party to prove the alleged custom regarding transfer of houses in a village by citing instances before the Court, showing any transaction in which such a custom was asserted or recognised as well as particular instances in which such custom was claimed or recognised as laid down in S. 13, Evidence Act. The fact that certain sale-deeds or mortgage-deeds were executed and registered and each contained assertions of the existence of the right of transfer, would be in itself admissible, quite independent of the facts whether the genuineness of the signatures on the originals of those documents had been formally proved or not. A.I.R. 1936 All. 119=1935 A.W.R. 1427=1935 R.D. 572=160 Ind. Cas. 1098.

——S. 13—Custom—Instances of.

—(Punjab)—Custom previously established—Instances showing continuity occurring after institution of suit

relating to custom—Instances are important and should be relied upon. 112 Ind. Cas. 447=A.I.R. 1928 Lah. 966.

——**S. 13 (b)—Custom—Instances of.**

Instances of exclusion or postponement of daughters to collaterals with reference to impartible estates are admissible to prove a similar custom of succession in partible estates governed by ordinary Hindu Law. 31 All. 457=36 I.A. 125=10 C. L. J. 216=13 C.W.N. 1073=6 A. L. J. 767=11 Bom. L.R. 890=12 O. C. 304=19 M. L. J. 605=4 Ind. Cas. 25 (P.C.).

——**S. 13 (a)—Custom—Instances of—Pending suit—Custom—Omission to plead.**

The fact that a custom was not pleaded in litigations between members of the community where it might have been pleaded, is relevant evidence, and the question of its relevancy is not affected by the circumstances that some of those suits were still pending in Courts at the time of the trial. 28 C. L. J. 306 =48 Ind. Cas. 561.

——**S. 13—Custom—Instances of.**

Instances of pre-emption in the neighbourhood of a **Mohalla** may indicate the existence of the custom of pre-emption in that **Mohalla.** Unconnected instances are by no means worthless evidence of the existence of a right to pre-empt. 78 P.R. 1911=138 P.L.R. 1911=241 P.W.R. 1911=10 Ind. Cas. 240.

——**S. 13—Custom—Instances of.**

The most cogent evidence of a custom is not the expressions of opinion as to its existence but instances where the alleged custom has been acted upon and by proof, afforded by judicial or revenue records, or private accounts and receipts, that the custom has been enforced. 57 Ind. Cas. 252 (Nag).

——**Ss. 13 and 42 — Custom — Judgment as to existence of—Relevancy.**

A question as to what the custom is in a particular matter in a locality or a class of people or a family is a question of public nature and judgments as to the existence or non-existence of the custom would be relevant both under S. 13 and S. 42 Evidence Act. Pak L.R. (1949) Lah. 679=A.I.R. 1950 Lah. 6.

——**Ss. 13, 42—Custom—Judgment as to.**

The value of a judicial decision on a question of custom arises from the fact, not that it is relevant under Ss. 13 and 42 as forming in itself a "transaction by which the custom in question was recognised etc, etc." but that it contains on its records a number of specific instances relating to the relevant custom. A.I.R. 1941 P.C. 21=1941 A. L. J. 530=1941 A.W.R. 314=7 B.R. 665=I.L.R. (1941) Lah. 154=68 I. A. 1=43 Bom. L.R. 432=I. L. R. (1941) Kar. (P. C.) 22 Sup.=43 P.L.R. 318=193 Ind. Cas. 436 (P.C.).

——**Ss. 13 and 42—Custom—Judgment as to.**

A judgment on a question of custom is relevant not merely as an instance under S. 13 but also under S. 42, Evidence Act as evidence of the custom. A.I.R. 1938 Lah. 309=40 P.L.R. 29=177 Ind. Cas. 775.

——**Ss. 13, 32 (4), 40, 43, 49, 87—Custom—Judgments as to.**

When it is alleged that a custom is binding upon a particular body of persons united by ties of religion, common descent, etc, this distinguishes it from a local custom. The evidence appropriate for establishing that the custom is binding on the particular parties must ultimately include proof of the fact that the parties before the Court have adopted it as a rule of conduct. The matter must depend on an inquiry as to "what has been **de facto** the practice"; such a custom originates as a rule framed by the parties (or their predecessors) for the conduct of daily life; the rule so framed grows up into a custom. Proof of fact—that the parties have adopted the rule of conduct—may consist of adducing previous instances in which the particular parties themselves have followed the rule. Secondly, it may consist of instances concerning other persons belonging to the same community or group as the particular parties, in which case it is a matter of inference that the particular parties would have acted in a similar way. To justify this inference the link must necessarily be established that the particular parties and the third parties whose conduct is actually proved stand on the same footing either by belonging to the same community or group, or to a community so similar to the one in question that the inference in question may be legitimately drawn. That the instance relied upon consists of an instance proved in Court does not differentiate the instance from other instances. The judgment may, of course, make the matter **res judicata** if all the requirements of S. 11, Civil P.C., are satisfied. On the other hand, the previous judgment may be merely evidence under Ss. 40, 41, 49. 87, 32 (4) or similar sections of the Evidence Act, or the judgment may be admissible under the provisions of Ss. 13 and 43, Evidence Act, as only establishing a particular transaction in which the custom was asserted and recognized. Even in such cases, the practical effect of the previous judgment or decision may, by reason of the quantity and nature of the evidence then adduced, be that third parties may not consider it worth their while to contest once more the applicability of the customary rule to themselves, although they were not strictly bound by the previous decision, and although the decision did not make the matter **res judicata.** A.I.R. 1937 Bom. 65=60 B. 919=38 Bom. L.R. 1034=167 Ind. Cas. 380.

——**S. 13—Custom—Judgment as to.**

A decision on a question of custom is not a judgment **in rem**; it is merely an instance, relevant under S. 13, Evidence Act, of a particular custom being asserted or denied, or possibly recognised, though the word 'recognised' may mean recognised by the parties to a particular transaction rather than by the Courts. A.I.R. 1936 Lah. 418=17 L. 232=38 P.L.R. 592=167 Ind. Cas. 951.

——**S. 13—Custom—Judgment as to.**

Quaere.—Whether judicial recognition of a custom is relevant under S. 13, Evidence Act. A.I.R. 1937 Lah. 223=17 Lah. 809=39 P.L.R. 148=167 Ind. Cas. 39.

——**S. 13—Custom—Judgment as to—Relevancy.**

A decision on custom is not a final decision. It is only a relevant instance, that such a right has been asserted and recognised. A.I.R. 1936 Lah. 21=17 Lah. 133=38 P.L.R. 472=162 Ind. Cas. 374.

——**S. 13—Custom—Judgment as to.**

A decision in a custom case is not a judgment **in rem.** It is only relevant under S. 13, Evidence Act, as a judicial instance of the custom being recognised. It may be that owing to faulty prosecution, one decision may be arrived at between certain parties while there may be another decision in a suit arising between other persons. A.I.R. 1934 Lah. 861=36 P.L.R. 256=16 Lah. 307=155 Ind. Cas. 212.

——**S. 13—Custom—Judgment as to.**

Where a custom was sought to be negatived and prior judgments wherein the custom was negatived were produced in evidence,

Held, that the judgments are admissible in evidence only as particular instances wherein the custom was recognized or departed from. 116 Ind. Cas. 799 (All.).

——S. 13—Custom—Judgment as to.

Judicial decisions recognizing the existence of a disputed custom among the Jains of one place are very relevent as evidence of the existence of the same custom among the Jains of another place, but the evidence that the usage has application to the particular case cannot be dispensed with. 99 Ind. Cas. 503=50 Mad. 228=26 M.L.W. 408=A.I.R. 1927 Mad. 228=51 M.L.J. 757.

——S. 13—Custom—Judgment as to—Jains.

Decisions recognising custom among Jains of one place are relevant in respect of Jains of another place. 78 Ind. Cas. 461=A.I.R. 1925 Nag. 174.

7. Decrees.

——S. 13—Decrees—Value of decrees as evidence.

The best proof of a custom is the circumstances in which it has been acted on and documentary evidence that it has been in force. The decrees in previous suits are the best evidence of instances in which the right was recognized. Ordinarily, and in the absence of special circumstances, a judicial decision in recognition or denial of a custom is good evidence in proof thereof. There may, however, be cases in which the judicial decision relating to a custom may not be of great value. A.I.R. 1939 All. 626=1939 A.L.J. 708=1939 A.W.R. 671=186 Ind. Cas. 564.

——S. 13—Decrees—Recitals in decrees and kobalas.

S. 13, Evidence Act, does not draw a hard and fast distinction between a claim and an assertion, nor between an assertion of rights made by a transaction and an assertion of rights made in a transaction.

In a suit by a landlord for an assessment of a fair and equitable rent in respect of a tank, the defendants alleged that they held the property rent-free and that the property was nishkar:

Held, that the recitals in the decrees and kobalas relied on by the defendants were admissible under S. 13 as assertion of rights claimed by them and they may be used for the purpose of proving that the defendants, over a long period of years, had treated the properties in suit as being their nishkar property. A.I.R. 1938 Cal. 763=67 C.L.J. 111=182 Ind. Cas. 413.

——S. 13—Decrees.

Where terms of compromise are recorded, and decree passed accordingly, the document, even if not registered, is admissible in evidence in litigation relating to the portion of the property, which was extraneous to the former suit. A.I.R. 1937 Lah. 708=39 P.L.R. 496=172 Ind. Cas. 743.

——Ss. 13, 35—Decree—Statement in decree that pedigrees were filed.

Statements in a decree that certain pedigrees were filed is evidence either under S. 35 Evidence Act as an entry in a public record or under S. 13 as evidence of the course of proceedings in a suit. A.I.R. 1934 P.C. 157=11 O.W.N. 889=4 A.W.R. 46=40 M.L.W. 217=67 M.L.J. 274=1934 A.L.J. 779=15 P.L.T. 531=1934 M.W.N. 751=60 C.L.J. 67=36 Bom. L.R. 867=38 C.W.N. 1101=56 All. 468=61 I.A. 286=150 Ind. Cas. 545 (P.C.).

——S. 13—Decree—Evidence of transaction—Admissibility.

Where, in a suit by a person against the Government, it was asserted by him that he, along with another, purchased a zemindary at a revenue sale and the Court gave him a decree against the Government:

Held, that this decision was admissible in evidence even against a stranger as to the purchase at the revenue sale, as evidence of a transaction. A.I.R. 1933 Cal. 222=56 C.L.J. 369=143 Ind. Cas. 179.

——S. 13—Decrees—Decree not binding on parties as res judicata is not conclusive evidence of enforcement of custom.

Although the most satisfactory evidence of the enforcement of a custom is a decree, still a decree which does not bind the parties as res judicata, is a mere piece of evidence capable of rebuttal. It does not necessarilyiprove a custom. A.I.R. 1930 Sind 193=126 Ind. Cas. 748.

——S. 13—Decree.

Decree in a previous suit to which one party in subsequent suit was not party is admissible in evidence for corroboration of fact asserted by party in oral evidence and question of weight to be attached to it is question of fact. A.I.R. 1929 Pat. 749.

——S. 13—Decree.

A decree not set aside by a competent Court can be used as evidence with regard to the matters dealt with by it. 114 Ind. Cas. 670=A.I.R. 1928 Cal. 472.

——S. 13—Decree—Suit for rent—Decree by another co-sharer—Admissibility as to rate of rent.

A decree obtained by a co-sharer land-lord in a previous suit is not admissible in evidence as to rate of rent in a subsequent suit for rent by another co-sharer land-lord. It does not follow that because one co-sharer was suing for the particular amount as representing his share of the rent, necessarily other co-sharers would be getting the same amount if the shares were identical or a proportionate amount, unless there was one contract by which the tenancy was created: 22 C.W.N. 304, Not foll.; 22 Cal. 533 (P.C.), Dist.; 25 Cal. 522 (F.B.) and A.I.R. 1923 P.C. 1, Foll.; [cf. A.I.R. 1928 Cal. 355 S.A. No. 2452 of 1925—Ed.] Per Mitter, J.—A decree obtained by a co-sharer land-lord is admissible in evidence as to the rate of rent in a subsequent suit for rent by another co-sharer land-lord.—Per Mullick, J.—22 C.W.N. 304 and 22 C. 533 (P.C.), Foll.; 10 C.W.N. 1084, doubted. 112 Ind. Cas. 787=A.I.R. 1928 Cal. 353.

——S. 13— Decree—Rent decree—Evidentiary value in proceedings under Criminal P. C., Ss. 144 and 145.

The rent-decree is to some extent evidence under S. 13 of Evidence Act as to the land-lord having recognised the holding as being in possession of tenant sued. It is not conclusive against third parties. 65 Ind. Cas. 856=3 Pat.L.T. 570=23 Cr. L. J. 200=A.I.R. 1922 Pat. 557.

——Ss. 13, 43—Decree obtained against defaulter by consent—Suit against auction-purchaser in Revenue sale.

A decree obtained by consent against a defaulting proprietor for possession of a plot of land is admissible in a suit where the purchaser is a party to show how possession was obtained although that arrangement may not be binding upon the purchaser. 9 C.W.N. 383.

——S. 13—Decree—Previous ex-parte decree between parties.

An ex-parte decree not obtained by fraud between the same parties on a question at issue is admissible in evidence in a later suit. 28 C. 676.

——Ss. 13, 43, 39—Decree in prior litigation—Estoppel.

A decree is admissible in evidence for the limited purpose of proving the fact of prior litigation and the fact that plaintiff's title was successfully established therein. It cannot estop a person who was no party to the prior litigation. 7 C.W.N. 574.

8. Documents.

——S. 13—Document between strangers—Recitals in—Admissibility.

Recitals in a document, which is not inter partes, are not admissible in evidence. I.L.R. (1946) Nag. 518=1946 N.L.J. 511=A.I.R. 1946 Nag. 401.

——S. 13—Document between strangers—Entries in—Admissibility.

Entries in a kobala which show the purchase of the suit land by the plaintiff's predecessor-in-interest and on which the plaintiff bases his title, are admissible in evidence under S. 13 of the Evidence Act against the defendant land-lord, although they are not binding on him. 224 Ind. Cas. 55=A.I.R. 1946 Cal. 450=82 C.L.J. 158.

——S. 13—Documents—Assertions of tenancy being permanent in documents of transfer executed by tenants—Admissibility.

The assertions of permanent tenancy rights continuing over a long period of years in various documents of transfer executed by the tenants are admissible under S. 13, Evidence Act, though the weight to be attached to these recitals in the documents must depend upon the circumstances of each case. A.I.R. 1945 Cal. 283=49 C.W.N. 133=I.L.R. (1947) 1 Cal. 270.

——S. 13 (a)—Documents—Sale certificate.

Sale certificates are documents evidencing a transaction, to wit a rent execution sale by which a right to receive and a custom to pay rent in cash only were recognised and asserted. They are, therefore, admissible under S. 13 (a), Evidence Act. A.I.R. 1943 Cal. 565=76 C.L.J. 251=209 Ind. Cas. 292.

——Ss. 13, 35—Documents.

The printed copy of the index register is itself a public document. It is relevant under S. 13 as well as S. 35, and hence admissible in evidence. A. I. R. 1912 Bom. 161=44 Bom. L.R. 295=I. L. R. (1942) Bom. 357=201 Ind. Cas. 420.

——S. 13—Documents—Kabuliyats describing lessee as mokurari tenant.

In a case not governed by S. 18 A, Ben. Ten. Act, Kabuliyats evidencing sub-leases granted by the lessee and describing the interest of the lessee as that of a mokurari tenant are evidence of the assertion of mokurari title on the part of the lessee and as such, they are good evidence under S. 13, Evidence Act, against the landlord even if he was not a party to the same. Even if S. 18-A, Ben. Ten. Act, be held to apply to such a case, that would simply exclude these documents as evidence against the land-lord of the incidents of the tenancy as described therein; not as evidence of the assertion of a claim as to the tenancy being of a particular description. All the same, S. 18-A, Ben. Ten. Act, does not necessarily preclude the applicability of S. 13, Evidence Act, to transactions in which the incidents of any tenure or holding are asserted or denied merely on the ground that the land-lord is not a party to the same. A.I.R. 1942 Cal. 486=46 C.W.N. 770=202 Ind. Cas. 545.

——Ss. 13 (a), 32 (7)—Documents evidencing transactions of transfers.

Documents evidencing transactions of transfers of a tenancy are relevant evidence under S. 13 (a), Evidence Act, for the purpose of establishing the permanent tenancy right; the statements as to the permanent character of the tenancy contained therein are also relevant evidence under S. 32 (7), Evidence Act, for proving the permanent tenancy.

Of course, the statements in the documents may not be relevant to the establishment of the mokarari character of the tenancy, none of the transaction being such as could be said to be transactions by which the mokarari character of the right claimed was asserted within the meaning of S. 13 (a), Evidence Act. A.I.R. 1941 Cal. 541=I.L.R. (1941) 2 Cal. 44=45 C.W.N. 590=74 C.L.J. 145=197 Ind. Cas. 376.

——S. 13—Document—Recitals in.

Under S. 13, the recitalts in document not admissible under S. 18-A of Bengal Tenancy Act, are permissible, not as evidence of grant, but to show the nature of the title. A.I.R. 1933 Pat. 656=13 Pat. 45=149 Ind. Cas. 1177.

——S. 13—Documents—Ryots' rights to transfer houses.

For the purpose of proving a custom, entitling the ryots to transfer their houses, certified copies of sale deeds evidencing particular instances of transfers by ryots are admissible in evidence inasmuch as the object of producing the certified copies is not to prove the original sale-deeds or the genuineness but only to prove instances of transfers. A.I.R. 1940 All. 535=1940 A.L.J. 650=1940 O.W.N. 1136=1940 R.D. 545=I.L.R. (1940) All. 726=1940 A.W.R. 486=192 Ind. Cas. 570.

——S. 13—Documents—Sale certificate.

A sale certificate granted under O. 21. R. 94, Civil P. C., showing the lands comprised in the tenancy can be admitted in evidence under S. 13, Evidence Act as a transaction by which the right to possession of certain plot of land as constituting the tenancy lands was recognized. A.I.R. 1940 Cal. 539=71 C.L.J. 504=191 Ind. Cas. 824.

——S. 13—Document reciting transfers and sub-leases.

The assertion of a right to transfer necessarily implies the existence of a permanent lease. Consequently documents reciting transfers and sub-leases are admissible in evidence to show that the lease is permanent. A.I.R. 1940 Cal. 393=71 C.L.J. 209=190 Ind. Cas. 622.

——S. 13—Documents—Pedigrees put in by ancestors of parties always same—Members not numbered—Admissibility to prove seniority.

Pedigrees set up a number of times in a number of years by the predecessors of the parties in proceedings in which they claimed certain properties, are admissible in evidence even in the

absence of numbers to give the relative seniority of brothers.

A pedigree cannot always be accepted as correct even when it is not a forgery. Where, however, a number of pedigrees are put in by the direct ancestors of parties to the case and they are always the same, the fact which cannot be due to chance, there must have been the design to give the correct order. A.I.R. 1939 Oudh 17=1938 O.W.N. 1267=178 Ind. Cas. 950.

——S. 13—Documents—Recitals in deeds of sale or mortgage.

An act of transfer by way of sale or mortgage of property necessarily involves an assertion that the transferor owns the interest transferred and is, therefore, a transaction by which such a right is claimed or asserted. The recitals in the documents of such transfer are, therefore, admissible under S. 13, Evidence Act though the assertions in the documents may be in favour of the person relying upon them. The more recent the transaction, the less value to be attached to it. A.I.R. 1938 Lah. 846=179 Ind. Cas. 762.

——S. 13—Documents.

The register of information compiled by the Assistant Collector, regarding the pargana watandars under directions given by the Collector under the orders of the Inam Committee, is a public document and relevant under S. 35, or at any rate, S. 13 for proving the date of the grant contained therein. A.I.R. 1937 Bom. 307=39 Bom. L. R. 288=I. L. R. (1937) Bom. 464=170 Ind. Cas. 801.

——S. 13—Documents—Mortgage-deed.

An act of transfer by way of sale or mortgage of property necessarily involves the assertion that the transferor owns the interest transferred. It is, therefore, a transaction by which the right is climed or asserted and consequently, a mortgage of the property in dispute by the predecessor-in-interest of the plaintiff is admissible in proof of his title. A.I.R. 1937 Lah. 688=39 P.L.R. 389=172 Ind. Cas. 769.

——S. 13—Documents—Kobala—Nishkar rights.

Kobalas in favour of predecessor with a description that the lands are nishkar lands are not admissible in evidence to prove the nishkar rights. 164 Ind. Cas. 319=39 C. W. N. 311.

——S. 13—Documents.

—Suit for khas possession of land on proof of title —Defendant alleging that the land belonged to his homestead—Documents of purchase of homestead by defendant and his predecessors in title held, admissible in evidence under S. 13. A.I.R. 1935 Cal. 367=60 C.L.J. 569.

——Ss. 13, 11—Documents—Recital in zarpeshgi deed.

Whether the recitals in a Zarpeshgi deed are admissible as a statement or not, the deed is admissible to prove that the land was leased as bakasht by the landlord from whom the plaintiff derived his title and under whom the defendant claimed to be an occupancy raiyat, even though the evidentiary value of this may be nothing. A.I.R. 1934 Pat. 81=150 Ind. Cas. 884.

——S. 13—Documents—Kabala.

Where the tenant files a suit against the landlord for a declaration that the plaintiff has a rent-free title to the land, a kabala which is a title-deed of the plaintiff is admissible in evidence at least on the point of explaining the nature of the possession. A.I.R. 1933 Pat. 685=149 Ind. Cas. 979.

——S. 13 (a)—Documents—Recital in partition deed as to nature of tenancy.

S. 13 (a), Evidence Act, refers to the admissibility of any transaction by which a right is asserted.

A deed of partition effected between the descendants of a tenant containing a recital that the lands are held by them in mokarrari kayami interest is not admissible for the purpose of establishing a mokarrai right in the tenancy and is only admissible in a contest between the lanlord and the tenant to establish the right to effect partition. A.I.R. 1932 Cal. 398=54 C.L.J. 353=137 Ind. Cas. 658.

——S. 13—Documents—Suit to establish rights as mahant—Papers containing recognition of rights by revenue officers and residents of village—Admissibility.

Where in a suit in which the rights as mahant were asserted a report containing signatures of revenue officers and residents of the village were filed to prove the said rights,

Held, that it was admissible under S. 13. 1930 A.L.J. 964.

——S. 13—Documents—Dispute regarding nature of land—Recitals in sale deeds in favour of one party to suit showing nature of same land are admissible not only under S. 32 but also under S. 13 (b).

1930 A.L.J. 564=A.I.R. 1930 All. 299.

——S. 13—Documents.

Settlement deed under which pro-note is transferred, if admissible as secondary evidence, may be employed to prove pro-note under S. 32 (7) read with S. 13 (a)—(Obiter) A. I. R. 1930 Mad. 742=123 Ind. Cas. 197.

——S. 13—Document.

—Mortgage-deed stating rent payable to superior land-lord—Mortgage debt paid off—Superior interest purchased by mortgagee—Suit for recovery of rent at an enhanced rate—No proof of enhanced rent—Mortgage bond is admissible to prove the rent. A.I.R. 1927 Cal. Dist. 117 Ind. Cas. 599=A.I.R. 1928 Cal. 703.

——S. 13—Documents.

—Dispute concerning land—Landlord's papers prepared in course of business concerning lands are admissible. 101 Ind. Cas. 792=A.I.R. 1927 Cal. 576.

——S. 13—Documents—Pattahs of other lands.

Where a plot of land was leased and the title of the lessor to the land was disputed, but previous to the lease in question, the lessor had excuted a pattah in respect of another plot of land and where his description of the boundary of the land in that pattah showed that he claimed the land in suit as his own,

Held, that the pattah was not a "transaction" as it did not relate to the land in suit. 86 Ind. Cas. 674=29 C.W.N. 469=A.I.R. 1925 Cal. 684.

——S. 13—Documents—Evidence of construction of old houses by old documents.

Old documents mentioning persons who built certain very old houses may be admitted in evidence under S. 13, Cl. (b) where direct evidence about the construction may not be easily available. 82 Ind. Cas. 582=5 L.R.A. Civ. 231=A.I.R. 1924 All. 526.

——S. 13—Documents—Lease-deed—Assertions in—Admissibility.

An assertion in the kobala executed by a tenant in favour of his transferee, that his right in it was a permanent one is admissible under S. 13 in evidence in a suit for ejectment of the tenant where permanent tenancy was claimed. 83 Ind. Cas. 918=39 C.L.J. 526=A.I.R. 1924 Cal. 991.

——S. 13—Document by third party recognising plaintiffs right is admissible in evidence.

The plaintiffs claimed the land in dispute as their man land and the defendant claimed it as his jote. The plaintiffs produced an ekrarnama addressed by a third party to an ancestor of the plaintiffs in which the land in suit was described as man land,

Held, the ekrarnama was admissible under both clauses (a) and (b) of S. 13. 70 Ind. Cas. 18=1 Pat. 375=3 P. L. T. 792=1923 P.H.C.C. 125=A.I.R. 1922 Pat. 488.

——S. 13—Documents.

Assertion of ownership in mortgage-deed is relevant as to ownership under S. 13 and after mortgagor's death under S. 32 (7). 70 Ind. Cas. 389=14 M.L.W. 327=1921 M.W.N. 560=A.I.R. 1921 Mad. 383.

——S. 13—Documents between strangers.

Documents purporting to be mortgage deed of property in suit executed by predecessors-in-interest of plaintiff in favour of third party and documents in which plaintiff has asserted his right in property are admissible in evidence. A.I.R. 1938 Lah. 795=40 P.L.R. 1054=I.L.R. (1938) Lah. 494=181 Ind. Cas. 498.

——S. 13—Documents between strangers.

Documents executed by parties who are starngers to a suit are not evidence in proof of the title of the party relying on them in the suit. A.I.R 1936 Lah. 1005=167 Ind. Cas. 704.

——S. 13—Documents between strangers.

—Recitals of boundaries in document not inter partes are inadmissible—Principle, however, is not applicable to mortgages, partition deeds and other documents of title. 1936 M.W.N. 760.

——S. 13—Documents between strangers.

Where in a sale-deed executed by the husband in favour of his wife, the recital of the consideration for the sale was the dower debt:

Held, that, that recital was not evidence against third parties and its evidentiary value was nothing against third parties. 37 P.LR. 777.

——S. 13—Document between strangers—Recital as to ownership of adjoining land—Admissibility of, againt person not party to deed.

A recital in a document as to the ownership of adjoining lands is not admissible in evidence as against persons who are not parties to the document. A.I.R. 1934 Lah. 750=154 Ind. Cas. 662.

——Ss. 13, 32, 157—Documents between strangers—Recital regarding boundaries in.

A recital regarding boundaries in a document, relating to an adjacent land, executed between strangers, is not admissible under S. 13, Evidence Act, but may be admissible if the executant is called and deposes to the boundary, to corroborate him under S. 157, or, if he is dead, under S. 32. A.I.R. 1933 Pat. 636=145 Ind. Cas. 944 (2).

——S. 13—Document—Recital of boundaries in—Admissibility.

A receipt, stating the disputed property as one of the boundaries to an adjacent plot, executed by a deceased person in the ordinary course of business and consisting of an acknowledgment written or signed by him of the receipt of money, is admissible in evidence under S. 32, and not under S. 13. 113 Ind. Cas. 414=5 O.W.N. 174=A.I.R. 1928 Oudh 248.

——S. 13—Documents between strangers—Recitals as to Boundaries—Admissibility.

A document between strangers to the suit in which mention is made of one of the parties or their predecessors as holding the land lying on the boundaries of the lands belonging to the executants of the document is not admissible in evidence. 86 Ind. Cas. 734=41 C. L. J. 374=A. I. R. 1925 Cal. 1034.

——S. 13—Documents between strangers—Recitals in—Are inadmissible.

A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence as against the parties who make it. But it is no more evidence as against third persons than any other statement would be. 84 Ind. Cas. 420=28 C.W.N. 1092=A.I.R. 1924 Cal. 1067.

——S. 13—Documents—Admission in Road Cess return—Evidence.

An entry in a Road Cess Return in which a former proprietor of an estate admitted the existence of a Lakhiraj, although not binding on the auction purchaser of the estate at a Revenue sale, is admissible under S. 13, 19 Ind. Cas. 548. (Cal.).

——Ss. 13 and 35—Documents—Containing assertion of right.

A document containing an assertion of certain rights though not a public document under S. 35 is admissible under S. 13. (1915) M.W.N. 76=28 M.L.J. 217=17 M.L.T. 271=26 Ind. Cas. 841.

——S. 13—Documents containing assertions of right—Whether evidence.

Documents containing assertions of right of a tenure holder to hold at a certain rental, are admissible under S. 13. 23 Ind. Cas. 773 (Cal.).

——S. 13 (b)—Documents—Entries in—Ikrari-malikhan-e deh.—Dictated by landlord alone—How far admissible.

Entries in Ikrari malikhan e deh recording a village custom as stated by the landlord are in the absence of fraud or error binding on persons affected thereby even though the entries were not prepared in the presence of or attested by such persons and they are admissible in evidence to prove custom. 1. O. L. J. 78=23 Ind. Cas. 962.

——S. 13—Documents—Kobala admitting right of easement.

A Kobala admitting the plff.'s right to an easement is relevant and admissibie under S. 13. 26 Ind. Cas. 781 (Cal.).

——S. 13—Documents—Partition paper—Estates partition Act, S. 57.

Partition paper, prepared under S. 57 Estates Partition Act is admissible in evidence under S. 13 of the Evidence Act as a record of transaction in which the right to certain plots is recognised. 2 Ind. Cas. 367 (Cal.).

——Ss. 13 and 32 (b)—Document—Sale deed—30 years old showing ownership of adjoining land.

A sale deed more than 30 years old in regard to a certain plot of land is admissible in evidence under Secs. 13 and 32 (b) of the Act, in a suit involving a question of title to that land. 11 A.L.J. 139=18 Ind. Cas. 752.

——S. 13—Documents—Sale deeds — Assertion of right.

To prove his vendor's title and exclusive possession of a garden, plaintiff produced certain documents dealing with the garden in question by way of partition; Held, that the documents were title deeds and contained an assertion of title to and possession of the property in dispute on behalf of the predecessor in title of the plaintiff against the defendant and should not have been excluded from consideration on the question of possession. 51 Ind. Cas. 866. (Cal.)

——Ss. 13 and 32—Documents—Sale deeds—Transaction—Meaning of.

The word 'transaction' means a business or dealing carried on or transacted between two or more persons. Where certain properties were claimed as the property of a particular family, and (1) sale deeds by widow asserting their husband's title to the properties (2) written statements filed by them in certain suits and (3) recitals in sale deed between third persons describing the properties as belonging to a particular family, were put in evidence, held per Ayling J., that the documents mentioned in (1) were admissible as transactions within S. 13 (a) and that those mentioned in (2) and (3) are not admissible either under S. 13 (a) as a transaction or under S. 32 as an admission against interest. (Per Seshagiri Iyer J.) That all of them were inadmissible. (1914) M.W.N. 779=26 Ind. Cas. 747.

——Ss. 13 (a), 32 (7)—Document, statement in—Admissibility against person not a party to it—Statement of deceased person—Right or custom, evidence of—Nakdi or bhaoli rent.

To prove or disprove a right or custom, it is not enough to adduce evidence of a transaction in which, or in the course of which, the right or custom was asserted or denied. The transaction will be relevant under S. 13, Cl. (a) of the Evidence Act if it be one by which the right or custom was asserted or denied. Where the question was whether a tenant held lands under the nakdi or bhaoli system of rent and the court based its decision on a statement contained in a hebanama executed by the deceased grandfather of the tenant:—Held, that the hebanama was not admissible in evidence under S. 32 (7) read with S. 13, Cl. (a), of the Evidence Act. 11 C.W.N. 703.

9. Essentials of assertion.

——S. 13—Essentials of assertion—Recital in document—When amounts to assertion of right.

There is a fundamental distinction between a mere recital and an assertion. A right is not asserted simply because it is recited in a certain document. It is asserted only when the transaction concerned is itself entered into in exercise of the right. Where in a transaction of usufructuary mortagage the executants were entitled to grant a usufructuary mortgage of the lands whether they held them under a revenue free title or not, the mere fact that in the document of mortgage a revenue free title was recited, would not constitute an assertion of such title within the meaning of S. 13 of the Evidence Act. 81 C.L.J. 274=A.I.R. 1947 Cal. 209.

——S. 13—Essentials of assertion.

A map and a chitha of the disputed lands prepared in 1922 under the orders of one of the parties to the suit and the collection papers showing collection of rent on the basis of the map and chitha go together and are admissible under S. 13 as an assertion of right by the party. A.I.R. 1945 Cal. 492=49 C.W.N. 791=I.L.R. (1946) 1 Cal. 149.

——S. 13—Essentials of assertion—Assertion of right in gift-deed.

Under S. 13, Evidence Act, mere assertion of a right may be some evidence of its existence. But an assertion of a right made in a deed of gift by the donor cannot be used as evidence to rebut the entry in the Record of Rights finally published many years after the deed of gift and which must be presumed to be correct at the date it was made. A.I.R. 1940 Pat. 16=20 P.L.T. 877=6 B.R. 33=184 Ind. Cas. 246.

——S. 13—Essentials of assertion.

Instances in which the right of custom is claimed, recognised or exercised etc., must be instances prior to the suit in question because S. 13, Evidence Act, under which they are admitted is in the past tense throughout. A.I.R. 1939 Lah. 105=41 P.L.R. 21=183 Ind. Cas. 794.

——S. 13 (b)—Essentials of assertion.

"Assertion" in cl. (b), S. 13, Evidence Act, includes both a statement and enforcement by act. The evidence tendered under this section need not necessarily be evidence of acts done, but a verbal statement not amounting to and not accompanied by any act would also be admissible, if it amounted to a "claim". A.I.R. 1939 Mad. 432=49 L.W. 409=1939 M.W.N. 325=(1939) 1 M.L.J. 602=186 Ind. Cas. 255.

——S. 13—Essentials of assertion

The illustration to S. 13, Evidence Act, shows that an instance claiming a right means something more than a mere statement of boundaries in a deed or in a plan. A distinction has been drawn between a claim and a statement of claim. Where, in a provious suit, in which a certain property was not then in dispute a plan was filed describing the property as that of the plaintiff's predecessors, it is not an instance in which the right in dispute was claimed and consequently not admissible in evidence. A.I.R. 1938 Lah. 635=40 P.L.R. 968=179 Ind. Cas. 68.

——S. 13—Essentials of assertion.

The mere assertion of the right in a document, to which the person against whom the right is asserted is not a party and of which he knows nothing is not to claim the right. A mere statement in patta or kabuliyat that the lessor is lakheraj debattar cannot be said to be an instance when the exercise of the right was asserted within the meaning of S. 13, Evidence Act. A.I.R. 1936 Pat. 543=15 Pat. 260=17 P.L.T. 507=3 B.R. 57=165 Ind. Cas. 589.

——S. 13—Essentials of assertion.

Evidence, to prove that a disputed title was asserted and enforced is relevant though the title may be asserted against parties other than those who

are disputing. 66 Ind. Cas. 222=8 O.L.J. 439= A.I.R. 1922 Oudh 178.

——S. 13—Essentials of assertion.

A mere statement of boundary cannot be classed with any of the verbs in S. 13 "created, modified, recognised, asserted or denied" and is, therefore, not admissible under S. 13 (a). 107 Ind. Cas. 293= A.I.R. 1928 Mad. 105.

——S. 13—Essentials of assertion.

Per Cuming and Mukerjee JJ.—The word "claim" implies that the right is asserted to the knowledge and in the presence of the person whose right will be derogated by the establishment of the claim. The mere assertion of the right in a document, to which the person against whom the right is asserted is not a party and of which he knows nothing is not to claim the right. 99 Ind. Cas. 189= 31 C.W.N. 32=A.I.R. 1927. Cal. 1.

——S. 13—Essentials of assertion.

A transaction or instance in which there is a mere assertion of a right or custom does not come within S. 13 but only such a transaction is admissible by which the right or custom is asserted or denied: 99 Ind. Cas. 189=31 C. W. N. 32=A. I. R. 1927 Cal. 1.

——S. 13—Essentials of assertion.

The words of S. 13 are wide enough to cover the mere assertion of a right in a previous suit where that right was in dispute. There is nothing in that section which requires that the right should be successfully asserted. 92 Ind. Cas. 104=A.I.R. 1926 Cal. 727.

——S. 13—Essentials of assertion—"Claim" and Recital—Distinction.

The word "claim" denotes a demand or assertion in relation to a thing or attribute as against or from some person or persons, showing the existence of a right to it in the claimant. A bare statement may or may not be a claim according to the attending circumstances in which it is made. It may amount to a claim or be a mere statement of claim, though in some circumstances a statement may amount to a claim.

A statement in a pattah that the land to the west of the land demised under that pattah belongs to the executant of the pattah is not a "claim" but a mere recital. 86 Ind. Cas. 674=29 C.W.N. 469=A.I.R. 1925 Cal. 684.

10. Former statement as to date of birth.

——Ss. 13, (a) 21 (1) and 32 (7)—Former statements as to date of birth.

Former statements of a person giving the date of his own birth are admissible under the combined operation of S. 21 (1) S. 32 (7) and S. 13 (a) of the Act but they do not possess any great probative force, the source of his information after all being only hearsay. 213 P.L.R. 1910=86 P.W.R. 1910=7 Ind. Cas. 505.

11. Judgments.

——S. 13—Judgments as to custom—Admissibility and relevancy.

See Evidence Act S. 13—Custom—Judgments as to.

——S. 13—Judgment in previous criminal proceedings in which plaintiff asserted his possession.

A previous judgment in a criminal case in which the plaintiffs asserted their possession of the land in dispute, and possession was held to be with them, is not admissible against the defendants who were not parties to the criminal proceedings, to prove the plaintiffs' possession at the date of the criminal proceedings, but the fact that at that point of time they asserted their title is admissible under S. 13, Evidence Act. A.I.R. 1942 Pat. 372=199 Ind. Cas. 144.

——S. 13—Judgment under S. 144, Criminal P.C. —Report of the Subordinate Magistrate.

It is settled law that the judgment of a Magistrate under S. 144, Criminal P.C., is not evidence of possession of the party in whose favour the proceeding may have terminated, even though the Magistrate may have restrained the opposite party from going upon the land as a result of his decision that the other party was in possession.

When the judgment itself cannot thus be the evidence of possession, a report of a Subordinate Magistrate who made the local enquiry certainly cannot be the evidence of possession. A.I.R. 1945 Pat. 453=24 Pat. 379.

——Ss. 13 and 35—Judgment—Order under S. 145, Cr.P. Code—Admissibility in evidence.

An order under S. 145, Cr.P. Code, declaring a party to be in possession is admissible in evidence under S. 13, Evidence Act, as an instance in which a right in dispute was claimed and recognised; and statements therein relating to the facts relevant to the case are admissible under S. 35. There is no warrant for holding that an order under S. 145, Cr.P. Code, is admissible only for the limited purpose of showing that the successful party thereunder was in possession at the time, but that the statements therein are in-admissible. I.L.R. (1949) Cut. 465=A.I.R. 1950 Orissa 19.

——S. 13—Judgments.

Order under S. 145, Criminal P.C., maintaining possession of plaintiff though it was set aside by High Court on other point is admissible to show the fact that possession was claimed. A.I.R. 1939 Lah. 188=41 P.L.R. 120.

——S. 13—Judgments—Suit for possession—Prior decision under S. 145, is a relevant fact.

In a suit for possession the fact that there was a Proceeding under S. 145, Criminal Procedure Code, that there was an inquiry into the matter and that there was a decision adverse to the allegations of the plaintiffs, is a relevant fact under S. 13. 82 Ind. Cas. 392= 40 C.L.J. 30=A.I.R. 1924 Cal. 1046.

——S. 13—Judgment inter partes—Proceedings under S. 145, Cr.P.C. whether relevant.

The facts of a previous proceeding under S. 145, Cr.P.C. and the order passed thereon are relevant in a suit between the same parties for recovery of possession of land on declaration of title but the reasons for the order are not relevant. 41 Ind. Cas. 456 (Cal.)

——Ss. 13, 35, and 67—Judgments—Cr. Court—Statements of cliams in proceedings under Cr. P. C., S, 145—Statements of claims in possessory orders inadmissible in proof of title.

Recitals of the claims of parties in possessory orders under S. 145 Cr. P. C. are inadmissible to prove title under S. 13 of Evidence Act or other wise. They come neither under S. 63 not being oral accounts by a witness of the contents of a document, nor under S. 35 as entries in public records.

29 C. 187 ref. to. 9. C. 586 dist. 15 M. 378 disapproved. 37 Ind. Cas. 911 (Cal).

—S. 13—Judgment—Criminal P.C., S.145—Order as to possession.

Orders under S. 145 Criminal (P. C.) are, on general grounds and under S.13 of the Evidence Act, admissible even as against other persons, though not parties to the order, to prove the fact of the passing of such orders, the parties to the dispute of the lands in dispute and the person declared entitled to possession. If the order describes the lands by metes and bounds or with reference to physical marks, extrinsic evidence is admissible to prove their identity. If maps accompany such orders, maps are admissible to explain the orders, and extrinsic evidence is admissible to identify the objects shown in the maps. Reports accompanying the orders, or maps, but not referred to in the order, are admissible as hearsay evidence of reputed possession or under the provisions of S. 13 of the Evidence Act. 6 C. W.N. 386=12 M.L.J. 83=29 C. 187=4 Bom. L. R. 167=29 I. A. 24 (P.C.).

——S. 13—Judgments—Of execution proceedings.

In a suit for declaration of title to immovable property records of execution proceedings by the plaintiff respecting the same property (as against tenant etc.,) are admissible under S. 13 of the Evidence Act. 21 C.L.J. 65=34 Ind. Cas. 215.

——S. 13—Judgment of French Court in regard to validity of adoption—Admissibility in evidence in proceedings before Courts in British India—Value to be attached to such judgments.

A judgment given by the French Courts in Pondicherry in regard to the valilidity of an adoption by a Hindu widow would be admissible in evidence under S. 13 of the Evidence Act in proceedings in Courts in British India even though one of the parties to such proceedings was not a party to the proceedings in the French Courts. The weight to be given to it must depend on all the circumstances and it cannot be said that it must be followed. As it is a judgment of the Court of the domicile in relation to the validity of the adoption both in law and as regards the facts necessary to its validity in Pondicherry, it is cogent evidence of the French law itself and ought in such circumstances to be given great weight in all the matters with which it deals. 77 I.A. 33=I L.R. (1950) Mad. 862=54 C.W.N. 200=A.I.R. 1950 P.C. 34=63 L.W. 91=1950 A.L.J. 105=52 Bom. L.R. 474=1950 A.W.R. 227=(1950) 1 M.L.J. 172 (P. C.).

——S. 13—Judgment in previous suit.

A Judgment in a previous suit may be relevant under S. 13, Evidence Act, for establishing a particular transaction, but the findings of fact and reasons upon which the judgment is founded cannot be relevant in a subsequent suit:

Held, that the judgment in the previous suit was relevant only to show that the land which formed the subject-matter of the previous suit was the property of the plaintiffs. It was not relevant to show that the land in the subsequent suit fromed part of a bigger piece of land which was given by means of a Royal grant to the plaintiffs' ancestors. A.I.R. 1940 Lah. 309=42 P.L.R. 247=190 Ind. Cas. 689.

——S. 13—Judgment in previous suit.

Where rights of a party in a subsequent suit were not in issue in a previous suit, the judgment in the previous suit is not admissible in subsequent suit. A.I.R. 1940 Nag. 382=1940 N. L. J. 437=193 Ind. Cas. 41.

——Ss. 13 and 11—Judgments — Previous judgment contesting the right of granthi—Findings regarding the nature of property.

Where in a suit contesting the right of then granthi of the Darbar Sahib (golden temple at Amritsar), to alienate certain shop it was held that the properties were waqf and attached to the granthi and could not be alienated by the granthi the judgment only proves that at that time also the right of the granthi to alienate certain property was called in question. The finding of the Court that the property was waqf and was attached to the granthi is not relevant in a subsequent suit by the successor to the office challenging the alienation by his predecessor-in-title. 1 Lah. 540=59 Ind. Cas. 734.

——S. 13—Judgments—Previous judgments.

Per Wallis, C. J.—The fact that the ancestor failed in a contested suit to prove the relationship of his line with the deceased fifty years ago when such an issue was much more susceptible of proof, is evidence against the existence of the right under S. 13. 18 M.L.T. 504=(1915) M.W.N. 962=2 L.W. 1175=31 Ind. Cas. 590.

——S. 13—Judgments — Post litem judgments, admissibility to prove transactions.

As the wording of S. 13, Evidence Act, under which judgments can be let in as evidencing transactions or instances is all in the past tense, the judgments subsequent to the suit in which they are relied on as evidencing the particular transaction or instances in dispute, are not admissible in evidence. A.I.R. 1939 Lah. 152=41 P.L.R. 670=181 Ind. Cas. 703.

——S. 13—Judgment—Subsequent judgment.

S. 13, Evidence Act, does not make judgments subsequent to the matter under investigation relevant in any case. A.I.R. 1931 Pat. 386=32 Cr. L.J. 1224=12 P.L.T. 647=134 Ind. Cas. 625.

——S. 13—Judgments.

Under Ss. 13 and 43, Evidence Act, judgments are admissible only as establishing particular transactions in which a right, existence of which is in question, was claimed, recognised or exercised or in which its exercise was disputed, asserted or departed from. A.I.R. 1937 Bom. 244=39 Bom. L.R. 224=170 Ind. Cas. 172.

——Ss. 13, 14—Judgments—Reasons on which judgment is founded.

Under Ss. 13 and 14, Evidence Act, judgments are admissible only as establishing particular transactions in which a right, the existence of which is in question, was claimed, recognized or exercised or in which its exercise was disputed, asserted or departed from. In particular, the reasons upon which the judgment is founded or any finding of fact other than the transaction itself cannot be deemed to be relevant in the subsequent case. A.I.R. 1937 Bom. 244=39 Bom. L.R. 224=170 Ind. Cas. 172.

——S. 13—Judgment — Findings of facts and reasons for judgment—Whether relevant in subsequent suit.

The judgment in a previous suit may be relevant under S. 13, Evidence Act, to establish a particular transaction, but the reasons on which the judgment is founded or any finding of fact other than the

transaction itself, cannot be relevant in the subsequent case. A.I.R. 1937 Lah. 437=174 Ind. Cas. 722.

——Ss. 13, 42—Judgments—Previous decision.

Where the right claimed in subsequent suit by the plaintiff was asserted by one party and denied by the other in the previous suit and the right which the plaintiff in the previous suit claimed was of a public nature, the case being that the land in suit was a takya:

Held, that the previous decision was an important piece of relevant evidence under Ss. 13 and 42, Evidence Act, in the subsequent suit by the plaintiff for declaration of her title to the land. A.I.R. 1936 Lah. 929=163 Ind. Cas. 924.

——S. 13—Judgments.

Where in a prosecution for counterfeiting trade mark, certain previous proceedings in the Civil Court relating to the exclusive right of the complainant were referred to and judgments in the prior case were filed:

Held, that the judgments were relevant under S. 13, Evidence Act, as a particular instance when the right claimed was claimed and disputed. A.I.R. 1931 Oudh 277=8 O.W.N. 827=32 Cr. L.J. 1177=134 Ind. Cas. 477.

——S. 13—Judgments inter partes—Judgment in which right under dispute was recognized by Court is admissible as relevant fact.

Where the mortgagee's right to hold a valid charge on the property comprised in a mortgage is in dispute and it is found that in a previous suit the right was asserted by the representatives of the mortgagee and the right claimed was recognized by the Court, the judgment in that suit being an instance in which the mortgagee's right was recognized against the plaintiffs is a relevant fact and as such is admissible in evidence under S. 13. 121 Ind. Cas. 387=1929 A.L.J. 741=A.I.R. 1930 All. 9.

——S. 13—Judgments—Observation in—Admissibility.

Observations in a judgment relating to a different matter though connectd cannot bind a third party and the judgment itself cannot be evidence against him. 1930 M.W.N. 396=A.I.R. 1930 Mad. 751=129 Ind. Cas. 650=32 M.L.W. 850=59 M L.J. 321.

——S. 13—Judgments.

When a similar question regarding the factum and validity of adoption, was raised in a previous proceeding, the judgments in which that adoption was upheld do constitute relevant pieces of evidence under S. 13. 114 Ind. Cas. 616 (Nag.).

——S. 13—Judgments.

Judgment in a previous suit is admissible in evidence under S. 13 to establish the illegitimacy of a certain person. 109 Ind. Cas. 310=3 Luck. 416=5 O.W.N. 143=A.I.R. 1928 Oudh 233.

——S. 13—Judgments—Evidentiary value of.

Judgments inter partes can be admitted in order to prove the conduct of the parties or to show particular instances of the exercise of rights, or admissions made by parties' ancestors or how the property was dealt with previously as relevant evidence under the provisions of S. 11 or S. 13. They cannot be wholly excluded from consideration because in so far as they explain the nature of possession or throw light on the motives or conduct of parties or reproduce the admissions made by the parties or their ancestors and also embody an authoritative statement of the facts which the investigation then held before the Court brought to light, such judgments have very high evidentiary-value and may even shift the burden of proof. 97 Ind. Cas. 694=9 N.L.J. 215=A.I.R. 1927 Nag. 19.

——S. 13—Judgments.

It is not the correctness of the previous decision, but the fact that there has been a decision, that is established by the production of the judgment. 70 Ind.Cas. 194=36 C.L.J. 9=A.I.R. 1923 Cal. 240.

——S. 13—Judgments not operating as res judicata—Admissibility.

A judgment in a prior suit relating to a different Jama but between the same parties is admissible in evidence, whether or not it constitutes res judicata. 65 Ind. Cas. 522 (Cal.).

——S. 13—Judgments—Prior judgment questioning a right is admissible.

A judgment given in a previous suit contesting the right of the then Granthi that the property was waqf and was attached to the Gaddi, and therefore could not be treated by the Granthi as his private property, is admissible for the purpose of showing that at that time also, the right of the Granthi to alienate certain property was called in question. 59 Ind.Cas. 734=49 P.L.R. 1921=A.I.R. 1921 Lah. 337.

——S. 13—Judgments.

Judgments which are neither res judicata nor judgments in rem, are not admissible as showing that a particular right was asserted or denied. 60 Ind. Cas. 147=7 O.L.J. 474.

——S. 13—Judgments.

Judgments not inter partes in previous cases in which the right involved in the present litigation was asserted are admissible. 60 Ind. Cas. 142=2 U.P.L.R. (B.R.) 81.

——S. 13—Judgment inter partes—Tenant, decree against.

A decree (obtained by plaintiff's predecessor or a stranger) showing that defendants tenants had a holding in the estate on a certain rental is admissible under S. 13 for showing that the defendants held a holding in that estate on that rental. 22 C.W.N. 304=40 Ind. Cas. 442.

——S. 13—Judgment inter partes—If admissible.

A Judgment inter partes is admissible in evidence in a latter suit. Obiter. A decree in a case in which the land-lords and tenants were co-defendants against a third person, is a decree inter partes as between land-lord and tenant. A judgment in a title suit is evidence in a subsequent rent suit and vice versa. 9 C.L.J. 16=5 M.L.T. 274 and 359=13 C.W.N. 217=1 Ind. Cas. 572.

——S. 13—Judgments inter partes.

Where two suits relate to the same subject matter between the parties, technically different but practically the same, the finding in the previous suit on any one of the issues, common to both, is not only relevent but also a very valuable piece of evidence, though not conclusive and is not res judicata. 139 P.W.R. 1909=4 Ind. Cas. 997.

——S. 13—Judgment inter partes.

Where in a previous suit between the same parties or their representatives, the boundary between two villages was incidentally decided, **Held**, that the judgment in the previous suit was admissible under S. 13, for the limited purpose of show-

ing that the title which is now asserted was on that occasion alleged, but not in proof of all the facts pfoun therein. 9 C.L.J. 597=12 C.W.N. 739 =4 Ind.Cas. 81.

——S. 13—Judgment not inter partes**—Admissibility.**

A Judgment not **inter partes** is admissible under S. 13 of the Evidence Act as mere evidence of a transaction in which the nature of the property in suit was asserted and recognised. The reasons upon which the judgment is founded and the findings of fact there come to, cannot be regarded as part of the transaction and are, therefore, not relevant under the section. A.I.R. 1949 E. P. 233.

——S. 13—Judgment not inter partes.

The purpose of S. 13 is to enable a right which may be constituted by a number of acts, by the exercise of the right itself—**animo domini**, on numerous occasions to be proved by transactions or particular instances in which the right or custom in question was asserted or denied by evidence otherwise admissible. A judgment is admissible because it is the evidence or integration of a litigation or a judicial proceeding, a transaction within the meaning of S. 13 for the purpose of ascertaining the parties to the dispute and the contentions of the parties, the subject of the dispute and the final decision of the Court, but not for the purpose of proving the reasons for the Court's decision and for using its findings of fact as evidence of those facts in another case. A.I.R. 1945 Sind 57=I.L.R. (1945) Kar. 40.

——S. 13—Judgment not inter partes.

A judgment not **inter partes** may be admissible in evidence only under S. 13, Evidence Act, as establishing a particular transaction, if any, by which the relevant right was asserted, recognised, etc. The fact that there was a litigation or that as a result of this litigation the then plaintiffs recovered possession of the lands may be relevant under S. 11, Evidence Act. The judgments not **inter partes** will be evidence only to the extent of showing the existence of those facts. But findings of fact in or reasons for the judgment are irrelevant and not admissible under S. 13, Evidence Act. A.I.R. 1944 Cal. 57=I.L.R. (1944) 1 Cal. 203=77 C.L.J. 194=48 C.W.N. 505=211 Ind. Cas. 460.

——S. 13—Judgments.

—Guardianship proceedings for custody of a child—Father not made party—Subsequent suit—Parentage of child in issue:

Held, that the orders in guardianship proceedings cannot be relevant under S. 13. A.I.R. 1942 Mad. 129=54 L.W. 411=201 Ind. Cas. 39.

——S. 13—Judgment not inter partes.

Though the recitals and findings in a judgment not **inter partes** are not admissible in evidence, such a judgment and decree are admissible to prove the fact that the decree was made in a suit between certain parties and for finding out for what land the suit had been decreed. A.I.R. 1941 Cal. 193=72 C.L.J. 320= 44 C.W.N. 935=195 Ind. Cas. 412.

——Ss. 13, 43—Reasons for judgment and finding of fact other than transaction itself whether relevant.

Although a judgment in a previous case not **inter partes** may be admissible under Ss. 13 and 43, Evidence Act, as establishing the decision arrived at, the reasons upon which the judgment was founded and any finding of fact other than the transaction itself, are not relevant evidence. A.I.R. 1939 Bom. 313=41 Bom. L.R. 561=184 Ind. Cas. 337.

——Ss. 13, 40 to 44—Judgment not inter partes **and not admissible under Ss. 40 to 44.**

The application of S. 13 cannot be extended to allow judgments to be used which are definitely excluded by Ss. 40 to 44, Evidence Act. A judgment, in which what is sought to be established by the plaintiff is a fact proved in a previous action to which the defendant was not a party, is inadmissible in evidence. A.I.R. 1938 Pat. 103=3 B. R. 206=166 Ind. Cas. 664.

——S. 13—Judgment not inter partes**—Findings of facts in previous suit, admissibility.**

Though a judgment in other proceedings even not **inter partes** is admissible in evidence as, what has been described as an integration of judicial proceedings, themselves held to be a transaction within the meaning of S. 13, its admissibility is subject also to other provisions of the Evidence Act, and is subject to the overriding principle that the Evidence Act does not make a finding of fact arrived at on the evidence before one Court in one case evidence of that fact in another case. After all the purpose of S. 13 is to enable a right which may be constituted by a number of facts by the exercise of the right itself **animo domini**, on numerous occasions, to be proved by transactions or particular instances in which the right or custom in question was asserted or denied, but by evidence otherwise admissible. A judgment is admissible because it is the evidence or integration of a litigation or a judicial proceeding, a transaction within the meaning of S. 13, Evidence Act, for the purpose of ascertaining the parties to the dispute and the contentions of the parties, the subject of the dispute, and the final decision of the Court, but not for the purpose of proving the reasons for the Court's decision and for using its findings of fact as evidence of those facts in another case. A.I.R. 1938 Sind. 132=I.L.R. (1939) Kar. 18=176 Ind. Cas. 549.

——S. 13—Judgment in previous title suit not inter partes.

Where the question is as to permanency of a tenancy, the judgment in a previous title suit in which permanent tenancy rights were claimed is admissible in evidence, under S. 13, Evidence Act, in so far as it is evidence of a transaction in which permanent rights were claimed, though the plaintiff in the subsequent suit was not a party to it. A.I.R. 1937 Cal. 373=65 C.L.J. 333=173 Ind. Cas. 498.

——Ss. 13 and 42—Judgment not inter partes.

Judgment not **inter partes** holding that a particular right was claimed and recognized by law is admissible. A.I.R. 1935 Lah. 179.

——S. 13—Judgment not inter partes**—Evidencing possession.**

Where a judgment is not **inter partes**, it may be used under S. 13, Evi. Act, as instance when the possession of a party is challenged and found to be

correct. A.I.R. 1935 Oudh 394=1935 O.W.N. 674=11 Luck. 209=155 Ind. Cas. 1087.

——**Ss. 13, 43—Judgment not** inter partes.

Judgments not **inter partes** are admissible only under S. 13 or S. 43, Evi. Act. A.I.R. 1933 Cal. 21=36 C.W.N. 866=140 Ind. Cas. 385.

——**Ss. 13, 43—Judgment not** inter partes.

Under the provisions of Ss. 13 and 43, Evi. Act, a judgment not **inter partes** only is admissible as establishing a particular transaction. The reasons upon which the judgment is founded are no part of the transaction and cannot be regarded, nor can any finding of fact there come to, other than the transaction itself, be relevant. A. I. R. 1931 P. C. 89=53 C. L. J. 333=35 C.W.N. 521=1931 M.W.N. 435=33 M L.W. 707=33 Bom. L. R. 885=61 M. L. J. 9=58 Cal. 1187=58 I. A. 125=131 Ind. Cas. 753 (P. C.).

——**S. 13—Judgment not** inter partes.

Where a judgment is not **in rem** nor relating to matters of public nature, nor between the parties to a subsequent suit, the fact that the Court by that judgment decides a point in a particular way is not relevant for the purpose of the decision of the same point in the subsequent suit. 121 Ind. Cas. 644=26 N. L. R. 33=12 N. L. J. 164=A.I.R. 1930 Nag. 1 (F.B.).

——**S. 13—Judgment not** inter partes.

Judgment in a case in which a similar question was decided is admissible though not **inter partes.** The weight to be attached to it is for the trial Court to decide. A.I.R. 1930 Pat. 231=125 Ind. Cas. 115.

——**S. 13—Judgment—Findings of fact.**

The Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case where parties are not the same. 114 Ind. Cas. 561=1929 A. L. J. 246=49 C. L. J. 327=33 C.W.N. 463=29 M.L.W. 674=10 P.L.T. 301=31 Bom. L.R. 734=56 I.A. 119=56 Cal. 1003=A.I.R. 1929 P.C. 99=56 M. L. J. 562 (P.C.).

——**S. 13—Judgment not** inter partes — **Throwing light on title of landlord—Admissibility.**

Where in a suit for ejectment by a jaghirdar, the defendants, sought to rely on judgments decided between the landlord and certain other tenants in other villages on the ground that in those cases although not **inter partes** the relation of the jaghirdar to his tenants and the right under which he held was decided.

Held, that the judgments in the other cases were not admissible in evidence. 118 Ind. Cas. 702=31 Bom. L.R. 335.

——**S. 13—Judgment not** inter partes.

Judgment not **inter partes** in which an adoption was upheld constitute relevant pieces of evidence under S. 13 of the Evidence Act. 114 Ind. Cas. 616 (Nag.).

——**S. 13—Judgment not** inter partes.

Judgments in the former litigation though not **inter partes** are admissible under S. 13. 89 Ind. Cas. 663=A.I.R. 1926 Nag. 129.

——**S. 13—Judgment not** inter partes.

Judgments not **inter partes** in suits wherein right had been asserted and recognised or denied are admissible under the section. 88 Ind. Cas. 699=22 N.L.R. 49=A.I.R. 1926 Nag. 109.

——**S. 13—Judgments not** inter partes.

The fact that certain judgments have been held not to operate as **res judicata** does not, however, mean that the judgments are not admissible in evidence. Judgments relating to a particular right, although not **inter partes,** but dealing with the same question, are clearly admissible under S. 13.

Where in the previous suit one of the main points for the consideration of the Courts was whether the property in suit was a private or public property and all the Courts concurred in holding that the property was a public property, it is clearly both a transaction as well as an instance in which the right, that the property was public property, was clearly asserted and recognized by the Court. 97 Ind. Cas. 853=1 Luck. 489=3 O.W.N. 645=13 O. L. J. 696=A.I.R. 1926 Oudh 578.

——**S. 13—Judgment not** inter partes—**Statements in—Admissibility.**

Statements contained in a judgment relating to a case in which the parties were different are not relevant. 83 Ind. Cas. 782=46 All. 575=22 A. L. J. 521=5 L.R.A. Civ. 785=A.I.R. 1924 All. 625.

——**S. 13—Judgment not** inter partes—**Findings in —Admissibility.**

Findings arrived at in a judgment in a prior suit not **inter partes** should not be used against a person in a subsequent suit. 65 Ind. Cas. 525 (Cal.).

——**S. 13—Judgment not** inter partes.

A judgment not **inter partes,** but which relates to the subject-matter of a suit and evidences the assertion of a right in controversy is admissible under S. 13 of the Evidence Act. 64 Ind. Cas. 465 (Cal.)

——**S. 13—Judgment not** inter partes.

Under S. 13 judgments not between the parties to the suit pronounced by a court of competent jurisdiction containing a declaration that the right in dispute has been asserted and recognised in a court of law, are admissible in evidence. 40 Ind. Cas. 838 (Pat.).

——**S. 13—Judgment not** inter partes.

Judgments not **inter partes** are admissible as evidence of usage as instances where the right was claimed, denied or recognised. 40 Ind. Cas. 159 (Mad.)

——**Ss. 13 (a), 32 (1) and 43—Judgment not** inter partes—**Recitals if evidence.**

Plffs. sued to recover possession of certain lands as **nisker brahmottar** and relied for their title on a recital of **brahmottar** title in their father's will and a recital in a judgment in a claim case, which was not **inter partes. Held,** that the recital in the will was not admissible under S. 32 (1) read with Sec. 13 (a) and that the recital in the judgment not **inter partes** was also not admissible. 36 Ind. Cas. 882 (Cal.)

——**S. 13—Judgment not** inter partes—**Use of recitals in judgment.**

A judgment not **inter partes** may be used in evidence in certain circumstances as a fact in issue, or as a relevant fact, or possibly as a transaction, but the recitals in the judgment cannot be used as evidence in a litigation between the parties. 20 C.W.N. 643=23 C. L. J. 583=35 Ind. Cas. 298.

——Ss. 13 and 19—Judgment not inter partes—**Admissibility in evidence for proving admission of defendant.**

Proper method of proving admission is by producing copy of defendant's deposition or by examining witness who had heard the evidence given in the former trial. A judgment in a prior suit not **inter partes** is inadmissible as evidence of an admission. 20 C. W. N. 648=22 C. L. J. 270=30 Ind. Cas. 821.

——S. 13—Judgment not inter partes.

The question was whether the appellant was a legitimate daughter of one **K** and **R**. A decree was passed in a suit between **R** and another by which **R** got only a small maintenance. **Held**, that the decree was admissible under S. 13. 10 Ind. Cas. 188 (Oudh).

——Ss. 13, 43—Judgment not inter partes **—Admissibility—Per Russell O. C. J.**

The rights and customs in S. 13 must be understood as comprehending all rights and customs recognised by law and therefore including a right of ownership. Per **Beaman J**:—The cases which S. 13 is intended to meet are cases in which the right or custom in question is regarded as capable of surviving repeated instances of its assertion and denial, **i. e.**, continuing rights which may be interrupted without being necessarily destroyed. The section does not apply to the case of a right created by, and inseparably bound up in, a document and which does not admit of proof or disproof by particular instances of assertion and denial. The question in a case was whether a particular sale deed represented a genuine or a sham transaction. One of the parties produced a judgment not **inter partes** to show that the sale had been declared to represent a sham transaction. **Held**:—Per **Russell O. C. J.**:—That the judgment in the prior suit would come within the purview of Cl. **b** of S. 13. Per **Beaman J.**:—A party who has been allowed to put in a previous judgment not **inter partes**, for the purposes of S. 13 of the Evidence Act, cannot be allowed to use its contents **qua** judgment virtually thereby converting it into a **res judicata**. That therefore, conceding that the judgment in the prior suit was admissible to prove that there was a dispute about the genuineness of the sale deed, it could not be used for any ulterior purpose. 9 Bom. L.R. 65=31 B. 143.

——Ss. 13, 35—Judgments not inter partes **in old cases—Recital of pleadings.**

It was the practice in olden times for the lower courts in Bengal to set out the pleadings in their judgment, and this practice was recognized by circulers issued by the Sudder Dewany Adalut. Such judgments are, therefore, admissible in evidence under S. 35 of the Evidence Act as an admission by a party. They are also admissible under S. 13 of the Act as instances in which the right in question was claimed and disputed and disallowed. 9 C. 586 foll. 3 C.L.J. 521.

——S. 13—Judgment not inter partes—**Admissibility.**

Held, that a compromise decree in a suit for possession be **A** by which **A** abandoned the suit on **B** agreeing to pay a certain rent to the landlord (also a party to the suit) was admissible in suit for rent by the landlord against **B**. 13 C.W.N. 217=9 C.L.J. 16 =1 Ind. Cas. 572.

——S. 13—Judgment not inter partes.

Per **Maclean, J.**—Judgment between the predecessor in title of one of the parties and a stranger is not inadmissible. 28 C. 142.

——Ss. 13, 65, 66 (2)—Judgments not inter partes **—Admissibility of—Board's letter—Recognition.**

In a suit for khas possession, on the ground that the defendants were trespassers on the death of their ancestor, the grantee, the plaintiff relied on office copies kept in the course of business of the grantor's sherista:- **Held**, that no notice to the defendants to produce the original was necessary to render secondary evidence admissible as the defendant, from the nature of the case, must have known that they would be required to produce the originals. (1) Where judgments not **inter partes** were filed to show that similar grants were resumed by the grantor or his heirs on the death of the grantee; **Held**:— They are admissible in evidence under the provisions of S. 13, of the Evidence Act. Board's letter dated 26th Nov. 1792, showing that jagirs are resumable on the death of the grantee, is inadmissible in evidence; (2) where the agent of the grantor, in ignorance of the death of the grantee, granted rent receipts to the heirs in the name of the grantee, **held** the receipts did not recognise the heirs as tenants and successors of the grantee, and it was not necessary to give them notice to quit before bringing a suit against them. 7 C.L.J. 90.

——S. 13—Judgment.

In a suit between a zamindar and the mirasdars of a village wherein the question of title to the poramboke lands came in for decision, **held,** that a judgment in a prior suit between the zamindar and some mirasdars, in which it was held that the waste lands in the village were the property of the mirasdars, was relevant under S. 13 of the Evidence Act. 17 M.L.J. 518=2 M.L.T. 455=30 Mad. 510.

——S. 13—Judgment—Remarks in it.

A judgment is relevant under S. 13 only as an instance of assertion of a right. The remarks therein cannot be treated as evidence they being mere opinions of one who is not cross-examined. A judgment describing land by metes and bounds is of no value unless explained by extrinisic evidence. 10 M.L.T. 330 =(1911) 2 M.W.N. 337=12 Ind. Cas. 423.

——S. 13—Judgment — Revenue Court — Strong evidence.

The finding of a higher Revenue Authority on the question of tenant's status, though not **res judicata** in a Civil Court is entitled to great weight. It is not open to the Civil Court to ignore the finding of an appellate Revenue Authority and accept that of a Subordinate Revenue officer, though the former was wrong and the latter right. 155 P.W.R. 1912=186 P.L.R. 1912=16 Ind. Cas. 886.

——S. 13—Judgments—Revenue Court—Decisions under Ss. 103 and 106 of the B. T. Act—Admissibility.

A decision in a case under S. 103 and a Judgment in a case under S. 107, B. T. Act, regarding certain other tenants in the same village are relevant under S. 13 of the Evidence Act. (1920) P.H.C.C. 177= 1 Pat. L.T. 221=56 Ind. Cas. 417.

——S. 13—Judgments—Transaction.

Judgments, in which no right was recognised, asserted nor its existence asserted or departed from are admissible only to prove the fact of the person's denial and the court's decision, but are not admissible to prove the person's minority, where the judgments dealt with the question of competency of the person to enter into contracts. 6 A.L.J. 693=2 Ind. Cas. 839.

——S. 13—Judgments—Proceedings in suit—Suit for possession—Relevant.

Where the defendants in a suit for possession allege a prior lease granted to them by the plaintiff's lessors, the proceedings of a suit for rent by such lessor together with maps etc. are relevant, though defendants were no parties to that suit. 34 Ind. Cas. 163 (Cal.).

——S. 13(b)—Judgments—Decision as to minority.

A judgment holding a person to be a minor is inadmissible under S. 13 (b). 33 Ind. Cas. 142 (Mad).

12. Maps.

——Ss. 13, 11, 32 and 36, 40-43—Map—Admissibility—Proof—Admissibility of map prepared in another suit between one of parties and stranger—Admissibility.

In a suit, a map prepared in another suit between one of the parties and a stranger was produced. In the suit in which the map was prepared, there was no dispute regarding the lands in dispute in the suit in which the map was produced:

Held, that the map could not be admitted without examining the maker thereof or without otherwise proving its correctness. The map was nothing but a pictorial representation of hearsay evidence. It could not, therefore, be admitted under S. 11. None of the Ss. 13, 32 or 36 was applicable to the case. The fact that the map formed a part of the decree did not alter the position. Ss. 40, 41 and 42 were also inapplicable. There was no other provision which could make it relevant within the meaning of S. 43. A.I.R. 1945 Cal. 492=49 C.W.N. 791=I.L.R. (1946) 1 Cal. 149.

——S. 13—Map or plan attached to document of title—Admissibility.

A map or plan attached to or referred to in a document of title, is a part of the document and is necessary to understand or explain the document itself, and is therefore admissible in evidence. 54 C.W.N. 671= A.I.R. 1951 Cal. 253.

——S. 13—Map prepared by private party before suit.

A map prepared by a private party long before the institution of a suit for declaration of title is not admissible in evidence under S. 13 of the Evidence Act, unless it is proved that it was a transaction by which a right was recognised or asserted. 49 Ind. Cas. 951 (Cal).

——Ss. 13 and 36—Maps—Thak map—Entries if evidence against both proprietors and tenants.

The entries in thak map and its explanatory field book, are evidence under S. 13, both against proprietors as well as tenants. 22 Ind. Cas. 645. (Cal).

——Ss. 13 and 83—Maps—Map of Khas Mehal lands—Admissibility.

A map prepared under the directions of the Govt. as landlord, of **khas mehal** lands is admissible under S. 13 though not as a public record under S. 83. 16 C.W.N. 116=13 Ind. Cas. 332.

——S. 13—Maps — Batwara — Khasra Map—Admissibility of.

A Batwara Khasra map prepared in pursuance of a partition under the Partition of Estate Act (VIII of 1876), by the Collector, was a document of title and admissable in evidence under the section. 38 Ind. Cas. 491 (Pat).

13. Transaction.

——S. 13 (a)—Transaction—Suit is not transaction.

S. 13 (a), Evidence Act speaks of transactions by which the right is asserted and not those in which the right is claimed.

The proposition to be proved is the right claimed or denied in the suit. A transaction by which this right might have been asserted or denied, etc., is only a material evidencing the proposition. The ultimate **factum probandum** is the right claimed or denied in the suit. The transaction is only an evidentiary fact, the **factum probans**. This **factum probans** itself, in its turn, may require proof and may thus become an intermediate proposition to be proved. A judgment may come in under S. 13, Evidence Act only as an evidentiary fact to establish this intermediate proposition. When established, the proposition only brings in a **factum probans** and nothing else.

A suit is not a transaction within the meaning of S. 13, Evidence Act. A.I.R. 1944 Cal. 57=77 C.L.J. 194=48 C.W.N. 505=I.L.R. (1944) 1 Cal. 203=211 Ind. Cas. 460.

——S. 13—Transaction — Niskar right—S. 18-A, Bengal Tenancy Act, 1885, effect.

S. 13, Evidence Act, does not contemplate evidence of any incident or right in the sense of evidence of any grant creating these incidents or rights but it contemplates only certain transactions and instances as evidence of facts relevant to the fact in issue in any particular case, and it makes these transactions and instances relevant for the purpose of establishing any right or incident, thus making such transactions or instances evidence of the fact in issue. Clause (b) of S. 13 does not bring in the particular instances in which the right was asserted. The clause speaks of the particular instances in which the right was claimed or in which its exercise was asserted. The word 'claimed' implies a demand which involves the presence of the party against whom such demand is made. Hence statements in **kobala** executed by the mortgagor to which the landlord was no party are not admissible in evidence under S. 13 (b), against the landlord in a rent suit instituted by him inasmuch as they are not instances in which the **niskar** right was exercised or its exercise was asserted. Moreover, S. 13 (b) does not bring in the statement itself but only the instances in which the exercise of the right was asserted. Even assuming that the documents are relevant under S. 13 (b), Evidence Act, S. 18-A, Ben. Ten. Act excludes them from being used in evidence against the landlord. S. 18-A, Ben. Ten. Act, even as it stood before the amendment by Act IV of 1928, excluded from evidence the statements contained in documents of the above nature. A.I.R. 1942 Cal. 445=I.L.R. (1942) 1 Cal. 510=75 C.L.J. 20=46 C.W.N. 169=202 Ind. Cas. 570.

14. Wills.

——S. 13 (a)—Will—Recital in that property dealt with was property of testator—Admissibility.

See—(1950) 1 M.L.J. 325=A.I.R. 1950 Mad. 486.

——S. 13—Will.

Statements of facts in a will must come under cl. (7) of S. 32, Evidence Act but they will be admissible only if they are statements of relevant facts and are contained in documents relating to transactions mentioned in S. 13 (a). A.I.R. 1937 Mad. 538=1937 M.W.N. 309=45 L.W. 422=I.L.R. (1937) Mad. 1012=170 Ind. Cas. 107.

——S. 13—Will—Statement in will regarding nature of tenancy may be taken as evidence.

A statement in the will made by tenant regarding the permanency of his tenancy may be regarded as one made in course of a transaction by which the property was bequeathed to the legatee under the will and consequently the statement made in the will may be taken as evidence under S. 13. 118=Ind. Cas. 353=56 Cal. 275=A.I.R. 1929 Cal. 473.

——Ss. 13 (a) and S. 32 (7)—Will—Unprivileged wills—Inadmissible.

Wills not admitted to probate are not admissible in evidence under Ss. 13 (a) and S. 32 (7) except on proof by an attesting witness that they are in accordance with S. 50 of the Ind. Succession Act. 22 C.L.J. 551 =33 Ind. Cas. 342.

——S. 13 (a)—Will—Recital in.

Recital in will was not admissible under S. 32 (1) read with S. 13 (a) of the Evidence Act. 30 Ind. Cas. 882 (Cal.).

15. Written statement.

——S. 13—Written statement.

The written statement of a Hindu Widow in answer to a suit for partition against herself and other members of her husband's family as to how she treated a particular piece of property claimed as partible is relevant under S. 13. 33 Ind. Cas. 446 (Mad.).

16. Miscellaneous.

——S. 13—Miscellaneous.

S. 13, Evidence Act, consists of two parts. The first part deals with transactions and the second part with instances. A.I.R. 1939 Cal. 758=70 C.L.J. 126=185 Ind. Cas. 454.

——S. 13—Miscellaneous—'Right', meaning of.

'Right' in S. 13, Evidence Act, means 'incorporeal right' and does not refer to any question of ownership of property in contradistinction to incorporeal rights. A.I.R. 1933 Pat. 285=14 P.L.T. 574=12 Pat. 285=145 Ind. Cas. 223.

——Ss. 13, 35—Miscellaneous—Recitals in order of President of Union Board.

A recital in the order of a President of a Union Board is not admissible under S. 35 or S. 13, Evidence Act in evidence, unless such President has been examined with regard to that recitation. A.I.R. 1931 Mad. 487=1931 M.W.N. 366=32 Cr. L. J. 767=131 Ind. Cas. 654.

——S. 13—Miscellaneous — X making statement in former suit that he was orphan when adopted—His statement was admissible in subsequent suit to prove instance of orphan's adoption.

In former suit in which the adoption of **X** was attacked, though not on the ground of his being an orphan at the time of adoption, **X** had made a statement that he was a year old when he was adopted and that his father and mother were then both dead.

Held, that this statement of **X** was admissible if produced in a subsequent suit, in which the question of the validity of an orphan's adoption was in question to prove an instance of an orphan's adoption. 118 Ind. Cas. 154=A.I.R. 1929 All. 561.

——S. 13—Miscellaneous—Instances of rights—Rights not enforced—Effect.

The mere fact that rights, recognised by Courts, were not exercised for some years does not lead to inference of abandonment nor does it affect the rights themselves. 40 Ind. Cas. 159. Mad.

——S. 14.

Synopsis.

1. Acts and Conduct
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1. Acts and Conduct.

——Ss. 14 and 15—Acts and conduct—Licensed clerk.

Where a licensed clerk was charged with cheating by collecting 2 annas more than due, from each licensee, evidence of action with others is not admissible under S. 14 or 15 of Evidence Act. 34 All. 93=8 A. L. J. 1269=12 Cr. L. J. 611=12 Ind. Cas. 987.

2. Applicability.

——Ss. 14, 8, 11—Applicability.

S. 14, Evidence Act, applies only to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, not to cases where the question of guilt or innocence depends upon actual facts, as it does at a trial for the offence of arson.

The fact to be proved was that the fire at the soap factory in 1940 was an intentional fire and the evidentiary fact sought to be tendered in evidence was the fire at a mill in 1932, the accused being concerned in both the facts concerned because he was the principal share-holder in both companies;

Held, that the evidentiary fact was inadmissible under Ss. 14, 11 and 8, Evidence Act. A.I.R. 1941 Rang. 324=1941 Rang.L.R. 566=43 Cr. L. J. 373=198 Ind. Cas. 455.

——Ss. 14 and 15—Applicability—Relation of S. 14 and S. 15—Opinions of Judges.

S. 15 is subject to S. 14 as regards evidence of knowledge and intention. Evidence of the opinions of the other judges on other documents written or attested by the accused in proceedings to which he is not a party is not admissible to prove his intention or knowledge, in his trial for giving false evidence in respect of an alleged forged document. 13 N.L.R. 35=18 Cr. L. J. 339=38 Ind. Cas. 723.

3. Collateral offence.

——S. 14—Collateral offence—Evidence of.

Evidence of a collateral offence cannot be received as substantive evidence of the offence on trial, though under S. 14, evidence may be given of intention and the like matters where the matter of such intention or like matter is relevant. A.I.R. 1945 Bom. 152=46 Bom.L.R. 811=I.L.R. (1945) Bom. 278=219 Ind. Cas. 250.

——S. 14—Collateral Offence—Evidence of committing theft—Not relevant to show state of mind in committing dacoity.

Evidence of commission of other offences such as thefts does not show an intention to commit a different kind of offence, such as dacoity and is therefore not relevant as showing the existence of any relevant state of mind, etc. 32 Bom.L.R. 324=A.I.R. 1930 Bom. 157.

——S. 14—Collateral offence—Case of cheating—Previous act of fraud is inadmissible.

Cheating is a case in which the question of guilt or innocence of the accused depends upon proof of actual facts and not upon the state of the accused's mind. Therefore the evidence as to any previous act of fraud is not admissible under any provision of the law. 86 Ind. Cas. 970=26 Cr. L. J. 906=29 C.W.N. 483=A.I.R. 1925 Cal. 674.

——S. 14 - Collateral offence—Evidence of thefts—Value.

In a case where the offence for which the accused are being tried is the particular one of belonging to a gang of dacoits, evidence merely that the accused habitually commits thefts (as opposed to dacoity and possibly robbery) is not evidence indicating an intention to commit the particular crime of which the accused is charged and is therefore inadmissible. But where the accused himself has given evidence that he has a good character such evidence is admissible under S. 54. 75 Ind. Cas. 67=46 Bom. 958=25 Bom.L.R. 214=24 Cr. L. J. 867=A.I.R. 1923 Bom. 71.

——S. 14—Collateral offences—Evidence of collateral facts—Principles explained.

It is settled law that under neither of Ss. 14 and 15 can the evidence on facts similar to but not part of the same transaction as the main fact be received for the purpose of proving the occurrence of the main fact, which must be established by evidence directly bearing on it. But when the existence of that fact has been so established and a question arises as to the state of mind of the person who did it, or whether the act in question was done accidentally or with a particular knowledge or intention, evidence of similar acts may, under certain conditions, be admitted. S. 14 is wholly inapplicable to a case where the state of mind or feeling of the accused is not a fact in issue or a relevant fact, and the guilt or innocence depends on proof of actual facts.

Where the accused was charged under S. 409, Penal Code, for embezzling three specific sums.

Held, that evidence of collateral offences in respect of other sums was not admissible. 112 Ind. Cas. 850=30 Cr. L. J. 18=11 A.I.Cr.R. 405=A.I.R. 1928 Lah. 382.

——S. 14—Collateral offence — Evidence of character.

In a case of cheating, evidence of similar acts committed by the accused, is relevant to show the intention of the accused. Evidence to show character of the accused, that he is likely to do such an act is inadmissible. 26 P.W.R. 1910, Cr.=11 Cr.L. J. 428=12 P.R. 1913, Cr.=269 P.L.R. 1914=6 Ind. Cas. 964.

——S. 14—Collateral offence—Fraud—Previous instances.

Evidence showing that the accused practised frauds similar to one for which he is prosecuted, on various other persons, is admissible under S. 14 as showing systematic course of conduct and negativing an honest motive. 36 Cal. 573=9 C.L. J. 610=13 C.W.N. 973=2 Ind. Cas. 601.

4. Counterfeiting Coins.

——S. 14—Counterfeiting coins.

——Counterfeit coins and instruments found in the house of accused in two districts—Trial in one district—Evidence of such possession in another district admissible. 61 Ind. Cas. 647=22 Cr.L. J. 407=3 U.P.L.R. (Pat.) 50.

5. Defamation.

——Ss. 14, 15—Defamation—Suit for—Defence of truth.

In a suit on libel, evidence of instances of plaintiff's acts more or less resembling the particular act of misconduct imputed to him in the libellous statement is inadmissible unless those acts were parts of the habitual and intentional and not accidental conduct of the plaintiff. 15 Bom.L.R. 130=19 Ind. Cas. 98.

6. Divorce proceedings.

——S. 14—Divorce proceedings—Letter by respondent wife to co-respondent.

In a divorce proceeding, a letter written by the respondent wife to the co-respondent is good evidence under S. 14, Evi. Act of the respondent's feelings towards the co-respondent at the time it was written. A.I.R. 1943 Cal. 146=47 C.W.N. 251=I.L.R. (1943) 1 Cal. 340=205 Ind. Cas. 597.

7. Former deposition.

——S. 14—Former deposition.

The accused in a case of forgery and conspiracy had previously given evidence in a Civil Court as to the genuineness of the document,

Held, that though the statement could not be admitted as confession, the jury if independently satisfied that the documents are not genuine, the evidence is to be regarded as having high evidentiary value upon the question of intention whether or not they are in conspiracy. 1929 Cr. C. 194=A.I.R. 1929 Cal. 539.

8. Former judgment.

——S. 14—Former judgment—Admissibility for showing criminal tendencies to commit offences.

When offence charged against an accused is that of belonging to a gang of thieves, a former judgment more than 25 years old and convicting him of dacoity is admissible in evidence, though the former judgment is useful only for the purpose of proving that the accused is a person of criminal tendencies to commit theft who may be a member of the alleged gang. The judgment by no means goes to show that he had any habit of committing theft in the period under consideration. 89 Ind. Cas. 527=26 Bom.L.R. 1223=26 Cr. L. J. 1391=A.I.R. 1925 Bom. 195.

9. Former speeches.

——S. 14—Former speeches.

Proceedings under S. 108, Criminal P. C., for speeches offending against S. 153, Penal Code:

Held, that the previous speeches made by the speaker are admissible under S. 14. A.I.R. 1940 Nag. 134=1940 N. L. J. 31=41 Cr. L. J. 713=I.L.R. (1942) Nag. 62=189 Ind. Cas. 74.

——S. 14—Former speech.

—Prosecution based on speech—Previous speech, though made about six months before, is admissible as evidence of intention of speaker if both speeches form part of series of speeches on one topic. A.I.R. 1930 Lah. 867=127 Ind. Cas. 209.

——S. 14—Former speeches.

Where there is a series of speeches on one and the same topic within a short period of time, one may be considered as throwing light on the meaning and import of another and on state of mind of the speaker with reference to the subject matter of other speeches. 32 Mad. 3=5 M.L.T. 1=9 Cr. L. J. 108=1 Ind. Cas. 22.

10. Former writings.

——S. 14—Former writings — Seditious trial—Intention.

Primarily, anything that an accused tried under S. 124-A, I.P.C., has written is, if it comes within the general words of S. 14, relevant and admissible. At the same time, of course, the writing should be within a reasonable time of the particular occurrence, i. e., the particular article or other document, in respect of which he is being charged. 108 Ind. Cas. 30=30 Bom. L.R. 315=9 A. I. Cr. R. 429=29 Cr. L. J. 320=A.I.R. 1928 Bom. 78.

11. Intention.

——S. 14—Intention—Evidence of similar transactions not the subject of charge—Admissibility to prove intention.

Evidence of similer transaction not the subject of any charge, relevant to the charge of abetting an offence as showing an intention to aid the commission of the offence and an intentional omission to put a stop to an illegal practice, which was an "illegal omission," would be admissible to prove intention under S. 14 of the Evidence Act. 1947 A.L.J. 497=51 C.W.N. 900=49 Bom. L.R. 688=60 L.W. 634=1947 M.W.N. 589=1948 O.W.N. 52=1948 A.L.W. 49=1948 A.W.R. (P. C.) 1=1948 O.A. (P.C) 1=A.I.R. 1947 P.C. 135=(1947) 2 M. L. J. 328 (P.C.).

——S. 14—Intention—Evidence as to history of dealings between accused and officers-in-charge in prosecution under S. 409, Penal Code.

In a prosecution under S. 409, Penal Code, the evidence as to the history and the dealings between accused and his officers is relevant under S. 14, Evidence Act, for the purpose of showing the accused's state of mind and it is from this evidence that the Court has to deduce whether the intention of the accused was dishonest within the meaning of the statute, always remembering that if there is room for reasonable doubt, the accused is to get the benefit of it. A.I.R. 1936 Pat. 350=15 Pat. 108=17 P.L.T. 302=2 B.R. 696=37 Cr. L. J. 877=164 Ind. Cas. 74=1936 P.W.N. 450.

——S. 14—Intention.

Whether a man has or has not a particular intention is a matter of fact to be inferred from the surrounding circumstances and from the acts of the person concerned. The state of a man's mind is as much a question of fact as the state of his digestion. A.I.R. 1935 Sind 203=37 Cr. L. J. 106=29 S.L.R. 424=159 Ind. Cas. 466.

——Ss. 14, 15—Intention—Charge of cheating.

It is doubtful whether evidence as to the fact that the accused had also ordered goods from others and had not paid for them is relevant under Ss. 14 and 15, Evidence Act, upon the question whether when the accused entered into contract with complainant he had the fraudulent intention of not paying for the goods and even if relevant, its its evidentiary value is very small. A.I.R. 1932 Bom. 273=34 Bom. L.R. 313=56 Bom. 204=33 Cr. L. J. 401=137 Ind. Cas. 142.

——S. 14—Intention—Proof of.

Intention has to be proved like any other fact and may of course be deduced from the conduct of the parties. 99 Ind. Cas. 121=8 L. L. J. 512=27 P.L.R. 867=28 Cr. L.J. 89.

12. Mental Capacity.

——S. 14—Mental capacity.

The mental capacity of a party cannot be said to be irrelevant, when upon contractual relations entered into by the party, his property is sought to be made liable and the contract is in English, a language of which the party is said to be ignorant; and, when he is shown to be lacking in mental capacity, it is incumbent upon the creditors to establish that the party liable has signed the contract with an understanding mind. A.I.R. 1942 Sind 17=198 Ind. Cas. 567.

13. Previous acts.

——Ss. 14 and 15—Previous acts—Suits—Facts relating to similar circumstances — Admissibility.

In a prosecution under S. 209 I. P. C., evidence relating to other suits by the accused against other persons, may be admissible under S. 14, and 15 of the Evidence Act, to show the animus of the accused, and a systematic course of fraud and to rebut the plea of good faith or mistake. But evidence relating to similar suits by other persons is not admissible, unless those suits form part of the same transaction or the result of a conspiracy between them. 22 C.W.N. 494=17 Cr. L.J. 776=46 Ind. Cas. 696.

14. Previous Convictions.

——S. 14—Previous Conviction.

Evidence of previous conviction is admissible only as specified in S. 54, Evidence Act, although when a prisoner is charged under S. 401, Penal Code, previous conviction can be proved under S. 14, Evidence Act. A.I.R. 1935 Sind 115=29 S.L.R. 121=36 Cr. L.J. 1310=158 Ind. Cas. 282.

——S. 14—Previous conviction,

. Evidence of previous conviction can be used to prove habit and association. A.I.R. 1933 Oudh 355=10 O.W.N. 688=35 Cr. L.J. 273=9 Luck. 22=146 Ind. Cas. 1064.

——S. 14—Previous conviction.

Where the evidence of previous conviction or the evidence that a man has been bound over under the preventive sections can be considered only as evidence of character it must be excluded but where such evidence is admissible aliunde, it should not be excluded. Where the accused is charged under S. 400, I.P.C., such evidence is admissible, not as evidence of character but as evidence to prove habit and association. A.I.R. 1930 Oudh 455=7 O.W.N. 862=128 Ind. Cas. 739.

——S 14—Previous Conviction.

—Previous conviction—Evidence of, not admissible to show state of mind. But amounts to an evidence of bad character and not admissible under S. 54. 60 Ind. Cas. 331=22 Cr. L.J. 219=5 Pat .L. J. 706.

——S. 14—Expl. (2)—Previous conviction.

Previous convictions are relevant under S. 14 Expl. (2). But the propriety of the accused's conviction must be exclusively judged by reference to the evidence adduced by prosecution at the trial. 18 P.L.R. 1910=11 Cr. L.J. 364=6 Ind. Cas. 492.

15. Previous forgeries.

——Ss. 14 and 15—Previous forgeries.

Series of similar acts involving forgery is evidence of intention but not forgery itself. 40 Cal. 783=20 C.W.N. 262=17 Cr.L.J. 130=33 Ind. Cas. 306.

16. Previous offences.

——Ss. 14 and 15—Previous offences—Evidence of other dacoities, if admissible.

In a charge of dacoity, evidence of other docoities committed by the accused is inadmissible either under S. 14 or S. 15 of the Evidence Act. (1912) M.W.N. 49=13 Cr.L.J. 125=13 Ind. Cas. 781.

17. Private opinion of advocate.

——S. 14—Private opinion of Advocate is irrelevant.

Private opinion of an Advocate on questions like malice etc., of the Judge trying a case are irrelevant and of no concern to any Court. A.I.R. 1942 Sind 122=I.L.R. (1942) Kar. 252=44 Cr.L.J. 367=205 Ind. Cas. 309.

18. Similar acts.

——S. 14—Similar acts—Rash driving of motor car—Evidence regarding similar occurrence previously—Admissibility.

Where in a prosecution under S. 304-A I.P.C., it was sought to be proved that the accused had taken part in a similar occurrence just previously by which as a result of the rash driving of his motor car certain persons were injured,

Held, that evidence regarding the previous occurrence was not relevant either under S. 14 or under S. 15 of the Evidence Act.

Per Waller, J.—The accused is charged with rashness but the prosecution is not entitled to prove that he was rash generally or in relation to another occurrence. Rashness can be proved with reference to the particular occurrence alone. 1929 M.W.N. 395.

——S. 14—Similar acts.

Where accused was charged under S. 302, for having administered Dhatura to the deceased, the evidence of certain boys that he had previously offered sweets to boys and that one of the boys was afterwards robbed of his jewellery when affected with one of the symptoms of Dhatura poisoning, should not be admitted. S. 14 as explained in illustration (c) shows that the fact that the accused offered sweetmeats to other boys and poisoned one of them with Dhatura is not evidence that he administered poisoned sweetmeats to the deceased. 73 Ind. Cas. 262=6 N.L.J. 144=24 Cr.L.J. 566=A.I.R. 1923 Nag. 248.

19. State of mind.

——S. 14—State of mind.

Subsequent events can merely show the reflections of what a man's mind may have been; previous events are of more importance as showing the influences which have worked upon the man's mind to bring it into the condition that it was at the moment of commission of offence. A.I.R. 1935 Rang. 456=37 Cr.L.J. 217=159 Ind. Cas. 1065.

——S. 14—State of mind.

Explanation 1 to S. 14, Evidence Act, requires that a fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists not generally, but in reference to the particular matter in question. Unless there is anything which indicates an intention to commit a particular crime which is the subject of investigation, statements made by the accused prior to the crime brought in as facts showing the state of mind of the accused, are not relevant. A.I.R. 1933 Nag. 136=34 Cr. L.J. 505=29 N.L.R. 251=143 Ind. Cas. 17.

——S. 14—State of mind.

Evidence of subsequent conduct is admissible to show the state of mind of an accused and therefore to show that the accused knew of and was a party to the cheating. 69 Ind. Cas. 159=20 A.L.J. 324=23 Cr.L.J. 671=A.I.R. 1922 All. 244.

——S. 14—State of mind.

Where the circumstances attending a transaction are by themselves suggestive of bona fides, the evidence of intention afforded by subsequent conduct of the parties must be clear and cogent. It must not be of an equivocal character, but absolutely inconsistent with the bona fide of the transaction and leading to one, and one presumption only viz., presumption of fraud. 4 Bom. L.R. 180=26 B. 577.

20. Statement after offence.

——S. 14—Statement after offence.

A statement by an accused person immediately after the occurrence of an offence is relevant as showing his state of mind but a repetition of what some other persons said to the accused, by the accused, is not relevant and it has to be proved by d rect evidence of the person who heard it. 81 Ind. Cas. 717=25 Cr.L.J. 1005=6 L.L.J. 575=A.I.R. 1924 Lah. 733.

21. Statement of Co-accused.

——S. 14—Statements of co-accused.

Statements implicating co-accused but not incriminating maker are not admissible in evidence—Parts of such statements are admissible against maker as indicating knowledge on his part. 120 Ind. Cas. 81=30 Cr.L.J. 1121=1929 Cr. C. 678=A.I.R. 1929 Sind 250.

——S. 15—Scope.

S. 15, Evidence Act, is not so wide as to admit hearsay evidence or the evidence of facts alleged to has been discovered by the investigating Police Officer in the course of his investigation and not properly proved. There is also a difference between the admissibility of evidence and its cogency or weight. A. I. R. 1939 Sind 209=41 Cr.L.J. 28=I. L. R. (1940) Kar. 249=184 Ind. Cas. 474.

——S. 15—Scope.

The Court has to decide what was the intention of the insolvent on the date of the transfer, and the document by which the transfer was made must be looked at for the purpose of seeing what was the prima facie intention of the insolvent. The recitals of the document are, therefore, admissible. A.I.R. 1931 All. 142 (2) 1931=A.L.J. 26=135 Ind. Cas. 117.

——S. 15—Scope of—Accidental or intentional.

Per Walsh J:—S. 15 of the Evidence Act is applicable to all cases where the question is whether an untruthful statement is "accidental or intentional or made with particular knowledge or intention." 39 All. 273=15 A.L.J. 241=18 Cr.L.J. 529=39 Ind. Cas. 673.

——Ss. 15 and 14—Scope.

S. 15 must be read subject to S. 14 so far as evidence of knowledge and intention is concerned. 13 N.L.R. 35=18 Cr.L.J. 339=38 Ind. Cas. 723.

——S, 15—Series of similar occurrences—Single instance.

The accused who was entusted with collection of money from debtors of a Bank, collected a certain amount from a debtor and did not credit it in the cash book of the Bank or otherwise account for the same. To a charge under S. 408, I. P. Code, his defence was that there was no misappropriation but that owing to pressure of work he forgot to credit the amount in the cash book. To prove dishonest intention on his part, evidence was let in of another instance of a similar omission by him to credit an amount collected from another debtor.

Held, that such evidence was inadmissible, as one instance could not constitute "a series of similar occurrences" within the meaning of S. 15 of the Evidence Act. 223 Ind. Cas. 481=47 Cr.L. J. 542=50 C.W.N. 457=A.I.R. 1946 Cal. 440.

——S. 15—Series of similar occurrences.

Evidence of a single act is admissible and in this sense, one evidentiary fact can form a series, within the meaning of S. 15, Evidence Act, with the fact to be proved. A.I.R. 1941 Rang. 324=1941 Rang. L.R. 566 =43 Cr.L.J. 373=198 Ind. Cas. 455.

——S. 15—Series of similar occurrences.

The question of proximity of time of the acts tendered to that in question goes rather to the weight to be given to the evidentiary facts than to their admissibility.

The acts of which evidence is tendered must be of the same specific kind as that in question.

Consequently, in the case of an act which has formed the subject of a charge of arson under S. 436 Penal Code, a previous act which was not the subject of a criminal charge at all is inadmissible. A.I.R. 1941 Rang. 324=1941 Rang. L. R. 566=43 Cr.L. J. 373=198 Ind. Cas. 455.

——S. 15—Series of similar occurrences.

—Three successive shops, each, insured belonging to accused burnt down by three successive fires—Accused getting insurance money in each case—Fire, held not accidental but part of design in which accused had his share. A.I.R. 1939 Cal. 335=I.L R. (1939) 1 Cal. 511 =40 Cr.L.J. 667=182 Ind. Cas. 386.

——S. 15—Series of similar occurrences.

Where the accused administered **Dhatura** posion to **A** and **B**, both of whom died from the effects thereof and on the following day administered the same posion to **D**, who also died, the acts against **A** and **B** are relevant to a case of murder of **D**, as forming incidents in a series of similar transactions occurring about the same time and tending to show system and intention. 32 P.L.R. (1911)=12 Cr.L. J. 125=9 Ind. Cas. 731.

——S.15—Illus. (a)—Series of similar occurrences.

It is not necessary that all acts should form part of one transaction but that such acts should form part of series of similar occurrences in order that its evidence should be admissible under S. 14 of the Act. 36 Cal. 573=9 C.L. J. 610=13 C.W.N. 973=2 Ind. Cas. 601.

——S. 15—Similar acts.

The fact that on a previous occasion, the premises of the club had been raided, and that certain persons, said to be members of that club, had been found there at the time, and subsequently convicted under the Gambling Act, is quite irrelevant to show that, when on a subsequent occasion, the same premises were raided and other persons were found with gaming

instruments, these persons were engaged in unlawful gaming. A.I.R. 1935 Rang. 233=36 Cr.L.J. 1228=157 Ind. Cas. 798.

——S. 15—Similar acts—Charge under S. 409, Penal Code.

Where, on being charged under S. 409, Penal Code, the accused pleaded that payments were made to persons who were not entitled to receive them but he acted **bona fide** and under misapprehension, and the prosecution tried to adduce evidence of other transactions in which the accused had appropriated sums money out of funds entrusted to him to his own use:

Held, that S. 15, Evidence Act, did not apply to the case and the evidence so sought to be adduced would merely show dishonesty and as such, would be irrelvant for rebutting the accused's defence of **bona fide** payment to wrong persons.

In cases where the conduct alleged and proved against the accused is capable of more than one interpretation, it is permissible for the prosecution to call evidence of similar acts on the part of the accused for the purpose of showing that his conduct was systematic and, therefore, not capable of a favourable interpretation. A.I.R. 1933 Cal. 136=34 Cr.L.J. 294=142 Ind. Cas. 274 (2).

——S. 15—Similar Acts—Criminal misappropriation in 1925—Evidence adduced of similar acts in common link done in 1924—Evidence is admissible. 111 Ind. Cas. 387=29 Cr.L.J. 835=11 A.I.Cr.R. 185=A.I.R. 1928 Lah. 880.

——S. 15—Similar acts.

Evidence of similar acts is admissible to show intention. 98 Ind. Cas. 407=50 Bom. 174=28 Bom. L.R. 115=27 Cr.L.J. 1335=A.I.R. 1926 Bom. 231.

——S. 15—Similar acts—Evidence of intention.

Where the intention of the accused is a relevant fact, evidence of similar transactions both prior and subsequent to the alleged offence is admissible as evidence of intention. But such evidence is only evidence of intention, it is not evidence that accused committed the offence with which he is charged. 83 Ind. Cas. 889=26 Cr.L.J. 185=16 S.L.R. 197=A.I.R. 1921 Sind 57.

——S. 15—Similar acts—Dacoity—Accused's plea of innocent or accidental presence at the spot—Evidence of previous armed raids admissible.

Where the accused who were charged under S. 389, I. P. C., plead that their presence in company and armed at a spot was accidental and innocent, it is open to the prosecution to rebut this theory, and to produce evidence that in the same locality raids have taken place in which one of the gang had been concerned. In the case of actual dacoity the prosecution is bound to prove the accused's commission of all the acts which constitute the offence. Section 15 of the Evidence Act admits the production of any evidence which would determine the construction to be placed upon acts which in themselves might or might not be the preparation for dacoity and evidence that one or more members of the gang had been concerned in previous and similar offences committed at the same place is admissible in evidence for the purpose. 71 Ind. Cas. 360=24 Cr.L.J. 136.

——S. 15—Similar acts—Evidence of—Conspiracy.

Evidence of similar facts may be received to prove a party's knowledge of the natue of the main fact or transaction of his intent with respect thereto. To admit evidence under this head, the other acts must be of the same specific kind as the one in question and not of a different character. The acts tendered must also have been proximate in point of time to that in question. 19 C.W.N. 676=42 Cal. 957=21 C.L.J. 331=16 Cr.L.J. 497=29 Ind. Cas. 513.

——S. 15—Similar but unconnected facts.

The evidence of similar, but unconnected facts is not admissible to prove a fact in issue. Where the accused is charged with the offence of forging certain receipts, the evidence of two witnesses that the accused produced forged receipts by way of defence in another suit and never established their genuineness is not admissible to show that these receipts are also forged. They can be used only to prove the intention or conduct of the accused. A.I.R. 1935 All. 521=1935 A.L.J. 493=1935 A.W.R. 628=36 Cr.L.J. 1199=157 Ind. Cas. 557.

——S. 15—Similar occurrences—Subsequent occurrences.

S. 15 covers both previous and subsequent similar occurrences. 22 C. W. N. 494=19 Cr. L. J. 776=46 Ind. Cas. 696.

——S. 15—Similar articles.

Articles published in the same issue of a paper and forming the same subject-matter of one or other of the charges may be admitted to prove intention. A.I.R. 1931 Cal. 337 (2)=53 C.L.J. 256=32 Cr.L.J. 758=34 C.W.N. 1095=131 Ind. Cas. 566.

——S. 15—Similar articles previously written by the same writer.

To use other articles than that complained of as seditious for showing the meaning of certain expressions used in the article complained of and also to show the intention of the writer, it is necessary to show who the writer was and that he wrote all the aritiicles. 38 Cal. 253=15 C.W.N. 141=11 Cr.L.J. 667=8 Ind. Cas. 531.

——S. 16—Demand issued by municipality.

No presumption of service can be raised in case of every demand issued by municipal office. 1936 M.W.N. 1147.

——S. 16—Execution of injunction.

Where an injunction was granted and the question was whether it was executed or not,

Held, that it should be presumed as executed. 79 Ind. Cas. 609=A.I.R. 1924 Nag. 385.

——S. 16—Letters posted.

Where it is proved that certain registered letter, correctly addressed, had been posted by the sender and that the letter did not come back to him, the Court is justified in presuming that it reached its destination. There is, however, no presumption that letter which was posted, was properly addressed and the presumption has no application till it is established that the letter was properly addressed. 164 Ind. Cas. 446=39 C.W.N. 1041.

——S. 16—Refusal of letter posted.

A person refusing a letter posted to his address is affected with notice of its contents. 12 S.L.R. 142=50 Ind. Cas. 194.

——S. 17. Synopsis.

1. Absence of denial in written statement
2. Admissibility of evidence and admissions
3. Admission—Effect
4. Admission—Evidentiary value
5. Admission—If passes title to immovable property
6. Admission—Nature of
7. Admission—Point of law
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10. Admission—What is
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12. Admission for specific purpose
13. Admission in pleading
14. Admission in prior proceedings
15. Admission of adoption
16. Admission of marriage
17. Admission under inducement
18. Answers by Ministers in Assembly
19. Erroneous admissions
20. Former deposition
21. Kabuliat—Admission in
22. Notice by mother of minor
23. Scope
24. Statements in deeds and wills.

1. Absence of denial in written statement.

——S. 17—Absence of denial in written statement of allegation in plaint—If relevant as admission in another litigation.

The absence of denial in written statement of an allegation in the plaint may amount to an admission only for the purpose of that suit, and cannot have the effect of an admission capable of being proved under S. 17 of the Evidence Act in another litigation. 225 Ind. Cas. 329=48 P. L. R. 21=A. I. R. 1946 Lah. 256.

2. Admissibility of evidence and admissions.

——Ss. 17 and 44—Admissibility of evidence and admissions.

Where the plaintiff sues upon a title and adduces some evidence of it, he can avail himself of the defendant's admissions and need not positively prove his title **Mulki** papers containing statements made by plaintiff's predecessor when there was no dispute against his own interest are admissible. 16 C. W. N. 683=15 Ind. Cas. 691.

3. Admission—Effect.

——S. 17—Admission—Effect of.

A fact admitted by a party to be true must be taken to be established until the contrary is proved. 1 Lah. 137=56 Ind. Cas. 191.

——S. 17—Admission—Effect.

B sued **W** to recover a sum of money wrongly paid to him. **W's** admission in a previous suit between **B** and a third person that he had received the money from **B** was proved against him. In the present suit **W** pleaded that he had not received the money and that the receipt executed by him in favour of **B** was obtained from him under undue influence.

Held that **W's** admission in the previous suit shifted the burden of proving non-receipt of the money and existence of undue influence on **W**. 75 Ind. Cas. 1027 =A.I.R. 1924 Lah. 650.

——S. 17—Admission—Effect.

Admission though not conclusive, shifts the burden of proof. 7 N.L.R. 23=10 Ind. Cas. 700.

——S. 17—Admission—Effect of—Defendant not a party to deed containing admission—Presumption, rebuttable.

When the defendant is no party to the deeds containing the admission, there is no estoppel, and the party making the admission may give evidence to rebut the presumption, but unless and until that is satisfactorily done the fact admitted must be taken to be established. 11 C.W.N. 321=17 M.L.J. 103=4 A.L.J. 102=29 A. 184=9 Bom. L.R. 267=2 M.L.T. 109=5 C. L. J. 115=34 I. A. 27, (P.C.).

4. Admission—Evidentiary value.

——S. 17—Admissions—Evidentiary value.

The value of admissions must depend upon the circumstances in which they were made and possible motives for incorrect statements by interested parties should not be ignored. The nature of the facts admitted is also meterial. If the fact is one within the personal knowledge of the party admitting and there is no evidence of convincing explanation forthcoming, its value is considerable. If, on the other hand, the fact admitted is an inference from evidence and circumstances, the weight of admission may be very little. A. I. R. 1939 All. 626= 1939 A.L.J. 708=1939 A.W.R. 671=1939 R.D. 492= 186 Ind. Cas. 564.

——S. 17—Admissions made by persons against their own interests—Evidentiary value.

If admissions are made by persons against their own interests, they may be accepted as true unless shown to be otherwise. And the burden of proving them to be incorrect would lie on those who made them or on those who subsequently came to stand in their shoes. A.I.R. 1946 Lah. 450=48 P.L.R. 187=223 Ind. Cas. 505.

——S. 17—Admission—Evidentiary value.

The effect of an admission is to shift the burden of proof to the party making the admission. What a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted the fact admitted must be taken to be established. 116 Ind. Cas. 903=10 Lah. 694=30 P.L.R. 750=A.I.R. 1929 Lah. 318.

——S. 17—Admissions—Evidential value.

Ashworth, J.—Admissions are of no evidential value once they are proved untrue. This admission as to receipt, in the deed is proved untrue by the Sub-Registrar's endorsement that a lesser sum was paid at time of Registration. The admission must, therefore, be rejected entirely. 100 Ind. Cas. 1037=49 All. 707=25 A.L.J. 572=A I.R. 1927 All. 385.

——S. 17—Admissions—Evidentiary value.

Admissions are always evidence against the party who makes them but they are evidence which varies very much in value according to the circumstances and a Court is quite at liberty to reject them if it is satisfied from other circumstances that they were untrue. 65 Ind. Cas. 345=8 O.L.J. 596=A.I.R. 1922 Oudh 55.

5. Admission—If passes title to immovable property.

——S. 17—Admission—If passes title to immovable property.

Title to land cannot pass by admission or relinquishment deed when the statute requires a deed of transfer. 10 C.W.N. 650=4 C.L.J. 22=33 C. 967.

6. Admission—Nature of.

——S. 17—Admission, nature of—Proof of knowledge of contents of documents whether necessary.

To be an admission, a document need not have been written by the person against whom it is sought to be used; it is sufficient if it be proved that the document has been in his possession and that his conduct in reference to it creates an inference that he was aware of its contents and admitted their accuracy. Unless this be done the document cannot be used as proof of its contents. What conduct would properly give rise to such an inference must necessarily depend on the circumstances of each case. Mere possession of letters would not ordinarily go for much, and the value of such possession must largely depend upon whether it can be shown that their contents have been recognised and adopted by the replies they may have elicited, or the conduct they may have inspired. If no such consequence can be traced, their value must necessarily be materially discounted. 37 Cal. 467=14 C.W.N. 1114=11 Cr.L.J. 453=7 Ind. Cas. 359.

7. Admission—Point of law.

——S. 17—Admission—Point of law.

An admission as regards a point of law is not binding on the person making it. 4 Bom. L.R. 340.

8. Admission—Proof.

——S. 17—Admission—Proof—Woman's admission in document.

Where, in a document executed by a woman, there is an admission and the fact that she made that statement is relevant in a suit in which the document is proved, the admission should also be held to be proved even though the woman is not examined. A.I.R. 1935 Lah. 628=160 Ind. Cas. 751.

——S. 17— Admission — Proof—Particulars of admission not given—Admission is valueless.

A general statement by a witness that a number of persons admitted having committed a crime, is valueless without some indication as to which of the persons made the admission in question, with some particulars of what was actually said. 90 Ind. Cas. 145=7 L.L.J. 259=6 Lah. 437=26 P.L.R. 601=26 Cr.L.J. 1489=A.I.R. 1925 Lah. 418.

——S. 17—Admission, proof of—Recital in judgment, if evidence.

The recitals in a judgment are no evidence whatsoever to prove the exact admission made by a party or a witness unless the whole of the statement is recited therein, because it may be that the Court has taken an incorrect view or has misunderstood the admission made.

An admission must be construed literally and strictly. A.I.R. 1943 Pat. 169=22 Pat. 55=9 B.R. 345=206 Ind. Cas. 609.

——S. 17—Admission—Proof of—Admission must be proved by producing statement made.

Where a previous admission of a party is sought to be used against him, the statement containing the admission must be put in. Court's order referring to the admission is not sufficient proof. 102 Ind. Cas. 198=28 P.L.R. 196=A.I.R. 1927 Lah. 377.

9. Admission—Relevancy.

——Ss. 17 and 23—Admissions—Relevancy of.

Relevancy of admissions must be determined with reference to Evidence Act. 18 C.W.N. 718=24 Ind. Cas. 311 (P.C.).

10. Admission—What is.

——S. 17—Admission—What is.

The mere fact that statement by one party was repeated by the opposite party would not make it his admission. A.I.R. 1944 All. 130=1944 A.L.J. 121=1944 A.W.R. (H.C.) 99=215 Ind. Cas. 138.

——S. 17—Admission—What is—Vague admission is no admission.

In answer to the question put to the accused as to whether three packets of cocaine were recovered from him he replied that three packets were recovered from him, but he went on to say that they were handed to him by a man named Babu and that the accused did not know what these packets actually contained.

Held, that his statement does not amount to an admission that he had cocaine in his possession. 83 Ind. Cas. 904=21 A.L.J. 869=5 L.R.A.Cr. 9=26 Cr.L.J. 200=A.I.R. 1924 All. 198.

——S. 17—Admission—What is—Casual statements are not.

Applications for mutation of names by two different agents of the plaintiff, in each of which he is stated to be six years old at the time, cannot be called admissions by persons authorised to make them as the agents had no authority to make any statement in regard to the plaintiff's age beyond that he was still a minor. Similar is the case of the casual statements that the plaintiff was then seven years old made in the **Mukhtiarnama** executed on his behalf by plaintiff's guardian. These statements can be proved only to corroborate or contradict depositions given in the suit by the persons who made them. 71 Ind. Cas. 140=6 N.L.J. 1=A.I.R. 1923 Nag. 164.

11. Admission—When binding.

——S. 17—Admission—When binding.

An admission without being aware of the circumstances is not binding. 15 C.L.J. 114=9 Ind. Cas. 806.

——Ss. 17 and 21—Admission by a party—Whether binds stranger.

A recital of payment of consideration in a mortgage document is an admission by the mortgagor within the meaning of Ss. 17 and 21 and may be proved against a person claiming under him though not a party to the document. 28 M.L.J. 92=26 Ind. Cas. 899.

——S. 17—Admission of one, if can be regarded as admission of another on ground of collusion.

There is no rule of evidence under which the statement of one person can be regarded as the admission of another person merely on the allegation that the two are in collusion. A.I.R. 1934 All. 684=3 A.W.R 489=18 R.D. 178=151 Ind. Cas. 261.

——S. 17—Admission by one of two brothers.

The admission of the plaintiff's claim by one of two brothers does not bind the other. 24 Ind. Cas. 105 (All).

——S. 17—Admission by witness of truth outside his personal knowledge—Its value as evidence against party putting forward that witness.

An admission by a witness put forward by one side as a witness of truth is not to be entirely disregarded as evidence against that side merely because, the matter in question being outside his personal knowledge, his statement (if to the opposite effect) would not be evidence in his favour. 80 C.L.J. 297=I.L.R. (1945) 1 Cal. 565.

12. Admission for specific purpose.

——S. 17—Admission for specific purpose—Binding nature of.

Where an admission was made by defendant appellant in a compromise filed in the appellate Court admitting ownership of plaintiff-respondent over disputed land for a special purpose to shorten proceedings and to a void further litigation, it cannot be held to be binding in the face of the finding by the High Court in second appeal that the agreement containing the admission was not an agreement within the meaning of O. 23, R. 3 and did not adjust the suit either wholly or in part. The statement was at the most an admission which could constitute a fresh piece of evidence coming up for consideration for the first time in the appellate Court in which case it must be shown that it was formerly produced and admitted under O. 41, R. 27. 73 Ind. Cas. 387=A.I.R. 1924 Lah. 316.

13. Admission in pleading.

——S. 17—Admissions in pleadings—Effect.

In a suit to recover possession, if the plaintiff himself admits a sale to the defendant the latter need not prove the sale. 4 Bur. L.T. 40=9 Ind. Cas. 770.

14. Admission in prior proceedings.

——S. 17—Admissions in prior proceedings.

In a criminal trial of an insolvent his admissions in other proceedings in insolvency are relevant if admissible under Ss. 18 to 31. 47 Cal. 254=31 C.L. J. 209=24 C.W.N. 425=56 Ind. Cas. 778.

15. Admission of adoption.

——S. 17—Admission of adoption.

Admission by widow of her adopting her daughter's son is of little value. 193 P.L.R. 1915=140 P.W.R. 1915=32 Ind. Cas. 312.

16. Admission of marriage.

——S. 17—Admission of marriage—Mahomedan Law—Probative value.

The effect of an acknowledgment of paternity validly made as establishing marriage between the parents of the acknowledgee may be a matter of substantive Mahomedan Law; but the effect of an admission of marriage, as proof of such marriage, is a question merely of adjective law governed by the Indian Evidence Act. Its probative value must necessarily depend on the surrounding circumstances. 103 Ind. Cas. 870=A.I.R. 1927 Sind 209.

17. Admission under inducement.

——S. 17—Admission under inducement.

If the maker of the admissions contradicts and retracts them on the ground of inducement they do not justify the passing of a decree on the basis of those admissions. 37 Mad. 38=21 M.L. J. 1077=10 M.L.T. 385=(1911) 2 M.W.N. 461=12 Ind. Cas. 568.

18. Answers by Ministers in Assembly.

——Ss. 17, 18 and 20—Answers by Minister to questions put in Assembly.

The answers given by the Home Minister in the Legislative Assembly in his capacity and in the discharge of his duties as such Minister, to whom the duty of answering questions on the subject has been allocated by the Governor under the Rules of Business, are admissible under Ss. 17, 18, 20, Evidence Act. A.I.R. 1943 F.C. 75=1943 M.W.N. 612=(1943) 2 M.L. J. 468=24 P.L.T. 332=45 Cr.L. J. 341=10 B.R. 394=I.L.R. 1943 Kar. (F.C.) 103 Sup.=1945 F.C.R. 1=48 C.W.N. F.R. 1=211 Ind. Cas. 241 (F.C.). **See also** A.I.R. 1943 Cal. 377=47 Cal. W.N. 802=208 Ind. Cas. 493 (S.B.).

19. Erroneous admissions.

——S. 17—Erroneous admission.

A decree-holder making an erroneous admission in an application accompanied by an affidavit, is entitled to retract that admission. A.I.R. 1931 Lah. 6=130 Ind. Cas. 406=32 P.L.R. 413.

——S. 17—Erroneous admission.

An erroneous admission does not bind the person making such admission. 77 Ind. Cas. 875=A.I.R. 1923 All. 575.

20. Former deposition.

——S. 17—Former deposition.

Evidence given by an accused on his own behalf in extradition proceedings is an admission by an accused person and is, therefore, **prima facie** admissible in evidence under S. 21; and it is, therefore, for the accused to show why it should not be so admitted. No particular formality is required to enable an admission by an accused person to go in as an admission. 112 Ind. Cas. 50=22 S.L.R. 458=29 Cr. L. J. 962=A.I.R. 1929 Sind 15.

21. Kabuliat—Admission in.

——S. 17—Kabuliat— Admi sion in—Probative value.

An admission in a kabuliat is certainly evidence as to the character of the land. The probative value o such evidence is a question of fact. 9 C.L. J. 15=13 C.W.N. 135=1 Ind. Cas. 571.

22. Notice by mother of minor.

——S. 17—Notice by mother of minor—Use against minor.

A notice by the mother of a minor issued through a Pleader, which does not purport to be on behalf of the minor cannot be used against the minor as substantive evidence of partition though it may be used to contradict another witness on the point. A.I.R. 1945 All. 164=1945 A.W.R. (H.C.) 61=1945 A.L.J. 60=I.L.R. (1945) All. 135.

23. Scope.

——S. 17—Scope—Suit by two brothers on footing that they and other members formed joint family—It is useful evidence of relationship **inter se.**

Where a suit was filed by two brothers to recover land sold by their father on the footing that the family consisting of themselves, their elder brother and father, was a joint family:

Held, that although this could not in law be correct as between them on the one hand and their father and the eldest brother on the other, it was useful evidence as to their relationship **inter se.** A.I.R. 1939 P.C. 200=5 B.R. 946=1943 O.W.N. 251=43 C.W.N. 1093=70 C.L. J. 373=1940 R.D. 99=1940 A.W.R. 56=183 Ind. Cas. 177 (P.C.).

——Ss 17 and 21—Scope.

What S. 21, Evidence Act makes relevant is an admission and while an admission includes confession, the confession must still be an admission within meaning of S. 17, Evidence Act before it can be held to be relevant under S. 21, Evidence Act. A I.R. 1937 Cal. 433=38 Cr. L. J. 852=170 Ind. Cas. 201.

——S. 17—Scope.

To prove a statement made by a party and amounting to an admission within the meaning of S. 17, Evidence Act, is one thing and to admit the record of evidence given by a party on a former occasion on the ground that it contains some statements which are admissions is quite a different thing. A.I.R. 1932 Bom. 117=34 Bom. L.R. 35=137 Ind. Cas. 710.

24. Statement in deeds and wills.

——S. 17—Statements in deed.]

Statements in a mortgage deed as to the interest of the father and son (the executants) are, as against a subsequent purchaser from the son, simple admissions which could be rebutted by evidence. 7 Bur. L.T. 69=24 Ind. Cas. 482.

——Ss. 17, 21, 101-103 and 115—Statement in mortgage deed—How far binding on mortgagor.

As against the mortgagor, the recital in the deed is a weighty evidence and the **onus** lies upon the mortgagor to establish that the statement contained in the deed is untrue. What a party himself admits to be true may reasonably be presumed to be so, but the party may prove the statement to have been mistaken or untrue. 5 Cal. L. J. 653.

——S. 17—Statement in will.

A statement in a will suggesting an inference as to a fact in issue, cannot be proved by or on behalf of the person who made it or his representative-in-interest. Even where two executors, who were members of the family, acted upon the will, still the statement cannot be treated as an admission by the members of the family that the statement in the will is true. 26 C.W.N. 273=15 M.L.W. 404=A.I.R. 1922 P.C. 102.

——S. 18 Synopsis.

1. Admissions
(a) as to custom
(b) by agent
(c) by attorney
(d) by co-accused
(e) by co-owner
(f) by co-sharer
(g) by co-heir
(h) by co-party
(i) by father of defendant
(j) by Government
(k) by Mahant
(l) by member of community
(m) by minor
(n) by mukthear
(o) by partner
(p) by pleader
(q) by principal debtor
(r) by third party
(s) Effect of
(t) When relevant
2. Admission before panchayat
3. Admission in deed of gift
4. Admission in earlier proceedings
5. Admission—Mistake
6. Answers of ministers in assembly
7. Applicability
8. Attestation
9. Batwara papers
10. Burden of proof
11. Business books
12. Debtor and creditor
13. Divorce proceedings
14. Donor and donee
15. Karnawan and tarwad
16. Law-Admission on point of
17. Pedigree filed by person
18. Predecessor-in-interest
19. Privy
20. Procedure
21. Proceeding—What is
22. Scope
23. Statement of accused at inquest
24. Statement of witness—If binds party
25. Suggestion—Is no admission
26. Vendor and vendee
27. Withdrawal of admission
28. Written agreement

1. Admissions.

1. (a) As to Custom.

——S. 18—Admission—As to Custom — Admission regarding a question of succession, based upon custom is binding on a party.

An admission on a pure question of law is not binding upon a party, but the question whether a particular custom does or does not prevail in any particular tribe is a matter on which the tribesmen themselves are in the best position to pronounce an opinion and a question of succession based upon custom does not stand on the same footing as the question of law. 113 Ind. Cas. 99=11 L. L. J. 24=30 P.L.R. 178=A.I.R. 1928 Lah. 779.

1. (b) By Agent.

——S. 18—Admissions—By agent.

Statements made by an agent to a party to proceedings in circumstances, which show that they are expressly or impliedly authorised to make the admissions are admissible in evidence. 109 Ind. Cas. 310=3 Luck. 416=5 O.W.N. 143=A.I.R. 1928 Oudh 233.

1. (c) By Attorney.

——S. 18—Admissions—By attorney.

A statement in a case drawn up by an attorney for the opinion of a pleader is admissible in evidence as it must be regarded as a statement of the persons on whose behalf he was acting, and what is said or done by him in the course of his business and within the scope of his authority is said or done by the persons on whose behalf he was acting. 101 Ind. Cas. 289=5 Pat. 777=8 P.L.T. 510=A.I.R. 1927 Pat. 61.

1. (d) By Co-accused.

——S. 18—Admission—By co-accused.

A statement by the accused which amounts to an admission that he was accompanying the person who committed the crime and which is otherwise self-exculpatory and fixes the sole guilt on co-accused, is

entirely inadmissible against the co-accused, but is admissible for what it is worth against the person making it, under S. 18, Evidence Act. A.I.R. 1936 Rang. 131=37 Cr. L. J. 531=162 Ind. Cas. 6.

1. (e) By Co-owner.

——S. 18—Admission—By Co-owner—Admissibility against others.

When several persons are jointly interested in the subject-matter of a suit, an admission of any one of these persons is receivable, not only against himself but also against the others whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the person in his character of one jointly interested with the party against whom the evidence is tendered. The requirement of the identity in legal interest between the joint owners is of fundamental importance. 222 Ind. Cas. 604=12 B.R. 298=A.I.R. 1946 Pat. 278.

——S. 18—Admission—Co-owners—Joint contractors or owners.

Ordinarily, an admission is admissible against the party making it or his privies. To this principle, there are important exceptions, namely, of admissions made by joint contractors and joint owners. But admissions made by such persons must be limited within legitimate bounds, and cases have defined those limits. They are two in number, namely, that the admission must relate to the subject-matter of the suit and that it must be made by the declarant in his character of a person jointly interested with the party against whom evidence is tendered. 164 Ind. Cas. 186=39 C.W.N. 277.

——S. 18—Admission—By co-owner.

Admission by a joint owner is admissible against the co-owner only if made after the joint ownership came into existence. Identity in legal interest is absolutely necessary. 45 Cal. 159=21 C.W.N. 996=25 C. L. J. 619=41 Ind. Cas. 116.

1. (f) By Co-sharer.

——S. 18 (1)—Admissions—By co sharer.

Statements made by the co-sharer land-lords admitting the permanency of the tenancy are admissions under S. 18 (1), Evidence Act though their evidentiary value may be very little in the circumstances of a particular case. A.I.R. 1941 Cal. 541=45 C.W.N. 590=I.L.R. (1941) 2 Cal. 44=74 C. L. J. 145=197 Ind. Cas. 376.

——Ss. 18 and 19—Admission—By co-sharer.

A statement by an alleged co-sharer in a previous deposition that certain property was not joint-property is not admissible against another person unless it is proved that at the time the alleged admission was made, the latter and the alleged co-sharer had community of interest. 25 C.W.N. 89=61 Ind. Cas. 544=A.I.R. 1921 Cal. 197.

1. (g) By Co-heir.

——S. 18—Admissions—By co-heir.

Admission by a person that one of the heirs has absolute right to the property to which the person along with others is an heir, cannot affect the other heirs. A.I.R. 1929 Rang. 272.

1. (h) By Co-party.

——S. 18—Admission—By co-party.

An admission or a confession of judgment by one of several defendants is no evidence against another defendant. 164 Ind. Cas. 186=39 C.W.N. 277.

——S. 18—Admission—By co-party.

The evidence of one of the defendants in a case cannot be admitted as an admission against another defendant.

Where defendant No. 1 was examined as a witness for defendant No. 2, before a Commissioner appointed by the Court and certain statements made by him were admitted as an admission against defendant No. 2 at the hearing of the suit upon a different issue:

Held, that defendant No. 1 could not be treated as an agent for defendant No. 2 within the meaning of S. 18, Evidence Act, and his evidence would not be admissible as an admission against defendant No. 2. A.I.R. 1932 Bom. 117=34 Bom. L. R. 35=137 Ind. Cas. 710.

——S. 18—Admission—By co-party.

Admission by one of defendants that the land in suit is ancestral is not binding on the others when they are not represented by him and have independent rights of their own. 122 Ind. Cas. 109=A.I.R. 1930 Lah. 238.

——S. 18—Admission—By co-party.

An admission or even a confession of judgment by one of the several defendants in a suit is no evidence against the other defendants. 117 Ind. Cas. 884=10 Lah. 816=A.I.R. 1929 Lah. 129.

——S. 18—Admission—By co-party.

An admission, or even a confession of judgment, by one of several defendants in a suit is no evidence against the other defendants. 115 Ind. Cas. 425=10 L. L. J. 339=29 P.L.R. 715=A.I.R. 1928 Lah. 129.

——S. 18—Admission—By co-party—Conditions for admissibility.

To make the admission by one party admissible against his co-party, it is absolutely necessary that the admission should relate to the subject-matter in dispute and that it should be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered and that the requirement of the identity in legal interest between the joint owners is of fundamental importance. 93 Ind. Cas. 115=30 C. W. N. 254=A.I.R. 1926 Cal. 705.

——S. 18—Admission—By co-party.

An admission made by some defendants in their character of persons jointly interested with the other defendants in the matter in respect of which the admission is made, is binding on the other defendants, 69 Ind. Cas. 35=A.I.R. 1923 Lah. 123.

——S. 18—Admission—by co-party.

Admissions of one of several persons jointly interested in the subject matter of a suit are receivable against him and his fellows whether they jointly sue or are sued, if they relate to the subject matter in dispute. 48 Ind. Cas. 193 (Nag.).

——S. 18—Admission—By co-party.

An admission of one of the persons jointly interested in the subject of the suit is admissible against himself and the others, if the admission is about the subject matter of the suit and is made by him in his character of a person jointly interested with the party against whom the evidence is given. The admission of one co-plaintiff or co-defendant is not admissible against another simply because of his position as a co-party in the suit but because of some privity of title or of obligation which justifies the use of the admission of one against the other. 45 Cal. 159=21 C.W.N. 996=25 C. L. J. 619=41 Ind. Cas. 116.

——S. 18—Admission—By co-party.

An admission by a defendant in his written statement is no evidence against his co-defendants. 13 A. L. J. 1089=30 Ind. Cas. 2.

——S. 18—Admission—By co-party.

An admission by one defendant will not bind another. 22 Ind. Cas. 916 (Cal.).

1. (i) By father of defendant.

——S. 18—Admission—By father of defendant.

Kabala executed by co-sharers in favour of plaintiff's father, written by father of defendants—Admissions as to shares of the defendants made in recitals—Admissions are binding on the defendants under S. 18. 71 C. L. J. 200.

1. (j) By Government.

——S. 18—Admission—by government officer.

Admission made by any Government officer will be binding on Government only when the officer would be discharging his lawful duty and in case the officer exceeds his authority in making any admission, such admission will not be binding on Government unless it is ratified by the Government. A.I.R. 1944 Pesh. 34=46 P.L.R. 266.

1. (k) By Mahant.

——S. 18—Admissions—By Mahant—If binding on successor.

S. 18, Evidence Act did not apply to admissions by the previous **mahants** and at any rate, the admissions in the previous suit could not bind the persons who were parties to the subsequent proceedings. A.I.R. 1931 Lah. 161=12 Lah. 497=32 P.L.R. 910=135 Ind. Cas. 657.

1. (l) By member of community.

——S. 18, Para. 2—Admission—By member of community—If and when binds other members.

A statement made by a member of a community to the prejudice of his own right in a disputed grave-yard does not bind the other members of his community in the absence of any proof that when he made the statement he occupied a representative capacity. A. I. R. 1949 All. 493=1949 A.W.R. 496=1950 A. L. J. 21.

1. (m) By minor.

——S. 18—Admission—By minors.

Defendants, who were the plaintiffs in previous suits, made a case that the lands were recognised by lage / istom as **zerait** lands.

Held, in any case the admission made on behalf of the defendants, who were then minors, would bind them in this suit, if the allegation was a necessary allegation and was essential to the case of the defendants. 71 Ind. Cas. 902=4 P.L.T. 135=1923 P. H. C. C. 65=1 Pat. L. R. 111=2 Pat. 414=A.I.R. 1923 Pat. 276.

1. (n) By mukthear.

——S. 18—Admissions—By Mukthear.

A party is not bound by the statement or admission made by his **Mukthear A am,** unless it is shown to have been made within the scope of the authority conferred by the **Mukthearnamah.** A.I.R. 1923 Pat. 37.

1. (o) By parner.

——S. 18—Admission—By partner—Firm when bound.

Admission by one partner made in a representative capacity would be evidence against firm under S. 18, Evidence Act. A.I.R. 1934 Lah. 625=148 Ind. Cas. 763.

1. (p) By pleader.

——S. 18—Admission—By pleader.

Where the plaintiffs are of equal status and are entitled to pre-empt, the statement by the Pleader that they (plaintiffs) being the members of joint Hindu family, are entitled to pre-empt one half of the property, is a statement amounting to a mere opinion of law, and is not binding on the plaintiffs. A.I.R. 1934 All. 531=154 Ind. Cas. 168.

——S. 18—Admission—By pleader.

Where the pleader of a party makes an admission, whether the admission is of law or an admission of fact that party is bound thereby and it would be doing great injustice to a Subordinate Court of law to re-open a matter in appeal, which has been decided by that Court on the admission of a pleader of a party. 118 Ind. Cas. 166=A.I.R. 1929 All. 446.

——S. 18—Admission—By pleader.

Per Patkar, J.—The pleader's admission on a pure question of law is not binding on his client and amounts to no more than his view that the qustion is unarguable. 117 Ind. Cas. 518=53 Bom. 309=31 Bom. L.R. 88=A.I.R. 1929 Bom. 89.

——S. 18—Admissions—By pleader.

Ananthakrishna Ayyar. J.—Though a party might not be bound by admissions made by his counsel on pure questions of law, yet on questions of fact, parties are bound by admissions made by their counsel, whether the admissions be made in the course of the trial in the first Court or in the course of the hearing of the appeal before the lower Appellate Court. 109 Ind. Cas. 178=A.I.R. 1928 Mad. 900.

——S. 18—Admission—By pleader.

A counsel has authority to make admissions to Court on behalf of his client on matters of fact relevant to his issues in the case in which he is engaged. Admissions on questions of law would not bind the client.

A counsel has no power to make an admission in or compromise or refer to arbitration a suit if he is instructed not to do so, without express authority from his client. 105 Ind. Cas. 5=50 Mad. 786=26 M.L.W. 465=39 M.L.T. 240=A.I.R. 1927 Mad. 852=53 M.L.J. 606.

——S. 18—Admission—By pleader—Admission in lower Court cannot be set aside by engaging another pleader in appeal.

Where in the lower Court the pleader for a party admitted the correctness of the accounts filed by the opposite party:

Held, it is not open to a party in appeal to try to go behind an admission made by his pleader, who represented him in the Trial Court, by engaging a fresh counsel in the appellate Court. 102 Ind.Cas. 283=A.I.R. 1927 Lah. 748.

——S. 18—Admission—By pleader.

An admission by counsel on a question of law, e. g., period of limitation cannot bind his clients. 100 Ind. Cas. 833=A.I.R. 1927 Lah. 284.

——S. 18—Admission—By pleader.

A party cannot be bound by any wrong admission of his pleader as to law, inasmuch as the parties must be presumed to know what is correct law. 92 Ind. Cas. 732=13 O.L.J. 138=A.I.R. 1926 Oudh 311.

——S. 18—Admission—By pleader.

An admission made by the counsel on a point of law cannot in any way bind client. 75 Ind. Cas. 1048=A.I.R. 1924 Lah. 702.

——S. 18—Admissions—By pleader.

Statement made by a party or pleader on a certain point in a previous case in admissible to prove or disprove the point in a subsequent case. 1 O.L.J. 532=26 Ind. Cas. 98.

——S. 18—Admission—By pleader.

An admission by a pleader based on an erroneous construction of an enactment amounts to a mistake of law and is not binding on his client. 9 Ind. Cas. 621. (Cal.)

——S. 18—Admission—By pleader—If binding on party.

A statement of relevant facts by a Legal Practitioner on behalf of his client, is tantamount to that of his client though he makes it without consulting his client. 213 P. L. R. 1910=86 P. W. R. 1910=7 Ind. Cas. 505.

1. (q) By Principal Debtor.

——S. 18—Admission—By principal debtors—Surety—If bound.

In an action against a surety the liability must be proved against the surety independently of any admissions by the principal debtor which are in law no evidence against the surety. 5 A.L.J. 142=1907 A.W.N. 293.

1. (r) By Third Party.

——S. 18—Admissions—By third party—Document executed between strangers to suit.

Documents executed by parties who are strangers to a suit are not evidence in proof of the title of the party relying on them in the suit. A.I.R. 1936 Lah. 1005=167 Ind. Cas. 704.

——S. 18—Admission—By third party.

Where there is no privity of contract between the parties an admission made by one party will not bind another. 12 L. L. J. 187.

——S. 18—Admission — By third party—Admissibility of recitals.

Recitals in a deed regarding the ownership of adjoining land are not admissible against the persons who were no parties to it. 108 Ind. Cas. 264 (Lah.).

——S. 18—Admission—By third party.

Recitals regarding the boundaries in a document not inter partes are statements made by third parties and cannot be admitted. 105 Ind. Cas. 61=A.I.R. 1928 Cal. 63.

——S. 18—Admission—By third party.

Admission in a previous suit by a non-party to the subsequent suit is not admissible. 84 Ind. Cas. 257=A.I.R. 1923 Lah. 16.

——S. 18—Admission—By third party.

A deed made between persons not parties to a suit and containing a statement as regards the property in suit is not evidence in the suit unless the maker is called to depose on oath. 19 Ind. Cas. 615 (Cal).

1. (s) Effect of.

——S. 18—Admissions—Effect.

What a party himself admits to be true must necessarily be presumed to be so, and it is for him to establish by evidence that the admission was made under circumstances which do not make it binding on him. A.I.R. 1932 Cal. 538 =59 C. 541=138 Ind. Cas. 761.

——S. 18—Admission—Effect.

Admissions against interest might be decisive against the person making them: but such admissions may be ignored where there are circumstances calculated to discount them. Evidence of statements made by a deceased testator or executant concerning the fact of execution or otherwise of the documents in dispute and also the state of mind of the executant and other circumstances attending the execution are admissible in evidence under the head of admissions. 1 O. L. J. 591=26 Ind. Cas. 547.

1. (t) When relevant.

——S. 18—Admission—When relevant.

Statements made by a person regarding the subject-matter of a suit after his interest in it has ceased, cannot be used as admissions under S. 18. 9 Bur. L. T. 152=9 L. B. R. 27=33 Ind. Cas. 888.

——S. 18—Admission—When relevant.

An admission to be relevant, it should be shown that the person who made it had an interest at the time of making it within S. 18. A kabuliayat being an act of ownership may be admissible as evidence of title. 19 Cr. L. J. 1=22 Ind. Cas. 714.

2. Admission before panchayat.

——S. 18—Admissions before Panchayat.

Evidence as to admissions and promises made by alleged thieves before a Panchayat is admissible without proof of the actual words used. 13 P.R. 1914, Cr.=16 Cr. L.J. 33=223 P.L.R. 1915=26 Ind. Cas. 625.

3. Admission in deed of gift.

——S. 18 Admission in deed of gift.

Admission made by the donor in the deed of gift that possession had been delivered is binding on him and even if it does not amount to estoppel, it certainly throws burden on the donor to show that the statement was untrue and false. A.I.R. 1943 Pesh. 17=205 Ind. Cas. 603.

4. Admission in earlier proceedings.

——S. 18—Admission in earlier proceedings.

Where a defendant does not give evidence, his previous statement made in earlier proceedings can be put in evidence as an admission and would be admissible against him but not against his co-defendants. A.I.R. 1942 Pat. 230=8 B.R. 716=20 Pat. 855=200 Ind. Cas. 546.

——S. 18—Admission in earlier proceedings in pleadings is admission in subsequent action though it is capable of rebuttal.

It is true that what a party himself admits to be true may reasonably be presumed to be true. But the party making the admission may give evidence to rebut this presumption and unless and until that is satisfactorily done, the fact admitted must be taken be to established. The same principle, will apply to an admission made in a signed pleading. Under the provisions of the Evidence Act, an admission contained in a plaint or written statement, or in an affidavit or in a sworn deposition given by a party in a prior litigation would be regarded as an admission in a subsequent action though it is capable of rebuttal. A.I.R. 1939 Mad. 446=(1939) 1 M.L.J. 227=49 M.L.W. 273=1939 M.W.N. 275=189 Ind. Cas. 325.

——S. 18(2) — Admission in earlier proceedings by legal representative of defendant.

Where, in a prior litigation, a person makes an admission in written statement in the character of a legal representative of a defendant as a legatee under his will, the admission is not binding on him in a subsequent suit by him as the reversioner to the estate of deceased because in the subsequent suit he is suing not only on his behalf but on behalf of all the reversioners. A.I.R. 1939 Mad. 446=49 M.L.W. 273=(1939) 1 M.L.J. 227=1939 M.W.N. 275=189 Ind. Cas. 325.

5. Admission—Mistake.

——S. 18—Admission—Mistake.

A plaintiff is not absolved from proving that an affidavit sworn to by him previously, was made under the circumstances mentioned therein, even though there is no explanation on the defendant's side for the plaintiff having made such statements if they are false. (1916) 1 M.W.N. 208=3 L.W. 210=33 Ind. Cas. 969.

——S. 18—Admissions—Mistake.

An admission by the defendant in favour of plaintiff, in ignorance of his legal rights will not be binding if the plaintiff as a matter of fact has no legal claim. 11 M.L.T. 124=(1912) M.W.N. 178=22 M.L.J. 260=13 Ind. Cas. 780.

6. Answers of Ministers in Assembly.

——Ss. 18, 17, 20 — Answer of ministers in Assembly.

Answers by Minister to questions put in Assembly are admissible under Ss. 17, 18 and 20, Evidence Act. A.I.R. 1943 F.C. 75=1943 M.W.N. 612=10 B.R. 394=45 Cr.L.J. 341=(1943) 2 M.L.J. 468=24 P.L.T. 332=I.L.R. (1943) Kar. (F.C.) 103 Sup.=48 C.W.N.F.R. 1=1944 F.C.R. 1=211 Ind. Cas. 241 (F.C.).

——S. 18—Answers by Minister in Assembly.

Per Special Bench.—The Home Minister speaks on behalf of the Government as its spokesman and his answers to questions put to him as Home Minister, in relation to matters dealt by him as Home Minister, are admissible in evidence as admissions made by the Government. When Government is a party to the proceedings, these admissions are relevant and admissible under the Evidence Act, against the Government. The Crown may, of course, show that the admissions were really not admissions or that they were made under a mistake or that they were not binding on Government for any other valid reasons; but unless this is shown, the admissions must be taken in evidence against Government. A.I.R. 1943 Cal. 377=47 C.W.N. 802=208 Ind. Cas. 493 (S.B.)

7. Applicability.

——Ss. 18 to 21—Applicability—Criminal cases.

There is nothing in Ss. 18 to 21, Evidence Act, to suggest that they apply to civil cases and civil cases only. They apply also to admission in criminal cases. Consequently, incriminating statements not admissible as confessions in evidence will not necessarily be excluded. They may be admissible as admissions against interest under Ss. 18 to 21, Evidence Act. A.I.R. 1941 Sind 129=I.L.R. (1941) Kar. 257=42 Cr.L.J. 741=195 Ind. Cas. 458.

——Ss. 18 to 21—Applicability.

Admissions of incriminating facts by accused person to a Magistrate under S. 164, Criminal P.C., or to a Court during trial are admissible under Ss. 18 to 21. A.I.R. 1940 Sind. 53=I.L.R. (1939) Kar. 800=41 Cr.L.J. 477=187 Ind. Cas. 576.

8. Attestation.

——S. 18—Attestation—If admission.

Occupancy rights—Mutation in favour of third party alleged to be adopted son—Landlord attesting mutation—Subsequent suit by successors of landlord:

Held, that although landlord was present at mutation proceedings, the mere fact that he was recorded as having attested the mutation could not be regarded as his having created a fresh occupancy tenancy in favour of third party and that even if landlord's having attested could be regarded as an admission by him of the adoption, the admission being based on an 'erroneous state of affairs' would not be binding on landlord or his descendants. A.I.R. 1932 Lah. 651=33 P.L.R. 819=142 Ind. Cas. 720.

9. Batwara papers.

——S. 18—Batwara papers.

Batwara papers would also be evidence against the proprietors under Ss. 18 and 13, Evidence Act because they were made in their presence. 114 Ind. Cas. 479=7 Pat. 85=10 P.L.T. 399=A.I.R. 1929 Pat. 32.

10. Burden of proof.

——S. 18—Burden of proof.

Recital in mortgage bond as to receipt of consideration being admissible against subsequent purchaser, onus of proving want of consideration lies on him 10 P.L.T. 183=8 Pat. 766=A.I.R. 1929 Pat. 254.

11. Business books.

——S. 18—Business books—Admission that books are books of the firm—Effect.

Where all the parties by their memorandum admit that certain books produced in evidence are books of the firm, that admission must, unless there is anything on the face of them to the contrary, be taken to be an admission that they were books kept in the regular course of business. 117 Ind. Cas. 298=A.I.R. 1929 Mad. 689.

12. Debtor and Creditor.

——S. 18—Debtor and creditor—Creditor's admission of receipt is not of much weight in saving limitation.

When a creditor comes into Court with a claim which is capable of being regarded as a stale or time-barred claim, it is to his interest to make allegations which would save the claim from the bar of limitation. Having this view, the mere fact that the statement of receipt of interest is against the pecuniary interest of the person making the admission cannot be regarded as of great weight. 51 Mad. 549=29 M.L.W. 460=111 Ind. Cas. 210=A.I.R. 1928 Mad. 509.

——S. 18—Debtor and creditor—Creditor's admission after transfer of debt—Value of.

An admission by a creditor after transfer of his debt as to the receipt of money by the creditor before transfer, is not binding on the transferee. 108 P.W.R. 1914=202 P.L.R. 1914=25 Ind. Cas. 144.

13. Divorce proceedings.

——S. 18—Divorce proceedings—Admissions of a party must be received with the utmost circumspection and caution.

The admissions of a party in a divorce proceeding, unsupported by corroborative proof, should be received with the utmost circumspection and caution. Not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions if, though unsupported, they would effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of the kind. 105 Ind. Cas. 416=22 S.L.R. 261=A.I.R. 1928 Sind 55.

14. Donor and donee.

——S. 18—Donor and donee.

Neither the declaration of a donor nor the declaration of the donee made in their own favour can be admitted in evidence as against the person disputing the gift. 110 Ind. Cas. 26=A. I. R. 1928 Oudh 414.

15. Karnavan and tarwad.

——S. 18—Karnavan and tarwad—Admission of an Anandravan.

A statement made by a person when he was a mere junior **Anandravan** cannot be used as an admission against the **Tarwad** of which he subsequently becomes the **karnavan**. 74 Ind. Cas. 27=16 M.L.W. 768=31 M.L.T. 389=A.I.R. 1923 Mad. 153.

16. Law—Admission on point of.

——S. 18—Law—Admission on point of.

An admission to the effect that an appeal was understamped is not binding being an admission of a point of law. 120 Ind. Cas. 532=A.I.R. 1929 Lah. 879.

——S. 18—Law—Admission on point of.

Admission by a person that a Brahmin widow was admitted into the caste of Ahirs and that she was Kari wife of an Ahir, includes an admission of a point of law which would not bind him. 119 Ind. Cas. 698=A.I.R. 1929 Nag. 343.

17. Pedigree filed by a person.

——Ss. 18, 21—Pedigree filed by a person—Admissibility.

The pedigree filed by a person, if admissible, is a relevant admission under S, 21, Evidence Act, against the representative-in-interest of that person and admission within definition of S. 18, Evidence Act. A.I.R. 1934 P. C. 157=11 O. W. N. 889=40 M.L.W. 217=15 P.L.T. 531=1934 A.L.J. 779=67 M.L.J. 274 =60 C.L.J. 67=1934 M.W.N. 751=36 Bom. L.R. 867 =38 C.W.N. 1101=56 All. 468=4 A.W.R. 46=61 I.A. 286=150 Ind. Cas. 545 (P.C.).

18. Predecessor-in-interest.

——S. 18—Predecessor-in-interest—Statements are admissible only during the continuancy of interest.

Statements made by persons from whom the parties to the suit have derived their interest in the subject-matter of the suit are admissible as admissions, only when the admissions are of a date prior to the date of the transfer. Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against the persons claiming through them by title subsequent to the admission. 73 Ind. Cas. 428=10 O. L. J. 263=A. I. R. 1924 Oudh 19.

19. Privy.

——S. 18 (1)—Privy—Statement made by.

A statement affecting the title to the suit property by plaintiff's brother who was jointly interested in the subject-matter of the litigation is relevant under S. 18 (1). A.I.R. 1945 Mad. 361=(1945) 1 M.L.J. 378 =1945 M.W.N. 352=58 M.L.W. 321.

——S. 18 (1)—Privy—Statements made by.

Statements made behind the back of another cannot be binding on the latter and cannot be regarded as evidence against him. A.I.R. 1944 Bom. 213=46 Bom. L.R. 328=218 Ind. Cas. 301.

——Ss. 18 and 19—Privy—Statement made by.

An admission of receipt of consideration in a mortgage deed is admissible in evidence against a purchaser by private treaty. 12 A.L.J. 941=26 Ind. Cas. 68.

20. Procedure.

——Ss. 18, 21—Procedure.

If a party wants to rely on the opposite party's admission, he must take the admission as a whole, and not pick out a portion of it. A.I.R. 1934 Oudh 370 (1)= 11 O.W.N. 579=151 Ind. Cas. 297.

——S. 18—Procedure.

If a statement is to be relied upon as an admission, the whole statement must be taken. 34 C.W.N. 933= 59 M.L. J. 283=32 M.L.W. 407=52 C.L. J. 561=127 Ind. Cas. 746=A.I.R. 1930 P.C. 245. (P.C.)

[**See also**: 11 C.L. J. 382=5 Ind. Cas. 340].

——S. 18—Procedure.

It is a well established principle of law that if a plaintiff wishes to rest his case solely on the admission of a defendant with regard to a particular transaction, he must accept the admission as to that transaction as a whole. It is not open to him to pick out such part of the admission as may be favourable to himself and to neglect the rest. 70 Ind. Cas. 911=4 U.B.R. 114= 1 Bur. L.J. 248=A.I.R. 1923 Rang. 24.

——S. 18—Procedure.

Where an admission is made subject to conditions it must be accepted **in toto** or not at all. There is no right to reject the condition and take the remainder. 39 Bom. 399=17 M. L. T. 402=28 M. L. J. 589=19 C.W.N. 713=13 A.L. J. 529=21 C.L. J. 507=17 Bom. L.R. 460=2 L.W. 524=(1915) M.W.N. 522=42 I. A. 103=29 Ind. Cas. 223 (P.C.).

——S. 18—Procedure.

Where a suit is based upon a lost document, the loss of which however the plaintiff was unable to prove, he cannot succeed on the mere admission by the defendant of execution of the same when it is followed by a plea of payment duly endorsed thereon. 49 P.W.R. 1911=12 Ind. Cas. 246.

21. Proceeding—What is.

——S. 18—Proceeding, what it refers to.

The proceeding mentioned in S. 18, Evidence Act, refers to the proceeding in which the matter stated by the party is in issue or is relevant to the issue and not to the proceeding if any, in which the statement has been made. A.I.R. 1933 Rang. 292=35 Cr.L.J. 131= 146 Ind. Cas. 653.

22. Scope.

——S. 18—Scope.

S. 18 does not by itself make the admission therein mentioned relevant. 68 Ind. Cas. 566=A. I. R. 1921 Nag. 153.

23. Statement of accused at inquest.

——S. 18—Statement of accused at inquest.

Statement of accused on oath at a Coroner's inquest is admissible at his trial. 93 Ind. Cas. 690= 50 Bom. 111=28 Bom. L. R. 111=27 Cr. L. J. 466= A.I.R. 1926 Bom. 151.

24. Statement of witness—If binds party.

——S. 18—Statement of his witness—If binds party.

There is no rule of law with regard to the statement of witnesses, that a party must be bound by the statement of his witness though the belief in such a rule is not uncommon and does great harm in judicial trials in some of the Subordinate Courts. A.I.R. 1941 Lah. 55=42 P.L.R. 765=193 Ind. Cas. 186.

25. Suggestion—Is no admission.

——S. 18—Suggestion—Is no admission.

Where the admission is merely a suggestion made in the course of a negotiation and is not even unconditional, it is no admission at all. 76 Ind. Cas. 1049=1923 P.H.C.C. 142=1 Pat. L.R. 235=5 P.L.T. 347=A.I.R. 1923 Pat. 303.

26. Vendor and Vendee.

——S. 18—Vendor and vendee.

An admission by vendor in favour of third party is not binding on the vendee, if made subsequent to the sale. 73 Ind. Cas. 1039=1 Bur. L.J. 203=A.I.R. 1923 Rang. 51.

——S. 18—Vendor and vendee—Recitals in sale-deed as to source of purchase money.

Recitals in a sale-deed by the owner of a limited estate that the property was acquired with funds belonging to the estate may be taken to be against the pecuniary interest of vendor. 64 Ind. Cas. 481= 14 M. L. W. 33=1921 M. W. N. 434=A. I. R. 1922 Mad. 357.

27. Withdrawal of admission.

——S. 18—Withdrawal of admission.

The admission, if gratuitous, can be withdrawn at any time and therefore such a confession, though against the interest of the party making it, is of little value. 109 Ind. Cas. 26=A.I.R. 1928 Lah. 726.

28. Written agreement.

——S. 18—Written agreement—Not registered—Admission of execution.

An admission in a written agreement of the execution required registration but was not registered. It was obtained from a woman by mis-representation. No value can be attached to it as evidence of such execution. 240 P.L.R. 1911=117 P.W.R. 1911=12 Ind. Cas. 51.

——S. 19—Admission by Court of Wards—Minor.

Guardians of a person of an infant, are not competent to bind the ward by an admission as to his proprietary rights. An admission by a Court of Wards, cannot bind or prejudice the infant proprietor. 29 C. L. J. 577=52 Ind. Cas. 825.

——Ss. 19 and 20—Admission by landlord if binding on tenant.

An admission made by landlord is not binding on his tenant. A compromise entered into between the proprietors of certain land and others, whereby the parties to the compromise become joint proprietors of the land, has no binding effect upon the tenants of the land. 52 Ind. Cas. 739 (Pat.).

——S. 19—Admission—Compromise beyond scope of suit.

A compromise affecting property not the subject of the suit is nevertheless admissible in evidence in a subsequent suit as an admission by one of the parties. (1917) P.H.C.C. 181=43 Ind. Cas. 775.

——S. 19—Admission made in ignorance of right is not binding. A.I.R. 1944 Bom. 233 (2)=46 Bom. L.R. 432.

——S. 19—Admissions—Mere possession of document.

For a document to amount to an admission it is not necessary that it should have been written by the person against whom it is sought to be used. Mere possession of the document does not, by itself, count for much. It is sufficient if it be proved that the document has been in his possession and that his conduct in reference to it, is such as to create an inference that he was aware of its contents or admitted its accuracy. 39 Cal. 119=13 Cr. L. J. 433=15 Ind. Cas. 65.

——S. 19—Plaintiff in present suit not party to previous suit—Statement in plaint in suit—Admissibility of, in subsequent suit.

In a suit on a mortgage, it was contended that the statement made in the plaint in a suit brought by a person, for payment to whom certain money was kept in deposit with the mortgagee, against the mortgagor to which the plaintiff to their present suit was not a party, could not be used in evidence against him:

Held, that the statement was admissible, being a statement against the interest of the person making it inasmuch as it was an admission of payment made especially when no such objection was taken in the lower Court. A.I.R. 1934 Lah. 527=35 P.L.R. 463=149 Ind. Cas. 217.

——S. 19 — Admission by principal debtor if evidence against surety—Weight.

An admission made by the agent (principal debtor) against his surety is admissible in evidence against the surety though the weight to be attached to it will depend upon the circumstances of each case. The admission need not have been made when the agency continued. It is sufficient if it is made while the liability continues. (1913) M. W. N. 596=25 M. L. J. 51=20 Ind. Cas. 637.

——S. 19 — Admissions — Recitals — Parties and privies.

The recital of the consideration in a deed and the admission as to receipt of the consideration made before the registering officer, are evidence against the persons who claim through the executant of the deed. 10 A. L. J. 87=16 Ind. Cas. 483.

——Ss. 19, 21 — Admission — Statement of third person.

An admission by one co-mortgagee of receipt of the whole debt is evidence against the others under S. 19 of the Act; and the admission of a third person against his own interest, where it affects his position or liability, when that position or liability has to be proved against a party to the suit is relevant against that party. An admission of receipt of sums of money is in most cases an admission against his interest. Admissions in pleadings are relevant under S. 19 or 32 (3) of the Act and in the absence of the other evidence such pleadings should be marked as exhibits in the case and there referred to as evidence in the judgment of the court. **(Per Tyabji, J.)** The statements referred to in S. 19 become admissible only if they satisfy S. 17 as regards their nature, and S. 21, or the following sections as regards their relevancy. 14 M.L.T. 117=25 M. L. J. 329=20 Ind. Cas. 792.

——S. 19—Admission to be taken as a whole.

The Court must admit the tenant's admission as a whole, and must consider whether the land in possession is the same as the one comprised in the lease. 11 C. L. J. 382=5 Ind. Cas. 340.

——S. 19—Admissions—Value of.

Courts should not lightly ignore admissions made by parties to the proceedings. 35 M. L. J. 219=(1918) M.W.N. 666=48 Ind. Cas. 925.

——S. 19—Admissions — Value of.

An admission by a party to the suit on solemn affirmation is very strong evidence against him so as to shift the burden of disproving the facts admitted on to his shoulders. 106 P. R. 1917=119 P. W. R. 1917=41 Ind. Cas. 163.

——S. 19—Admissions—Value of.

Where the issue is whether there was a subsisting mortgage between the parties, any admission showing that a mortgage existed is relevant. But if a specific mortgage is alleged, an admission of some mortgage is not relevant. (1913) M.W.N. 924=21 Ind. Cas. 566.

——S. 19—Admission—When amounts to estoppel—Evidence.

The express or implied admissions of a party to a suit are strong evidence against him. But he may prove them to be untrue unless another person has been induced by them to alter his condition. 15 Bom. L.R. 249=19 Ind. Cas. 401.

——S. 19—By party.

—Title suit—Proceedings in previous title suit between defendant and third person are relevant and pleadings of defendant admissible as admissions. A.I.R. 1930 Pat. 405=125 Ind. Cas. 782.

——S. 19—By predecessor-in-interest.

An admission made by a person having a reversionary interest in the property at the time is evidence against another person claiming the reversionary interest under a title derived from the former. 64 Ind. Cas. 334 (Cal.).

——S. 19—By trustee.

Admission and conduct of trustee of public institution cannot be allowed to prejudice institution's case materially. 31 P.L.R. 509=A.I.R. 1930 Lah. 579.

——Ss. 19, 20—Deposition in a former case.

The description of the witness in the heading of the deposition is no part of the evidence given by the witness on solemn affirmation. Where the heading in a former deposition of the defendant's mother was invoked for the purpose of proving the illegitimacy of the defendant and the heading ran as follows: "I have lived with **G** for 12 or 14 years. I lived with him before his wife died, two years before that event." **Held,** that even if the document is admissible it is not entitled to any weight, and that it will be harsh and uncalled for to infer from the description any imputation of unchastity or that the witness intended to make a confession of immorality. 8 C.W.N. 241=6 Bom. L.R. 233=26 A. 108=31 I.A. 38 (P.C.).

——S. 19—Statements as to right.

The statements of a person who is in the best position to know all about his property ought not to be lightly set aside on the mere ground that they were made with fraudulent purpose. If his legal representative alleges the statement to be incorrect, the burden of proving that this is so, lies on him. 187 P.L.R. 1912=248 P.W.R. 1912=17 Ind. Cas. 216.

——S. 20—Applicability—Reference to outside party to decide matters in dispute in suit and the question of costs—Reference, if justified by S. 20.

A reference to an outside party to decide matters in dispute in a suit and the question of costs is not a reference to that party for information in reference to a matter in dispute and is not justified by S. 20 of the Evidence Act. 73 I.A. 52=I.L.R. (1946) All. 193=223 Ind. Cas. 567=1946 M.W.N. 161=50 C.W.N. 465=59 L.W. 309=1946 P.W.N. 142=12 B.R. 532=1946 A.L.W. 271=1946 A.L.J. 254=48 Bom. L.R. 452=1946 O.W.N. 220=27 P.L.T. 163=1946 O.A. (P.C.) 102=1946 A.W.R. (P.C.) 102=A.I.R. 1946 P.C. 72=I.L.R. (1946) Kar. (P.C.) 68=81 C.L.J. 314=(1946) 1 M.L.J. 339 (P.C.)

——S. 20—Applicability—Parties agreeing to abide by statement made by referee—Questions under Para. 15, Sch. II, Civil P.C., or Art. 158, Limitation Act, if arises.

Where parties to a suit agree to the appointment of referee and to the suit being decided according to the statement made by such referee, the agreement is not in substance a reference to aribitration, The statement made by the referee according to the agreement is an admission under S. 20, Evidence Act, and operates as an estoppel against the parties. In such a case, no question of para. 15, Sch. II, Civil P.C., or Art. 158, Limitation Act, arises. A.I.R. 1939 All. 176=1939 A.L.J. 1=1939 A.W.R. 7=180 Ind. Cas. 364.

——S. 20—Applicability—Statement of witness.

Under S. 20, Evidence Act, statements made by perons to whom a party to the suit had expressly referred for information in reference to a matter in dispute are admissions. Thus where the plaintiff and the contesting defendants and their respective pleaders enter into an agreement to the effect that they would accept the statement of a certain person and would not adduce any further evidence, the sworn testimony made by that person to the Court is binding upon the partics and a decree in accordance therewith is also binding upon the parties and the parties cannot be permitted to resile from the agreement entered into by them and the decree must stand. A.I.R. 1935 Oudh 118=1935 O.W.N. 15=153 Ind. Cas. 608.

——S. 20—Applicability—Agreement to abide by statement of a witness.

An agreement to abide by the statement of a particular witness is in substance not a reference to arbitration, nor opposed to public policy or repugnant to the provisions of the Contract Act.

The statement of the witness so made may be treated as an admission by the party himself under S. 20, Evidence Act, and operates as an estoppel. A.I.R. 1933 All. 861=1933 A.L.J. 1127=56 All. 39=146 Ind. Cas. 84 (F.B.)

——S. 20—Applicability.

—Agreement to abide by statement of witness—Parties, held can resile from agreement—Statement of witness, after one party has resiled from agreement should not have been recorded at all as an admission by the witness to be binding on any party. A.I.R. 1933 All. 184=1933 A.L.J. 69=146 Ind. Cas. 569.

——S. 20—Applicability—Agreement to be bound by the statement of a referee—Statement is an admission.

Where parties to a procceding agree to abide by the statement of a third person, the statement made by such person is a statement within the meaning of S. 20. It is true that ordinarily, mere admissions are not conclusive, as is provided in S. 31; but admissions of this kind must be taken to be admissions made in a suit by the nominee of a party thereto. Such admissions, therefore, are as conclusive and effectual as admissions made by the parties in their written or oral pleadings. The effect is to prevent each party from resiling from the statement made by such a nominee. 108 Ind. Cas. 34=A.I.R. 1927 All. 659.

——S. 20—Applicability.

Parties to a proceeding are at liberty to resile from an agreement under which they consented to abide by the statement in Court of a particular person before that statement is made. 42 P.L.R. 495.

——S. 20—Applicability.

Answers by Minister to questions put in Assembly are admissible under Ss. 17, 18 and 20 Evidence Act. A.I.R. 1943 F.C. 75=10 B.R. 394=1943 M.W.N. 612=(1943) 2 M.L.J. 468=24 P.L.T. 332=45 Cr L.J 341=I.L.R. (1943) Kar. (F.C.) 103 Sup.=48 C.W.N. F.R. 1=(1944) 6 F.C.R. 1=211 Ind. Cas. 241 (F.C.)

——S. 20—Common representative—Statement by a common representative of both parties is an admission.

Where both the parties and their legal advisers agreed in writing that a certain Vakil should hear the dispute between them and that they would abide by the statement that he might make before the Court,

Held, that the statement of the Vakil was an admission made in a suit by a nominee of a party and is as effectual as an admission made in pleadings either orally or in writing. 80 Ind. Cas. 16=5 L.R. A. Civ. 439=46 All. 710=A.I.R. 1924 All. 570.

——S. 21. Synopsis.

1. Admission against interest.
2. „ by accused.
3. „ by guardian.
4. „ by mukthear.
5. „ by pleader.
6. Admission in agreement to sell.
7. Admission and confession.
8. Admisssons—confessions.
9. Admission—False charge.
10. Admission in criminal proceedings.
11. Admission—If sufficient to pass title.
12. Admission—Ignorance of rights.
13. Admission in zamindari papers.
14. Admission—Proof.

15. Admission—Use in suits.
16. Bond and consideration.
17. Cess return.
18. Compromise.
19. Construction of documents.
20. Co-party.
21. Creditor and debtor.
22. Deposition in previous suit.
23. Divorce case.
24. Effect of.
25. Evidentiary value.
26. Execution proceedings.
27. Insolvent.
28. Joint family.
29. Pedigree.
30. Police file.
31. Procedure.
32. Recitals in deeds.
33. Recital in kobala.
34. Recital in petition to Government.
35. Recitals of admission in judgment.
36. Report of plaintiff's manager.
37. Representative.
38. Scope and construction.
39. Self serving statement.
40. Solenamah.
41. Solicitor's accounts.
42. Statement by deceased person.
43. Statement in sale certificate.
44. Statement as to rent payable in writ of attachment.
45. Statement—When admission.
46. Subsequent statement by widow of donee.
47. Will.
48. Woman describing herself as wife.
49. Miscellaneous.

1. Admission against interest.

——S. 21—Admission against interest.

An admission by a person that he is not a legitimate son is no doubt not conclusive, but made by him against his own interest; it may be accepted as true unless shown to be otherwise. 223 Ind. Cas. 505=48 P.L.R. 187=A.I.R 1946 Lah. 450.

——S. 21—Admission against interest.

Admissions, which would expose a man to a criminal prosecution, must be regarded as admissions against his own interests though they may, as the result of unusual circumstances, be in his favour at some subsequent time. Such admissions are admissible in evidence. A.I.R. 1942 Sind 106=I.L.R. (1942) Kar. 94=43 Cr. L.J. 888=202 Ind. Cas. 681.

——S. 21—Admission against interest.

The statement in a plaint in a previous suit against the interest of the person who makes it is admissible as an admission under S. 21, Evidence Act, in a subsequent suit against his successor-in-interest, without calling the maker as a witness, even if he be alive. A.I.R. 1937 Cal. 515=41 C.W.N. 1089=173 Ind. Cas. 427.

2. Admission by accused.

——S. 21—Admissions by accused—Admissibility.

Under S. 21 of the Evidence Act, admissions made by the accused are admissible in evidence. I.L.R. (1949) Nag. 355=3 A.I.Cr.D. 389=A.I.R. 1949 Nag. 303=50 Cr.L. J. 842=1949 N.L. J. 90.

——S. 21—Admission by accused recorded under S. 164, Cr. P. Code—Admissibility when it is not a confession.

A statement made by an accused and recorded under S. 164, Cr. P. Code by a magistrate authorised to record the same, though it does not amount to a confession may be admitted in evidence under S. 21, Evidence Act as an admission. 53 Mys. H.C. R. 17=28 Mys.L. J. 80.

——S. 21—Admissions by accused.

Admissions by the accused made before the beginning of the proceedings alone can be proved under S. 21, as in a Civil Suit. 36 Mad. 457=22 M.L. J. 73=10 M.L.T. 506=(1911) 2 M.W.N. 576=12 Cr.L. J. 585=12 Ind. Cas. 961.

——Ss. 21, 157—Admissions by accused—Statements made by witness to the Police and to panchayat—Statement made by the witness as accused before the committing Magistrate—Use of these statements for corroboration—Investigating Police officer—Deposition as to statements made to him by witnesses—Practice—Procedure.

In a case of the trial of an accused person the trying judge admitted into evidence against the accused: (1) statements made by a witness to the Police implicating the accused; (2) statements made by the witness to the Panchayat; (3) statement, made by the witness as an accused person before the committing Magistrate; and (4) statements made by the co-accused to the Police wheu the trying judge in the Court of Session found that the witness had completely changed his statement No. 3 while deposing in his court, and used statement Nos. 1 and 2 as corroborative of statement No. 3 which he believed. Relying upon these statements No. 1 to 4 the judge came to the conclusion of the accused's guilt:—**Held**, reversing the conviction and sentence that the judge was wrong in admitting into evidence statement Nos. 1 and 2 in the way he had done. Previous statements might be used to corroborate or contradict statements made at the trial, but not corroborative statements made prior to the trial. The object of referring to such statements should have been to see whether they contained anything which could be used for the purpose of cross-examining, on behalf of the accused, the witnesses examined for the prosecution. **Held** also, that statements Nos. 1 to 4 were altogether inadmissible as evidence of the accused's guilt for they could at most be regarded as admissions by the co-accused which could possibly be used against himself but could not be proved and used against the accused. The investigating Police officer should not be allowed to depose in examination-in-chief to what the witnesses said to him. It opens up an undesirably undue field for cross-examination and leads to the attention of the court being diverted from the true issues. Moreover, it is

contrary to the plain intention of S. 162 of the Code of Criminal Procedure which is that such statements should be used, if at all, on behalf of, and not against, the person under trial. 12 Bom. L.R. 663=34 B. 599=7 Ind. Cas. 933=11 Cr.L. J 542.

3. Admission by guardian.

——S. 21—Admission by guardian.

An admission made on behalf of a minor by his guardian is binding on the minor under S. 21, Evidence Act. A.I.R. 1932 Pat. 337=13 P.L.T. 509=12 Pat. 147=142 Ind. Cas. 495.

4. Admission by Mukthear.

——S. 21—Admission by Mukthear.

A fact admitted by the defendant's Mukthear prior to the framing of the issues is not conclusive, for the Court may require it to be proved otherwise. 82 Ind. Cas. 617=6 L. L. J. 358=A.I.R. 1924 Lah. 744.

5. Admission by pleader.

——S. 21—Admission by pleader.

An admission made by the counsel on a point of law cannot in any way bind client. 75 Ind. Cas. 1048=A.I.R. 1924 Lah. 702.

——S. 21—Admission by pleader.

A pleader has authority to admit certain fact so as to dispense with the necessity of further proof in a criminal case at the appellate stage. 112 Ind. Cas. 110=11 A. I. Cr. R. 243=29 Cr. L. J. 990=52 Bom. 686=30 Bom. L. R. 646=A.I.R. 1928 Bom. 241.

6. Admission in agreement to sell.

——S. 21—Admission in agreement not clear.

If there is no clear admission in an agreement, it affords no evidence on the merits. A.I.R. 1936 P. C. 150=2 B. R. 491=38 Bom.L.R. 690=60 Bom. 634=64 C. L. J. 21=63 I. A. 248=71 M. L. J. 691=162 Ind. Cas. 17=1936 O.W.N. 418 (P.C.).

7. Admission and confession,

——S. 21—Admission and confession—Distinction.

Admission is usually applied to a civil transaction, and to those matters in criminal cases which do not involve a criminal intent. While the term confession is usually used in criminal Court as denoting an acknowledgment of guilt. Admission in a civil suit that a document is genuine cannot in the forgery case be regarded as confession at all. 1929 Cr. C. 194=A.I.R. 1929 Cal. 539.

8. Admissions—Confessions.

——Ss. 21 and 29—Admissions—Confessions.

Confession which is not admissible under S. 164, Criminal P. C., cannot be admitted under S. 21 or S. 29 of the Evidence Act. A.I.R. 1937 Nag. 257=38 Cr. L. J. 987=20 N. L. J. 128=I. L. R. (1937) Nag. 416=170 Ind. Cas. 868.

——Ss. 21, 17—Admission—Confession, if should be admission within S. 17.

What S. 21, Evidence Act, makes relevant is an admission, and while an admission includes a confession, the confession must still be an admission within the meaning of S. 17, Evidence Act, before it can be held to be relevant uuder S. 21. It is necessary, therefore, that the statement of an accused person, to be relevant as a confession under S. 21, must be shown to have been made by a person and under circumstances mentioned in any of the sections following S. 17. A.I.R. 1937 Cal. 433=38 Cr. L. J. 852=170 Ind. Cas. 201 (S.B.).

——S. 21—Admission—Confession — Oral confession to Magistrate.

Oral confession to Magistrate is relevant and may be proved by testimony of the Magistrate. 121 Ind. Cas. 497=1929 Cr. C. 426=31 Cr. L. J. 269=A.I.R. 1929 Lah. 794.

——S. 21 (2)—Admission—Confession.

The conduct and condition of the accused at the time of making the statement to the effect that he has committed murder may be proved by the police officer. 10 C. L. J. 13=10 Cr. L. J. 193=2 Ind. Cas. 951.

——Ss. 21, 26—Admission—Unrecorded confession —Whether can be proved by oral testimony of Magistrate.

Under S. 21, Evidence Act, a confession, being a species of admission, would be relevant and can be proved as against the accused unless it can be shown that there is some provision of law which excludes the proof of such a confession. If a confession is made to a Magistrate himself, then that confession is obviously made "in the immediate presence" of the Magistrate, and the requirements of S. 26 are satisfied. A.I.R. 1934 All. 351=3 A.W.R. 459=1934 A. L. J. 178=36 Cr. L. J. 45=56 All. 730=152 Ind. Cas. 174.

——S. 21—Admission—Extra-judicial confession.

Extra-judicial confession to a doctor cannot carry the same weight as a confession duly recorded under S. 164, Criminal P. C., but it is admissible under S. 21. A.I.R. 1940 Pat. 163=19 Pat. 301=41 Cr.L. J. 533=6 B. R. 577=188 Ind. Cas. 57.

——S. 21—Admission—Extra-judicial confession.

The Evidence Act deals with the particular subject of evidence including the admissibility of evidence and is a special law within the meaning of S. 1, Criminal P. C. It follows, therefore, that no rule about the relevancy of evidence in the Evidence Act is affected by any provision in the Criminal P. C., unless it is so specifically stated in the latter Code.

The admission of a guilt in an application dictated to a petition-writer in a Magistrate's Court and afterwards presented to the Magistrate, is admissible under S. 21, Evidence Act. It does not become irrelevant under S. 24 or S. 25 of that Act. There is nothing in the Criminal P. C., which says that a confession contained in a document delivered to a Magistrate shall not be relevant in spite of the provisions in the Evidence Act. The application need not be verified in accordance with the provisions of S. 364, Criminal P. C. It is the statement in the confession and not the verification of the statement which affords the evidence that the accused is guilty. A.I.R. 1939 All. 242=1939 A. L. J. 107=40 Cr. L. J. 559=I.L.R. (1939) All. 377=1939 A.W.R. 190=181 Ind. Cas. 646.

9. Admission—False charge.

——S. 21—Admission—False report.

The appellant reported to the Police that two persons had caused the death of his child. The report was found to be false and malicious and he was convicted under S. 211, I.P.C. It was contended that the report by the accused was a confession and as S. 164, Criminal P.C., was not complied with, it was inadmissible in evidence:

Held, that at the time of reporting he was not an accused person but only a witness and the statement recorded was not a confession. It was, however, an admission and as such, relevant and admissible in evidence under S. 21, Evidence Act, subject to being properly proved. A.I.R. 1936 Pat. 358=17 P.L.T. 472=2 B.R. 643 (2)=37 Cr.L.J. 862=163 Ind. Cas. 805=1936 P.W.N. 276.

——S. 21—Admission—Scope of S. 21.

S. 21 is not limited by the provisions of Ss. 164, 342 and 364, Criminal P. C., as to the relevancy of admissions. A.I.R. 1936 Rang. 350=37 Cr.L. J. 920=164 Ind. Cas. 162.

10. Admission in criminal proceedings.

——S. 21—Admission in criminal proceedings.

Admissions made by the parties in proceedings under S. 202, Criminal P.C., are relevant provided they are duly proved. A.I.R. 1934 Lah. 286=149 Ind. Cas. 582 (1).

11. Admission—If sufficient to pass title.

——S. 21—Admission—If sufficient to pass title.

Per **Mudholkar**, J.—A person can get rid of his title to his property only by effecting a transfer in one of the modes permitted by law. Admitting some one's rights, when in fact he has none, is not one of them. I.L.R. (1950) Nag. 633.

12. Admission—Ignorance of rights.

——S. 21—Admission—Ignorance of rights.

Wrong admissions made in ignorance of legal rights have no binding effect. A.I.R. 1941 Oudh 429=1941 O.W.N. 648=1941 A.W.R. 395=1941 R.D. 359=194 Ind. Cas. 161.

13. Admission in Zamindari papers.

——Ss: 21 and 34—Admission in zamindari papers.

Admissions in the zamindari papers of the proprietor which are the books of account regularly kept in the course of business, are admissible under S. 34, Evi. Act, and can be proved under S. 21 of the Act by or on behalf of the persons making them. A.I.R. 1940 Pat. 622=19 Pat. 398=7 B. R. 170=191 Ind. Cas. 296.

14. Admission—Proof.

——Ss. 21 and 145 — Admission — Proof of relevancy and value of—Putting admissions to witness before proof, whether and when necessary.

(1) A party's previous admission is relevant under S. 21 and can be used as evidence against him if that party has not appeared in the witness-box at all. The value of the admission as a piece of evidence depends on the circumstances of each case but ordinarily an admission is a valuable piece of evidence.

(2) An admission is a relevant piece of evidence and can be used as legal evidence against a party even in cases where the party appears in the witness-box but makes no statement inconsistent or contradictory to that admission and a denial of that admission is not involved in the statement made by the party in the witness-box by considering the statement as a whole. In this case there is no conflict between the sworn word in Court and the previous admission and the case is, therefore, outside the ambit of S. 145, and therefore it follows that it is outside the rule laid down in A.I.R. 1915 P. C. 7.

(3) Where a party has gone into the witness-box on the point in issue and in the witness-box has made a statement inconsistent with the admission or the statement made in the witness-box involves the denial of the previous admission or runs counter to that admission, then the previous admission cannot be used as legal evidence in the case against that party unless the attention of the witness during cross-examination was drawn to that statement and he was confronted with the specific portions of that statement which were sought to be used as admissions. Without complying with the procedure laid down in S. 145, the admission contained in the previous statement cannot be used as legal evidence against that party. A.I.R. 1946 Lah. 65=47 P.L.R. 391 (F.B.).

15. Admission—Use in suits.

——S. 21—Admission—Use in other suits.

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. It frequently happens that a party is prepared in a particular suit to deal with the base on a particular ground and to make an admission, put that admission is not binding in any other suit, and certainly not for all time. A.I.R. 1941 Bom. 144=43 Bom. L. R. 232=194 Ind. Cas. 431.

16. Bond and consideration.

——S. 21—Bond and consideration.

Executant of a bond or his representative is bound by admission made therein as to the receipt of consideration burden of proving want of consideration is on him. 105 Ind. Cas. 847=29 P.L.R. 110=9 L.L.J. 511=A.I.R. 1927 Lah. 800.

——S. 21—Bond and considertion—Admission of executant how far binds his representative.

Where the execution of a mortgage deed and receipt of consideration is admitted by its executants, their admission is evidence against the mortgagors and their representives in interest under S. 21, Evidence Act. The burden of proving that the consideration was not as that stated in the deed is on the executants and their representatives in interest. 1 Pat. L.W. 413=39 Ind. Cas. 635.

——S. 21—Bond and consideration.

A recital as to the passing of consideration of a mortgage deed is admissible in evidence against the mortgagor's transferee under S. 21, Evidence Act. 21 Ind. Cas. 841 (All.).

——S. 21—Bond and consideration — Mortgage—Admission of passing of consideration—Admissibility in evidence against purchaser.

An admission made in a mortgage deed and before the registering officer by the mortgagor as to the passing of consideration is admissible in evidence against the auction purchaser of the equity of redemption. 35 All. 353=11 A.L.J. 371=21 Ind. Cas. 619.

——**S. 21—Bond and consideration.**

The recital in a mortgage deed and the admissions made by mortgagor at registration as regards the payment of consideration are admissible in evidence against a subsequent auction purchaser of the mortgaged property. 21 Ind. Cas. 554 (Oudh).

——Ss. 21 and 18—Bond and Consideration—Admission by mortgagor—Transferee.

Under S. 21, a recital by the mortgagor in the mortgage deed that he received the consideration is admissible in evidence against the transferees of the equity of redemption from the mortgagor. A finding based on such recital is a finding of fact and conclusive in second appeal. 10 A. L. J. 390=17 Ind. Cas. 644.

17. Cess return.

——S. 21—Cess return.

The Road Cess Act does not stand in the way of admission of road cess return filed by the entire body of landlords and the statements made by all the proprietors can be used by one of them against the other. A.I.R. 1937 Pat. 561=4 B. R. 98=172 Ind. Cas. 129.

——S. 21—Cess return.

Road cess returns are admissible only against the maker. 89 Ind. Cas. 747=42 C. L. J. 14=A.I.R 1925 Cal. 1189.

——S. 21—Cess return.

S. 95 of the Cess Act restricts the provisions of S. 21 of the Evidence Act and makes the exception to that section inapplicable to the case of these returns. A return cannot be used under any circumstances in favour of the person making it but it can be used by others for a purpose not directly connected with the statements made in the return. 79 Ind. Cas. 412=A.I.R. 1925 Cal. 408.

——S. 21—Cess return.

Where the Road Cess Return was signed by the landlords, it would be admissible as against them. 68 Ind, Cas. 676=A.I.R, 1923 Pat. 163.

18. Compromise.

——S. 21—Compromise—Unregistered compromise as to building.
—Defendant allowed to build structure on site worth less than Rs. 100—Payment of Rs. 50 to plaintiff—Parties acting on compromise —Subsequent suit by plaintiff for removal of building—Compromise unregistered—Admissibility.

Held, that though unregistered, the compromise was admissible, and as the parties had enjoyed benefit under it, the plaintiff could not be allowed to resile from it. A.I.R. 1934 Oudh 116=11 O.W.N. 450=148 Ind. Cas. 867.

——S. 21 — Compromise — Unregistered-deed — Statement in unregistered compromise is admissible as admission.

A compromise-agreement operating as a lease requires registration notwithstanding the fact that it has been embodied in a decree, and such an agreement, if unregistered, will not be admissible as a lease, although a statement in it may be admitted as an admission. When such a statement is admitted as an admission it is only a piece of evidence and it is open to the party who has made the admission to show that it was made in circumstances which did not make the admission binding on him or her as the case may be. A.I.R. 1930 Cal. 559=126 Ind. Cas. 715.

19. Construction of documents.

——S. 21—Construction of document—Party's improper construction—No admission.

It does not matter what view a plaintiff or a defendant may take of his obligations. In questions of construction of documents it does not matter in the least whether a litigant calls a document "a contract" or by any other name; its true construction is entirely for the Court. Where a manifestly improper construction (to his own prejudice) was originally apparently admitted by a party,

Held, that the Court should apply the right construction only. A. I. R. 1921 All. 399.

20. Co-party.

——S. 21—Co-party.

An admission of judgment by one of severa defendants is no evidence against his co-defendant: 11 L. L. J. 404=A.I.R. 1929 Lah. 721.

——S. 21—Co-party.

The fact, that one of the defendants was present at the time when measurement was made and map prepared and took party in the **batwara** proceedings in which the land in dispute was mentioned as Plaintiff's, is certainly evidence though not binding as an admission upon the defendants who claim under an independent title. 90 Ind. Cas. 643=A.I.R. 1926 Cal. 290.

——S. 21—Co-party.

The admission of one party may be given in evidence against another, when the party against whom the admission is sought to be used has a joint interest with the party making his admission in the subject matter of the thing to which the admission relates. 61 Ind. Cas. 544 =25 C.W.N. 89=A.I.R. 1921 Cal. 197.

——S. 21—Co-party.

An admission of one defendant in a written statement in a suit will not be evidence against others unless it is made evidence at the trial by examining that defendant who made the statement. 29 Ind. Cas. 924 (Mad).

21. Creditor and debtor.

——S. 21—Creditor and debtor.

Entry in a bond that no other sum is due is not binding on creditor but is only an admission in favour of debtor. 93 Ind. Cas. 996=A.I.R. 1926 Lah. 381.

——Ss. 21 and 32 (2)—Creditor and debtor.

Entries by a creditor in the **Samadaskat** book of his debtor mentioning the fact of the debt and the deposit of the title deeds come under S. 21 (2). Admissions in favour of the creditor are not excluded, if admissible under S. 32. 14 Bom. L. R. 1020=17 Ind. Cas. 722.

22. Deposition in previous suit.

——S. 21—Deposition in previous suit.

A deposition of a person in a suit to which he was not a party is, in a subsequent suit in which he is party, evidence against him and against those who claim under or from him.

Consequently, an admission by the plaintiff's father regarding a custom in the defendant's favour is admissible in evidence under S. 21, Evidence Act, against the plaintiff. A.I.R. 1933 Oudh 246=10 O.W.N. 268=17 R. D. 274=8 Luck. 445= 150 Ind. Cas. 282.

23. Divorce case.

——S. 21—Divorce case—Intercepted correspondence—Admissibility.

In a divorce case an intercepted correspondence between the respondents cannot be considered as evidence against the person to whom it is addressed for any purpose whatever. It is admissible against the respondent who has written it. But it is a very poor evidence as an admission. A. I. R. 1946 Oudh 78= 1945 O.W.N. (C.C.) 384=1945 A.W.R. (C.C.) 245.

24. Effect of.

——Ss. 21 and 145—Effect of.

Where it is an admission which goes to the root of the case, which is relevant under S. 21, Evidence Act, and its relevancy is not affected by the question whether the party may or may not have given evidence consistent with the statement contained in it, it is not necessary to observe strictly the provisions of S. 145. A.I.R. 1936 Pat. 588=17 P.L.T. 621=3 B.R. 85=165 Ind. Cas. 805=1936 P.W.N. 635.

25. Evidentiary value.

——S. 21—Evidentiary value.

The rule contained in S. 21 is that admissions are relevant and provable, but if they are self-serving, then generally they are not receivable in evidence. If the admission is a self-harming one then, with few exceptions, it is usually considered as a proof of a very satisfactory kind. Admissions are valuable pieces of evidence, as the rule is that what a party admits to be true is presumed to be true unless the contrary is established. Under this section admissions of a party on a point at issue are, therefore, relevant pieces of evidence in support of that issue, and unless there is anything else in the Evidence Act or any other statute which enjoins that such admission in any particular contingency would not be used as legal evidence or that they would not be used without complying with certain formalities, it will not be possible to hold that they are inadmissible in evidence. On the other hand, they will be treated as good evidence in a case unless in particular circumstances, their value is otherwise very little. A.I.R. 1946 Lah. 65=47 P.L.R. 391 (F.B.).

——S. 21—Evidentiary value.

A Court, when asked to consider the weight of an admission by a party, cannot ignore it on some guess of its own without any plea or explanation by the party making the admission. A.I.R. 1938 Mad. 133= (1937) 2 M.L.J. 511=46 M.L.W. 910=1937 M.W.N. 1285=176 Ind. Cas. 639.

——S. 21—Evidentiary value.

An admission made in a Court of law no doubt carries with it great weight but it is not conclusive and binding on the party making it, unless it operates, as an estoppel. The burden of proof, however rests heavily upon the party and after him, his heirs, to show that the admissions were untrue. 116 Ind. Cas. 236=53 Bom. 321=31 Bom. L. R. 109=A.I.R. 1929 Bom. 147.

——S. 21—Evidentiary value.

It is unsafe, if not unjust, in a case where an estimate is to be arrived at from the materials at the disposal of the Court to rely upon the admission of the defendant alone. 107 Ind. Cas. 844.

——S. 21—Evidentiary value.

Every admission which a party makes, is evidence against him, and may properly be acted on without necessarily accepting other admissions on other statements which he may have made. 90 Ind. Cas. 487 =A.I.R. 1926 Oudh 41.

——S. 21—Evidentiary value.

In 1903, the plaintiff's predecessors-in-title made an admission in a case brought by them against their step-mother to the effect that a door existed at **A** in the court-yard now in dispute and that it had been opened by the father of the present defendant.

Held, that this admission alone was not sufficient to prove that the door was opened by defendant's father at any time prior to 1903. A.I.R. 1923 Lah. 608.

——S. 21—Evidentiary value.

What a party admits to be true may reasonably be presumed to be so and until the presumption is rebutted, the fact admitted must be taken to be established. 1 Lah. 137=135 P.L.R, 1920=56 Ind. Cas. 191.

——S. 21—Evidentiary value.

An admission by a party is of considerable weight as evidence against him, and may, if unexplained be even decisive. 51 Ind. Cas. 876 (Mad.).

——Ss. 21 and 31—Evidentiary value.

A mere admission has not the effect of creating title though in the event of the title existing, it would have bound the party so admitting. 37 Ind. Cas. 983 (Cal.).

——S. 21—Evidentiary value.

The admissions of parties are binding on them and courts should not lightly go behind them. 38 Cal. 432 =38 I.A. 65=15 C.W.N. 345=9 M.L.T. 364=8 A.L. J. 441=13 C. L. J. 512=13 Bom. L. R. 396=(1911) 2 M.W.N. 182=9 Ind. Cas. 913 (P.C.).

——S. 21—Evidentiary value.

A plaintiff is not entitled to a declaration of proprietory right in the face of an admission by the plaintiff's predecessors that they had only **kan** and **kunki** rights though the plaintiff may have evidence showing enjoyment not ordinarily referable to the admitted rights. (1911) 1 M.W.N. 91=9 M.L.T. 218= 9 Ind. Cas. 329.

26. Execution proceedings.

——S. 21—Execution purchaser—If representative of judgment-debtor.

A statement by way of an admission made by a person cannot be used by him as evidence in his favour nor by his successors-in-interest or legal representatives. For the purposes of this rule, an auction-purchaser at a Court sale cannot be considered to be a successor-in-interest or a legal representative of the judgment-debtor, whatever may be the natural relationship between them. A.I.R. 1948 Pat. 426.

——S. 21 — Execution purchaser — Bound by admission of judgment-debtor.

A purchaser at an ordinary execution sale is in privity with and the representative-in-interest of the judgment-debtor within the meaning of S. 21 of the Evidence Act, so as to be bound by his admissions. He cannot contend that the terms of the bargain were unconscionable. 78 Ind. Cas. 338 =A.I.R. 1924 Nag. 208.

27. Insolvent.

——S. 21—Insolvent—Admission by.

The admissions, of an insolvent, if made after the Act of Insolvency, cannot furnish evidence against another insolvent or as against the Official Assignee. 66 Ind. Cas. 15=49 Cal. 93=34 C. L.J. 107=A.I.R. 1922 Cal. 267.

——S. 21—Insolvent — Deposition under S. 36 of the Presi. Towns Ins. Act—Admissibility.

The deposition of an insolvent examined under S. 36 of the Presidency Towns Insolvency Act and reduced to writing is admissible as evidence against him in a criminal charge. 46 Cal. 996=54 Ind. Cas. 478.

28. Joint family.

——S. 21—Joint family—Son is not representative of his father.

In a joint Hindu co-parcenary a son does not derive interest in the co-parcenary property through his father and hence the sons cannot be said to be the representatives in interest of the father. A.I.R. 1946 Nag. 84=I.L.R. (1945) Nag. 892=1945 N.L.J. 630.

——S. 21—Joint family.

The admission of a member of a Hindu family that the family is not joint and that certain properties belong exclusively to a certain — other member there of is not admissible against other members who contend that the family is joint. 61 Ind. Cas. 544=25 C.W.N. 89=A.I.R. 1921 Cal. 197.

29. Pedigree.

——Ss. 21, 18—Pedigree filed by person.

The pedigree filed by a person, if admissible is a relevant admission under S. 21 against the representative-in-interest of that person and admission within the definition of S. 18. A.I.R. 1934 P. C. 157 =11 O.W.N. 889=40 M.L.W. 217=1934 A.L.J. 779 =4 A W.R. 46=61 I.A. 286=67 M.L.J. 274=15 P.L.T. 531=60 C.L. J. 67=1934 M.W.N. 751=36 Bom. L.R. 867=38 C.W.N, 1101=56 All. 468=150 Ind. Cas, 545 (P. C.).

——S. 21—Pedigree.

From the mere fact that a pedigree is filed by a person, it cannot be assumed that he admitted all the relationship stated in it to be correct. 69 Ind. Cas. 421=9 O. L. J. 186=26 O. C. 109= A.I.R. 1922 Oudh 218.

——S. 21—Pedigree.

The admission of the correctness of a pedigree table by a person will be very strong evidence against him, though he will not be estopped from proving that it is incorrect. 6 P.W.R. 1913=142 P.L.R. 1913=18 Ind. Cas. 611.

30. Police file.

——S. 21—Police file.

Plaintiffs having to prove loss of certain account book in his custody cannot put in police file of alleged theft from his house. 4 L. L. J. 418=A.I.R. 1921 Lah. 332.

31. Procedure.

——Ss. 21 and 145—Procedure — Previous statement of witness—Admission in—Admissibility of.

(Per Lal. J. M.)—When a statement containing an admission is tendered in evidence and the maker of that admission had not been confronted with the statement, the admissions are admissible in evidence under S. 21 of the Evidence Act, and can be taken into consideration.

(Per Haider, J. M. I.—Where it is intended to contradict a witness by his previous statement made in writing his attention must be called to those parts of the previous statement which are contradictory to his present statement. The direction made in S. 145 of the Evidence Act is mandatory. 1949 R. D. 223.

——Ss. 21 and 145—Procedure.

Where a letter written by the defendant to the plaintiff contains passages some of which amount to pure admissions and others amount to contradiction of the evidence given by him in Court, the plaintiff is not entitled to use the passages in the letter as admissions against the defendant under S. 21 of the Evidence Act without complying with the provisions of S. 145 of that Act. A.I.R. 1949 Orissa 27.

——Ss. 21 and 145—Procedure—Previous admission made by party to suit—Admissibility—Compliance with S. 145—If and when necessary.

Under S. 21 of the Evidence Act, a party's previous admission is relevant and can be used as evidence against him if that party has not appeared in the witness box at all. The value of that admission as a piece of evidence depends on the circumstances of each case but ordinarily an admission is a valuable piece of evidence. An admission is a relevant piece of evidence and can be used as legal evidence against a party even in cases where the party appears in the witness box but makes no statement inconsistent or contradictory to that admission and a denial of that admission is not involved

in the statement made by the party in the witness-box by considering the statement as a whole. A previous admission of a party who has gone into the witness-box on the point in issue and in the witness-box has made a statement inconsistant with the admission or the statement made in the witness-box is such which involves a denial of the previous admission or runs counter to that admission, then the previous admission cannot be used as legal evidence in the case against that party unless the attention of the witness during cross-examination was drawn to that statement and he was confronted with specific portions of that statement which were sought to be used as admission. Without complying with the procedure laid down in S. 145 of the Evidence Act, the admission contained in the previous statement cannot be used as legal evidence against that party. 223 Ind. Cas. 579=47 P.L.R. 391=A.I.R. 1946 Lah. 65 (F.B.).

——S. 21—Procedure.

If a party wants to rely on the opposite party's admission, he must take the admission as a whole and not pick out a portion of it. A.I.R. 1934 Oudh. 370=11 O.W.N. 579=151 Ind.Cas. 297.

——S. 21—Procedure—Whole to be proved.

An admission must be read as a whole. It cannot be divided in parts and the plaintiffs allowed to bind the defendants to the portion which is in their favour and reject that which is against them. 40 P.L.R. 531.

——S. 21—Procedure.

Where there is no evidence against a person connecting him with an offence except his own statement or admission, that admission must either be taken as a whole against him or not be taken into consideration at all. 138 Ind. Cas. 217=33 P.L.R. 287=33 Cr. L.J. 570.

——S. 21—Procedure.

The prosecution cannot rely upon an admission made by an accused person to the police without other proof and, even if it could so rely, it would be bound to take admission as a whole. A.I.R. 1932 Mad. 24=34 M.L.W. 858=1931 M.W.N. 1138=61 M.L.J. 860=33 Cr. L.J. 173=135 Ind. Cas. 590 (1).

——S. 21—Procedure.

A party cannot disconnect a so-called admission of his adversary from the context in which it appears and use a part of it in his favour. 11 A.L.J. 255=18 Ind. Cas. 878.

——S. 21—Procedure.

Where a statement made by a party in a prior suit is relied on as an admission in a subsequent suit, he must be asked to explain it when he is in the witness-box. 170 Ind. Cas. 315=39 P.L.R. 200.

——S. 21—Procedure.

A previous statement made by a party cannot be made legal evidence in the case and used against him as an admission by merely filing an attested copy of that statement, without putting it to the party concerned. A.I.R. 1934 Lah. 753=155 Ind. Cas. 819.

——S. 21—Procedure.

Admissions cannot be used against a party unless they are put to him and an opportunity is afforded to him to explain them if they are capable of explanation. 31 P.L.R. 472=12 L. L. J. 149=A.I.R. 1930 Lah. 714.

——S. 21—Procedure.

Where in cross-examination a witness admits that a statement previously made by him is false he ought to be asked in re-examination why he made a statement which was false. The mere fact that the witness acknowledges the previous statement to be false is no justification for rejecting such previous statement, if on other grounds the Court is able to reach the conclusion that statement is in substance true. 6 O.L.J. 210=20 Cr. L. J. 465=51 Ind. Cas. 449.

32. Recitals in deeds.

——S. 21—Recitals in deed.

Recital in deed executed by Hindu widow is admissible as evidence of legal necessity. 80 Ind. Cas. 31=46 All. 822=22 A. L. J. 753=5 L.R.A. Civ. 556=A.I.R. 1924 All. 902.

——S. 21—Recitals in deeds—Admissibility.

The statement as regards boundaries of certain land made in kabuliyat is admissible in evidence against one of the parties, it not being a case of recital of boundaries in a third party document. A.I.R. 1936 Cal. 456=40 C.W.N. 566=166 Ind.Cas. 460.

——S. 21—Recitals in deeds.

Recitals in document between third parties is altogether irrelevant. A.I.R. 1936 Lah. 114.

——S. 21—Recital in deeds—Private document—Admissibility.

Though a statement is made in a private document it is not by itself proof of its truth or any more admissible to prove the truth of the matter stated than an oral statement by the same person. 37 Cal. 467=14 C.W.N. 114=11 Cr.L. J. 453=7 Ind. Cas. 359.

33. Recital in kobala.

——S. 21—Recital in kobala could be shown to be wrong.

The recital in the defendant's **kobala** where the revenue payable in respect of the two **mouzas** purchased by the latter is stated to be Rs. 200 a year is a statement of a fact and at the most can be taken as an admission which is not conclusive and would be explained away and shown to be wrong. A.I.R. 1937 Cal. 159=41 C.W.N. 281=I.L.R. (1937) 1 Cal. 665=66 C.L. J. 180=171 Ind. Cas. 237.

——S. 21—Recitals in kobala.

An assertion in the **kobala** executed by a tenant in favour of his transferee, that his right in it was a permanent one is admissible under S. 13 in evidence in a suit fot ejectment of the tenant where permanent tenancy was claimed. 83 Ind. Cas. 948=39 C.L.J. 526=A.I.R. 1924 Cal. 991.

34. Recital in petition to Government.

——S. 21—Recitals in petition to Government.

A genuine petition of appeal produced from the Government Secretariat, even though it may not bear the signature or thumb mark of the party, is admissible in evidence, but a statement made in it by the appellant in his own interest about his alleged relationship with a certain person cannot be admissible in evidence unless such statement has been brought home to the appellant as his own. A.I.R. 1931 Oudh 177=8 O.W.N. 349=136 Ind. Cas. 642.

35. Recitals of admissions in judgment.

——Ss 21, 35—Recitals of admission in previous judgments.

A statement in a judgment that one of the parties to it had made an admission as a witness is not admissible under S. 21, Evidence Act, as it is only secondary evidence of such admission. In the case of an admission it is very important to have the precise words of the admission. Such a statement is also not admissible under S. 35. A.I.R. 1935 Mad. 268=40 M.L.W. 810=154 Ind. Cas. 753.

36. Report of plaintiff's manager.

——S. 21—Report by plaintiff's manager—Admissibility against plaintiff.

In a dispute relating to the construction of a **bundh** between the parties, the defendant sought to produce a report made by the plaintiff's manager containing a note to the effect that the **bundh** was constructed on behalf of the defendant, on the ground that the manager purported to act as agent of the plaintiff and was authorized by him to make the statements:

Held, that the report could be admitted in evidence. A.I.R. 1941 Pat. 260=7 B.R. 897=22 P.L.T. 699=195 Ind. Cas. 313.

37. Representative.

——S. 21—Representative.

The father's admission in a previous suit cannot be used against a son in a subsequent suit if the latter does not derive his interest in the subject-matter of the subsequent suit from the former. Nor can the father be regarded as having been expressly or impliedly authorised by the son to make the admission. In a suit by reversioners for recovery of property they, in no way, claim through their parents nor could their parents be regarded as authorised to make the admissions. Therefore admissions by parents in former suits are irrelevent and inadmissible. 18 C.W.N. 718=24 Ind. Cas. 311 (P.C.).

——S. 21—Representative—Admission by one reversioner does not bind another.

One reversioner should not be regarded as deriving his interest from another in whom no interest ever vested, even though that other was his own father. So, an admission made by one reversioner does not bind another even though that other is his son. 68 Ind. Cas. 566=A.I.R. 1921 Nag. 153.

——S. 21—Representative—Admission by one of two brothers, whether binding on the other.

An admission by one of two brothers is not binding on the other. 24 Ind. Cas. 105 (All.)

38. Scope and construction.

——S. 21—Scope and construction.

S. 21 (3), which lays down that an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission, is an exception to the general rule and as such should be strictly construed. That clause is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for instance as part of the **res gestae**, as a statement accompanying or explaining a particular conduct but it cannot be held that a statement which is inadmissible in evidence under the general rule can be made admissible as such by reference to S. 21 (3). A.I.R. 1930 Oudh 441=7 O.W.N. 683.

39. Self-serving statements.

——S. 21—Self-serving statements.

Allegation by a person in his application that he had made a prior application earlier would not by itself be evidence of the fact that such an application was given by him. A.I.R. 1943 Mad. 501=(1943) 1 M.L.J. 386=56 M.L.W. 333=1943 M.W.N. 445=213 Ind. Cas. 255.

——S. 21—Self-serving statement.

Where the question is whether a person is a **benamidar** or real owner of property:

Per **Dawson Miller, C. J.**—Even self-serving statements made by the person are admissible under S. 11 if they render fact in issue highly probable or highly improbable.

Per **Mullick, J.**—Admissions made by the person in his own favour are not admissible.

Per **Foster, J.**—Where the statements are made by the person in the course of his instructions to his local agent who assists him in acquiring the property they are admissible as **res gestae**. 93 Ind. Cas. 454=5 P.L.T. Sup. 1=A.I.R. 1925 Pat. 68 (F.B.)

——S. 21—Self-serving statements.

The question was when A died. A mortgage-deed executed by A's son in a 1892, in which, A is described as dead is admissible, and will be used in favour of A's son as it is relevant otherwise than as an admission under S. 11 (2). 72 Ind. Cas. 985=A.I.R. 1923 Cal. 378.

——S. 21—Self-serving statements.

Where the plaintiffs sought to establish their pedigree proving **inter alia** that **A** and **B** were brothers: **Held** that a statement to that effect made by one of the plaintiffs in a deposition given long before the controversy in the suit arose was admissible in evidence. 12 C.W.N. 266.

40. Solenamah.

——S. 21—Solenamah—Statements in.

An admission by a party to a suit in the written statement and **Solenamah** by which the suit is compromised, does not lose its evidentiary value on the **Solenamah** being set aside at the instance of other parties. 22 C.W.N. 572=27 C. L. J. 502=45 Ind. Cas. 601.

41. Solicitor's accounts.

——S. 21—Solicitor's accounts—Entries in—Are admissible.

Entries in solicitor's books of account regarding object of purchase for client are neither inadmissible nor irrelevant nor hearsay. 114 Ind. Cas. 565=1929 A. L. J. 406=49 C. L. J. 335=33 C.W.N. 493=31 Bom. L.R. 710=1929 M.W.N. 422=30 M.L.W. 835= A.I.R. 1929 P.C. 77=57 M. L. J. 581 (P.C.).

42. Statement by deceased person.

——S. 21—Statement by deceased person—Statement that a document is a copy of the original is admissible.

The statement that a document is a copy of the original is admissible where made by a deceased person in a document relating to a relevant fact and also as an admission under S. 21. 117 Ind. Cas. 507=52 Mad. 453=56 I.A. 146=33 C.W.N. 578=29 M.L.W. 804= 31 Bom. L.R. 756=49 C.L. J. 566=1929 M.W.N. 553= A.I.R. 1929 P.C. 115=56 M.L.J. 730 (P.C.).

43. Statement in sale certificate.

——Ss. 21 (1) and 32—Statement in sale certificate.

Where the holding of tenants was purchased by the land-lord in execution of a money decree against them, a statement in the sale certificate as to the extent of their holding is a statement against interest, when they held land in excess of it, and hence admissible in evidence in favour of the land-lord. 24 Ind. Cas. 283. (Cal.)

——S. 21—Statement in sale certificate prepared from the information of the party himself—Admissibility against a stranger.

A statement in a sale certificate as to the amount of rent payable in respect of the holding in dispute at a sale in execution of a decree obtained by the plaintiff against a former tenant, prepared on information furnished by the party himself, can be used on his behalf and against a stranger only if it falls under one of the exceptions to S. 21 of the Evidence Act. 31 C. 380.

44. Statement as to rent payable in writ of attachment.

——S. 21—Statement as to rent payable—Admissibility of.

A recital in a writ of attachment is not admissible in evidence in favour of the maker of the statement and as against persons who claim under an independent title. 31 C. 380, Foll. 15 Ind Cas. 540 (Cal.).

45. Statement—When admission.

——S. 21—Statements—When admission—Person making statements in enquiry by Magistrate, which do not implicate him subsequently becoming accused.

A person who subsequently becomes an accused may have made many admissions which do not implicate himself in any criminal charges, and these would be admissible under S. 21, Evidence Act. Consequently, statements made to a Magistrate holding an enquiry by persons who are not even under arrest are admissible as against them as admissions. A.I.R. 1941 Mad. 720 =54 M.L.W. 81=43 Cr.L.J. 3=1941 M.W.N. 505= 197 Ind. Cas. 81.

——S. 21—Statement—When admission.

A statement may be used against a witness as admission but it cannot be used in confirmation of his testimony. Where a dispute between **X** and **Y** is whether **Y** had agreed to make a purchase from **X** on a certain date, a statement in support of **Y**'s allegation in a letter writen by **Y** to a third party is inadmissible either in examination-in-chief or in cross-examination. A.I.R. 1939 P.C. 146=50 M.L.W. 81=41 P.L.R 622= 182 Ind. Cas. 27 (P.C.).

46. Subsequent statement by widow of donee.

——Ss. 21, 32 (7), 11—Subsequent statements by widow of donee and donor to the effect that gift was fictitious.

Held, that the subsequent statements made by the widow of the donee, in a deed of relinquishment in favour of the donor, that the gift (the subject of relinquishment) in favour of her husband was fictitious and the statement to the same effect by the donor in his will after the relinquishment of the same property in his favour, were admissible to prove the fictitious nature of the gift. These statements came possibly under the second exception of S. 21, Evidence Act, by being admissible under S. 32 (7), Evidence Act and certainly under the third exception. The statements in question were also relevant under Cl. (1) of S. 11, Evidence Act, because they were inconsistent with the fact in issue.

Held, also, that the statements in question were prompted by the exigencies of the situation and could by no means be relied upon as representing the true state of facts and though the statements were admissible, they had little evidentiary value to prove the fictitious nature of the gift. A.I.R. 1938 Oudh 26=1937 O.W.N. 1058=13 Luck. 697=171 Ind. Cas. 481.

47. Will.

——S. 21—Will—Statement in a will cannot be proved in maker's favour.

A statement in a will suggesting an inference as to a fact in issue, cannot be proved by or on behalf of the person who made it or his representative-in-interest. Even where two executors, who were members of the family, acted upon the will, still the statement cannot be treated as an admission by the members of the family that the statement in the will is true. 100 Ind. Cas. 835=26 C.W.N. 273=15 M.L.W. 404=A.I.R. 1922 P.C. 102.

48. Woman describing herself as wife.

——S. 21 (1)—Woman describing herself as wife of **G** in deeds when her marriage with **G** was not in dispute.

Where a woman has described herself in deeds executed by her as the wife of one **G** when there was no dispute about her marriage with **G**, the statements made by her in such deeds are admissible and can be proved by her in a subsequent dispute where her marriage with **G** is questioned as she had special means of knowledge about her marriage with **G**. A.I.R. 1941 Oudh 284=1941 O. W. N. (C. C.) 249=1941 A. W. R. (C.C.) 98=16 Luck. 615=193 Ind. Cas. 161.

49. Miscellaneous.

——S. 21—Miscellaneous.

A party may found his case entirely on what he has succeeded in getting out of the other side's witnesses in cross-examination. A. I. R. 1933 Rang. 129=144 Ind. Cas. 851.

——S. 21 (1) and S 32 (5)—Miscellaneous—Statement as to date of birth, when admissible.

Statements as to the date of birth of a person contained in his deposition and in affidavits filed by him are admissible in evidence underS. 21 (1) read with S. 32 (5) if made by a person having special means of knowledge whether personal or hearsay. (1916) M.W.N. 208=3 L. W. 210=33 Ind. Cas. 969.

——S. 21—Miscellaneous—Statements by postman in departmental enquiry—Admissibility.

Oral and documentary evidence as to the statements of a postman in a departmental enquiry are inadmissible in evidence in his absence. 16 Cr. L. J. 3=26 Ind. Cas. 307.

——S. 22—Admission in maker's interest.

A party cannot use in his favour an admission by his predecessor made in his own interest. 41 Cal. 57=17 C.W.N. 1013=18 Cr.L.J. 347=20. Ind. Cas. 78.

——S. 22—Recital in bond—if admissible against representative of executant.

An admission of receipt of consideration in a bond is evidence against the representative in interest of the executant of the bond. 35 All. 194=11 A.L.J. 221=18 Ind. Cas. 744.

——S. 22—Written document—Contemporaneous oral agreement—Equitable principles.

Where a written document is alleged to be governed by a contemporaneous oral agreement or statement of intention which must be inferred from the surrounding circumstances, the court must be guided by S. 92 of the Evidence Act, and the court cannot have recourse to those equitable principles which enable the Court of Chancery to give relief in those cases of which 2 De. G. & J. 98 and 4 De. G. & J. 16 are examples. 7 Bom. L.R. 669=30 Bom. 119.

—S. 23—Admission in compromise—S. 23 is no bar to use of admissions in compromise which is not rejected.

The parties to a suit agreed to compromise it and executed a statement to that effect. A petition was presented stating that the case had been compromised with a prayer for decree. But it was signed by one defendant only; the other defendants disagreeing with its terms. Thereupon Court framed an issue to ascertain whether the compromise was binding on all the parties. Against the order of the court framing an issue and directing that enquiry to be made, the plaintiff filed an appeal which was dismissed, the Court holding the inquiry. As a result of the inquiry by Trial Court, it was held that the compromise was not binding on all the defendants and the suit was dismissed. On appeal, the District Judge held that as the compromise had been rejected and held not binding, and the appeal from the order was also dismissed, the admissions in the agreement could not be used as evidence as S. 23 acted as bar.

Held, that the agreement between the parties to compromise had been reduced to writing and had been filed in Court. It was wrong to say that the compromise was rejected and held not binding and that an appeal from that order was dismissed. The appeal was against the decision of the trial Court to make an inquiry against the binding nature of the compomise. Therefore, there had been no final adjudication by the District Judge that the compromise was not binding. It was necessary for the District Judge to decide whether the compromise propounded by the plaintiff was binding on the defendants and S. 23 did not present any bar to the proof of the compromise, if it was made as alleged by the plaintiff. 11 L.L.J. 446=A.I.R. 1930 Lah. 293.

——S. 23 — Admission before arbitrators — Value of.

An admission before an arbitrator is admissible in evidence although it is for the Court to attach whatever weight it thinks proper to it. S. 23 of the Evidence Act does not apply to such admission. 4 Pat. L. J. 676 = (1920) P.H.C.C. 52=52 Ind. Cas. 348.

——S. 23—Admission before referee.

Admissions to a person to whom the parties went for compromise are not inadmissible in evidence unless there was an express agreement that the evidence of the statements was not to be given. 95 Ind. Cas. 363=A.I.R. 1926 Lah. 548.

——S. 23—Applicability.

S. 23, Evidence Act, is expressly limited to Civil cases. Once the Magistrate admits a talk of compromise, it is for him to assess its value. 1936 M. W. N. 216 (1).

——S. 23 — Land Acquisition proceedings—Negotiations—Offer without prejudice—Admissibility.

Where after a notification for the compulsory acquisition of land, negotiations are started with the owner of the property by the Government regarding price and certain offers are made by the Government expressly "without prejudice" evidence of these offers is not admissible in an appeal by the owner from an award as to the price made by the District Judge. 92 Ind. Cas. 319=A.I.R. 1926 Lah. 509.

——S. 23—Letters—S. 23 does not cover case of letters merely because of the inscription "without prejudice."

Letters having the inscription "without prejudice" were accepted in evidence in lower Court. It was argued that they were inadmissible in evidence.

Held, that the provisions of S. 23 under which the privilege was claimed did not cover the case. The provisions excluded from category of relevant evidence, such admissions as are made, either upon an express condition that evidence of it is not to be given or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Moreover, where the defendant's counsel admits the letters in the trial Court, the privilege is withdrawn and the letters are free to be used in as evidence in a judicial proceeding. 6 O.W.N. 1088=A.I.R. 1930 Oudh 105.

——S. 24

Synopsis.

See also EVIDENCE ACT, SS. 30, 133, 114—ACCOMPLICE.

1. **Acceptance in part.**
2. **Admissibility.**
3. **Approver.**
4. **Confession in police custody.**

See also—S. 26—EVIDENCE ACT.

5. **Confession—What is.**
6. **Duty of Court.**
7. **Evidentary value.**
8. **Extra judical confession.**
9. **Free confession.**
10. **Inducement.**

See also (1) EVIDENCE ACT, S. 24—PERSON IN AUTHORITY.

(2) S. 28.

11. **Persons in authority.**
12. **Proof.**

See also CR. P. CODE, SS. 164, 364, 533.

13. **Retracted confession.**
14. **Scope.**
15. **Miscellaneous.**

——S. 24. 1. **Acceptance in Part.**

——Acceptance in part—Confession—Confession must be accepted in its entirety.

A confession must be accepted in its entirety so far as if affects the person making it. That is to say, anything which he puts forward in his confession by way of mitigation must be accepted, however improbable it may appear. The Court cannot accept only the inculpatory element and reject the exculpatory element. A. I. R. 1946 All. 15=1945 O.W.N. (H.C.) 275=1945 A.L.J. 459

——S. 24—Acceptance in part.

A conviction can be based on the judical confession of an accused. But where the judiclal confession is the sole evidence against him, it must be accepted in its entirety including the exculpatory portions. A. I. R. 1945 Lah. 43=46 P. L. R. 379=46 Cr. L. J. 736=220 Ind. Cas. 325.

——S. 24—Acceptance in part — Confession — Conviction, when can be based on.

Ordinarily, the conviction of the appellant based solely upon his statement should be allowed to stand only if there are very strong circumstances to warrant it. Each case must stand on its own circumstances, and where otherwise there is no sufficient evidence for conviction, a Court of law should not supplement the prosecution evidence by selecting out of the statements of the accused person passages which might indicate the guilt to the accused and to reject those which go to exonerate him. A.I.R. 1945 Oudh 235=1945 O.W.N. (C.C.) 44=1945 A.W.R. (C.C.) 23=46 Cr. L.J. 629=219 Ind. Cas. 486.

——S. 24—Acceptance in part—Effect must be given to that portion which indicates that accused acted under pressure—But this matter can only be considered by way of mitigation.

A confession, if accepted at all, should be accepted as a whole and not in part and, therefore, effect must be given to that portion of the confession which indicates that the accused acted, to some extent, under pressure. This, howeve, is a matter that can only be taken into consideration by way of mitigation of sentence. A. I. R. 1942 Lah. 271=44 P. L. R. 448=44 Cr. L.J. 77=203 Ind. Cas. 488.

——S. 24—Part relied on by Court—Other part proved to be false—Such part can be discarded.

If any part of a confession is relied upon by a Court and there is no evidence to disprove another part of it, the whole confession must be accepted by the Court but this is not the case when part of it is proved false by other evidence. In such a case, this Court is entitled to rely on one part disregarding at the same time the other. A. I. R. 1941 All. 145=1941 A. L. J. 86=1941 O. W. N. 337=42 Cr. L. J. 485=I. L. R. (1941) All. 280=1941 A. W. R. (H.C.) 65=193 Ind. Cas. 873.

——S. 24—Acceptance in part.

It is not right for the Court to put reliance on a portion of the statement made by the accused person which would implicate him in the commission of a crime and to disregard another portion simply because it would go against the prosecution story. A.I.R. 1940 All. 46=1939 A.L.J. 966=41 Cr. L. J. 258=1939 A.W.R. 768=186 Ind. Cas. 192.

——S 24—Part of it found false—Part found true may only be considered.

Where a confession made by an accused is found to be partly false, the Court may consider only that part which is found to be true and need not take into consideration the rest of the confession. A. I. R. 1940 Lah. 157=42 P.L.R. 1=41 Cr. L.J. 576=188 Ind. Cas. 326.

——S. 24—Acceptance in part.

A Court is not bound in law to accept a confession as a whole. If the Court is satisfied that part of a confession is true and part is false, it can accept such portion as it finds to be true and reject the false portion. A.I.R. 1940 Pat. 541=41 Cr. L.J. 472=187 Ind. Cas. 586.

——S. 24—Acceptance in part.

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory elements as inherently incredible. A.I.R. 1939 Lah. 534=41 Cr. L.J. 150=I.L.R. (1940) Lah. 217=42 P.L.R. 711=185 Ind. Cas. 274.

——S. 24—Acceptance in part.

Where there is evidence to show that any portion of the exclupatory statement in a confession by the accused is inherently improbable, the Court is at liberty to reject that portion of the statement which appears to it to be so improbable and to act only upon that part of the statement which is inculpatory. A. I. R. 1938 Lah. 850=40 P.L.R. 265=40 Cr. L.J. 185=179 Ind. Cas. 237.

——S. 24—Acceptance in part—In absence of other evidence, if whole of confession should be accepted as true statement.

It cannot be said that in the absence of other evidence, the whole of a given confession must be accepted as a statement of truth in its entirety. It is true that if an accused person makes a confession, the whole of that confession must be placed before the Court and is receivable in evidence. But there is no rule of law

which compels belief in the statement of a witness. The Court, if it comes to the conclusion that the statement in its essential particulars is true, is entirely entitled to disregard the statements which it may hold in the circumstances are not true. A.I.R. 1938 Pat. 258 =39 Cr. L.J. 554=19 P.L.T. 476=175 Ind. Cas. 300 (S.B.).

——S. 24—Acceptance in part—Part which exculpates though inherently incredible should be accepted when there is no evidence to prove that it is false.

A confession must be accepted or rejected as a whole if it is to be relied on, the part which implicates as well as the part which exculpates though the part which exculpates may appear inherently incredible because there is no evidence to prove that the part which exculpates is false. Judge must not leave out of his consideration when considering the truth or falsity of a confession or its parts, these probabilities and those presumptions which may properly arise from the other evidence on record, because little evidence is necessary to rebut statements which are in themselves inherently incredible, even when made by an accused in a confession. A.I.R. 1938 Sind 202=I.L.R. (1939) Kar. 75=40 Cr. L.J. 93=178 Ind. Cas. 520.

——S. 24—Acceptance in part—Court, if can admit only self-implicatory statement and exclude exculpatory part.

Where there is no other evidence to show affirmatively that any portion of the exclupatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible:

Held, that where the accused confessed that he dealt a blow only in self-defence and also stated that deceased died as a result of an accidental hatchet blow from a prosecution witness and the statement as to cause of death was found false in view of the medical evidence, the exculpatory statement giving rise to the plea of self-defence being distinct and separate from statement as to cause of death, could be considered on merits. A. I. R. 1937 Lah. 243=38 P.L.R. 105=38 Cr. L. J. 843=170 Ind. Cas. 81.

——S. 24—Acceptance in part.

Where there is no other evidence than the confession is to be rejected or accepted as a whole; when there is other evidence whereby the truth or falsity of a part of the confession could be tested, the Court will test the truth or falsity of the confession by that other evidence and will use its discretion and will accept that part of the confession which it believes to be true and reject that part which it believes to be false. Where, however there is no other evidence as to certain facts to which the accused in his confession testifies and which are in his favour, the Court will accept these facts as true if it accepts the confession and draw from them the proper inferences in favour of the accused. A.I.R. 1937 Sind 212=38 Cr. L.J. 968=31 S.L.R. 460=170 Ind. Cas. 827.

——S. 24—Acceptance in part—Conviction sought to be based solely on accused's statement—Statement should be taken in its entirety.

Where the conviction of the accused is to be based solely on his statement, the statement must be taken in its entirety and it is not open to the Court to rely on the incriminating portion of the statement of the accused and to exclude from consideration the exculpatory part thereof. A.I.R. 1935 Lah. 671=36 Cr. L. J. 966=37 P.L.R. 492=156 Ind. Cas. 529.

——S. 24—Acceptance in part.

Where the conviction does not solely rest on a confession but it rests on the dying declaration and the circumstatial evidence also the Court is not bound to accept the confession in **in toto**. A.I.R. 1935 Pesh. 59=36 Cr. L.J. 914=156 Ind. Cas. 6.

——S. 24—Acceptance in report—Confession must be taken as a whole—Self-defence.

Where there is no other evidence to show affirmatively that any portion of the exclupatory element in a confession is false, the Court must accept are reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. A.I.R. 1933 Lah. 232 =34 Cr. L.J. 318=34 P.L.R. 349=142 Ind. Cas. 20.

——S. 24—Acceptance in part.

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in a confession is false, the Court must accept or reject the confession as a whole, and cannot accept only the inculpatory element while rejecting the exculpatory element as liherently incredible. But it would be a dangerous doctrine to hold that, when an accused person has confessed, in every case, whether there was other evidence besides his confession against him or not, every statement made by him in his confession must be accepted as true. A.I.R. 1933 Rang. 204=35 Cr. L.J. 262=147 Ind. Cas. 49.

——S. 24—Acceptance in part—Rejection of exculpatory part, legality of.

Where a confession comprises to parts, one being in culpatory and the other exculpatory, if there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept are reject the confession as a whole cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible A.I.R. 1931 All. 1=32 Cr. L.J. 362=52 All. 1011= 1930 A.L.J. 1481=129 Ind. Cas. 258 (F.B.).

——S. 24—Acceptance in part.

When a part of the confession is found to be false the entire confession should not be rejected simply for that reason. If sufficient grounds exist, the part that charges the prisoner may be believed while that which is in his favour may be rejected. 132 Ind. Cas. 70 =8 O.W.N. 247=32 Cr. L.J. 830.

——S. 24—Acceptance in part—Confession to be taken as a whole.

Where there is no other evidence to show affirmatively that any portion of the expulpatory statement in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. 129 Ind. Cas. 258=32 Cr. L.J. 362=52 A. 1011=A.I.R. 1931 A. 1=1930 A.L.J. 1481=1931 Cr. C. 1 (F.B.).

——S. 24—Acceptance in part—Confession must be accepted as a whole.

When the only account of what happened on the night of murder is given by the accused himself and it is his admission contained in that statement that forms the basis of his conviction, the statement should be accepted in its entirecty and if it estabilishes any mitigating circumstances the accused should

be given the benefit of it. 121 Ind. Cas. 178=31 Cr. L.J. 226=31 P.L.R. 35=1930 Cr. C. 301=A. I. R. 1930 Lah. 269.

——S. 24—Acceptance in part—Confession not full—Court can reject portions that are false and deduce guilt.

Where the confession is anything but a full confession, the Court is at liberty to use the confession as it stands and derive a deduction of the guilt of the man who made it even while rejecting portions of it which are false. 123 Ind. Cas. 886=31 Cr. L.J. 575=6 O.W.N. 1017=A.I.R. 1930 Oudh 113.

——S. 24—Acceptance in part.

When a confession is given in evidence, the whole of it must be given. But it cannot be said that if the Courts believe the confession it must also accept the circumstances alleged by the accused in extenuation, however improbable may be the Court can believe that part of it which tells against the accused and reject that part which tells in his favour. 1930 M.W.N. 785.

——S. 24—Acceptance in part.

Per **Mirza, J.**—A confession in order to be relied upon need not make a clean breast of all the details in connection with the crime, but if the Court is satisfied that it has been voluntarily made, it may take into consideration such parts of it as it may by itself or in the light of the other evidence in the case consider to be true. 120 Ind. Cas. 350=31 Cr.L.J. 97=31 Bom. L.R. 565=A.I.R. 1929 Bom. 327.

——S. 24—Acceptance in part—Criminal Trial—Confession must be considered as a whole.

If accused is to be convicted on his confession, it must be taken as a whole and it would be unsafe to use the part against him and discredit the part in his favour. 39 Cal. 855 and 21 Cal. 955, Foll. 109 Ind. Cas. 605=27 M.L.W. 318=1928 M.W.N. 161=9 A.I. Cr. R. 493=29 Cr.L.J. 589=1 Mad. Cr. C. 113=A.I.R. 1928 Mad. 493=54 M.L.J. 607.

——S. 24—Acceptance in part—Confession must be read as a whole—Exception.

A confession or statement of an accused person must be read and accepted as a whole unless there is evidence to contradict any portion thereof in which case such portion may be rejected. 99 Ind. Cas. 71=28 Cr. L.J. 39=A.I.R. 1926 Lah. 554.

——S. 24—Acceptance in part—Confession must be accepted as a whole.

Where the only evidence against the accused is his confessional statement, the Court must accept the whole of the confessional statement. 88 Ind. Cas. 455=26 Cr. L.J. 1143=A.I.R.1925 Mad. 1069.

——S. 24—Acceptance in part.

Though, no doubt, when portions of the statement are admitted, the persons affected thereby may demand that the statement should be admitted and considered in its entirety, yet the principle that portions of a statement or confession may be admitted and others excluded is recognised in the Evidence Act itself. If and when certain facts are deposed to as discovered in consequence of information received from the accused when in custody of the Police, so much of the information as relates distinctly to the fact or facts thereby discovered will become admissible. 49 Cal. 167=A.I.R. 1922 Cal. 342.

——S. 24—Acceptance in part.

It cannot be said that a Court is not justified in holding that a confession as a whole may be true, although a particular detail is false especially when the detail refers only to the motive. Courts of law cannot pick out different statements made by an accused and piece them together so as to make a new statement. 75 Ind. Cas. 152=24 Cr.L.J. 904.

——Ss. 24 and 29—Acceptance in part—Confession—Acceptance in part, if may be accepted or rejected in part.

A confession is an evidence for the prisoner as well as against him and must be taken altogether. But it is only where no other evidence is forthcoming that this can be pressed to the extent of requiring that no part be accepted as true without accepting the whole. 26 W.R. 15, Cr. and 25 W.R. 23 (Cr.), Foll. If other evidence incompatible with a part of the confession is on record, it may he relied on in preference to that part. 20 Cr.L.J. 737=53 Ind. Cas. 145 (Nag.).

——S. 24—Confession, acceptance in part—Confession—If must be accepted or rejected in entirety.

Although a confession must be taken as a whole and considered along with the admitted facts of the case, the Court is at liberty to disregard any statement in the confession which it disbelieves. 19 Cr.L.J. 785=46 Ind. Cas. 705. (Nag.).

2. Admissibility.

——S. 24—Confession suspected to have been induced by person in authority—Admissibility.

Where there is good reason for the suspicion that a confession has been caused by inducement having reference to the charge against the accused person proceeding from a person in authority, the confession is inadmissible in evidence in view of the provisions of S. 24 of the Evidence Act. A.I.R. 1950 Cal. 427=4 A.I.Cr.D. 527.

——S. 24—Confession—Voluntary character—Confessions recorded with policeman standing guard and with confessing accused in handcuffs—If voluntary.

The accused must be free and unhampered at the time when his confession is recorded and should not be subject to the influence of the police. Where a police constable was standing guard when the confession of accused persons were recorded, and two of the accused were handcuffed when their confession were recorded, it cannot be said with confidence or certainty that the accused were not under the influence of the police. I.L.R. (1948) Nag. 147=49 Cr. L.J. 561=A.I.R. 1948 Nag. 344=1948 N. L. J. 489.

——S. 24—Construction—Confession—Exclusion of—Actual proof of inducement, threat or promise—If necessary—Circumstances justifying inference of non-voluntary character—Sufficiency.

Under S. 24 of the Evidence Act, it is sufficient to exclude a confession if there are circumstances in evidence which afford a well-grounded conjecture that the confession was not voluntary. 25 Pat. 612 =A.I.R. 1947 Pat. 305.

——S. 24—Admissibility—Court can ignore exculpatory part of confession which is proved to be false and use the rest against accused.

Where confession of an accused is partly inculpatory and partly exculpatory and exculpatory part is shown

to be false by evidence on the record, the Court is justified in ignoring that part of the confession and using the rest of it against the accused. A. I. R. 1945 Lah. 91=47 P. L. R. 11.

——S. 24—Admissibility—Approver in police custody but not threatened.

The principle that it is only when an approver's disclosure is extorted as the result of undue duress, such as threats or violence, that S. 24 is applicable and the statement must be ruled out of evidence, does not apply where the Court is not satisfied that in spite of being in police custody which was subsequently held to be illegal, the approver was either subjected or threatened to be subjected to any such ill-treatment as would make the statement inadmissible under S. 24. A. I. R. 1936 Lah. 409=37 Cr. L.J. 732=38 P. L. R. 1128=162 Ind. Cas. 969.

——S. 24—Involuntary confession—Rejection of, whether discretionary.

To reject a confession of an accused involuntarily made as inamissible is a matter for the discretion of the Judge. 162 Ind. Cas. 931=39 C. W. N. 677=62 Cal. 928=62 C. L. J. 217=37 Cr. L. J. 707.

——S. 24—Confession—Admissibility, question of—Aid of Evidence Act of Criminal Procedure Code.

Section 1 (2), Criminal P. C., shows that the Criminal P. C. does not affect any special or local law in force; so, one must look to the Evidence Act for the admissibility of confessions rather than to the Criminal P. C. A.I.R. 1936 Rang. 350=37 Cr. L.J. 920=164 Ind. Cas. 162.

——S. 24—Admissibility—Identity of confessing person.

Where the defence contended that a confession was not admissible against an accused person **B** because the identity of the maker of the confession was not proved but his name, his father's name, his caste, his age, his occupation and residence are the same as that of **B** accused and there is evidence that he did make a statement before a Magistrate and was put up one day to make a statement, though, as the Magistrate was ill, his statement was not recorded :

Held, that the inference could fairly be drawn that he did make the confession purporting to have been made by him and that the technical objection to the admissibility of the confession failed. A. I. R. 1935 Lah. 230=35 Cr. L. J. 1180=150 Ind. Cas. 1056.

——S. 24—Admissibility.

The circumstances in which a confession is made should not be such as to afford a well grounded suspicion that it was not voluntary. A.I.R. 1935 Mad. 479=1935 M.W.N. 82=36 Cr.L.J. 1107=157 Ind. Cas. 297.

——S. 24—Admissibility—Lesser degree of probability required to reject confession.

In order to justify the rejection of a confession, a lesser degree of probability would be necessary, inasmuch as instead of the word "proved," the Legislature has used the word "appear" in S. 24. A. I. R. 1934 Cal. 636=61 Cal. 399=38 C. W. N. 659=35 Cr. L. J. 1479=152 Ind. Cas. 44.

——S. 24—Admissibility — Non-incriminating statement.

Every statement made to the police by an accused person is not a confession and statements which are not of an incriminatory nature are admissible. The crucial question is what use does the prosecution attempt to make of the accused's statement. If that statement is useful to the Crown because it can be shown to be false, then it is admissible. If, on the other hand, it is useful because it is believed to be true. then it would be analogous to a confession and it cannot safely be admitted. A.I.R. 1934 Sind 100=35 Cr. L.J. 1332=151 Ind. Cas. 437.

——S. 24—Admissibility—Exculpatory statement of accused.

A statement made by a person who, at the time, was not an accused but subsequently became one, is exactly on the same footing as if he had been an accused at the time he made it. If such a statement does not, in any way, connect the accused with the crime charged, it is admissible in evidence. A. I. R. 1931 Lah. 763=32 Cr. L. J. 985=133 Ind. Cas. 55.

——S. 24—Admissibility.

Admissions by party in case in which charge is baseless and prosecution is carried only to harass party are not voluntary and therefore not binding. 120 Ind. Cas. 615=A.I.R. 1930 Lah. 364.

——S. 24—Admissibility—Question of admissibility of confession comes when statement is made to police officer or while in police custody.

The question whether or not a statement is to be regarded as admissible as being a confession or not usually arises in the case of a statement made to a police officer or in the case of statement made to a man while in custody of the police. 1929 Cr. C. 194=A. I. R. 1929 Cal. 539.

——S. 24—Admissibility in evidence is a matter which is to be decided after a full consideration of the evidence and the particular circumstances of each case.

It is not possible for a Court to say that the making of a confession appears to have been caused by any inducement, threat or promise except upon evidence before it. The inference may be suggsted by the confession itself or by the evidence of the prosecution or by the evidence adduced by the accused person or by the surrounding circumstances which the Court is always bound to take into consideration, but the conclusion cannot be reached on surmise or conjecture. Whether or not a confession is admissible in evidence is a matter which is to be decided after a full consideration of the evidence and the particular circumstances of each case. 108 Ind. Cas. 387=29 Cr. L. J. 385=A. I. R. 1928 Lah. 676.

——S. 24—Valuntary nature is test of admissibility—Factors to determine—Mentality of accused—Sufficiency of inducement and its relation with confession as cause and effect—Proof of inducement is not necessary.

The test of admissibility of a confession is its voluntary nature and not its falsity or truth. To determine the voluntary nature or otherwise of a confession, the mentality of the accused is to be judged rather than that of the person in authority. Not merely actual words but words accompanied by acts or conduct as well on the part of the person in authority which may be construed by the accused person, situated as he then is, as amounting to an inducement, threat or promise, will have to be taken into account. A perfectly innocent expression, coupled with acts or conduct on the part of the person in authority, together with the surrounding circumstances may amount to inducement threat or

promise. In scrutinising a case from the point of view of S. 24 of the Evidence Act the Court will have to perform a three-fold function, (1) to determine the sufficiency of the inducement, threat or promise, (2) the mentality of the accused, and (3) whether the confession appears to have been caused in consequence of the inducement, threat or promise. The section does not require positive proof (as defined in S. 3 of the Act of improper inducement to justify the rejection of the confession, the word "appears" indicating a lesser degree of probability than would be necessary if "proof" had been required. 86 Ind. Cas. 414=52 Cal. 67=29 C.W.N. 300=26 Cr. L. J. 782=A. I. R. 1925 Cal. 587.

——Ss. 24, 25 and 26—Admissibility—Confession, acceptance in part—Entire confession to be excluded.

A Judge should decide the question of admissibility of confession first and then exclude it from the record if inadmissible and keep its terms from the assessors. Inadmissible confession would be inadmissible wholly. 18 Cr. L. J. 383=38 Ind. Cas. 767 (Bur.).

——Ss. 24, 25, 26, 27—Accused pointing out articles stolen—Conduct—Admissibility of evidence—Application of Evidence Act, S. 27 an exception to preceding sections—Criminal Procedure Code (Act 5 of 1898), S. 163.

M was charged with the murder of a girl. On the hope of pardon being given to her she took the police to a place and pointed out and produced certain ornaments, which the deceased was wearing at the time of her death. **Held**, that the evidence was admissible to show that the accused did go to a certain place and there produced certain ornaments. It is the Evidence Act and not the Criminal Procedure Code that must be looked to as to whether the evidence in point is or is not admissible, S. 29 of the Evidence Act was an exception to the preceding sections and its object was to provide for the admission of evidence which, but for the existence of that section, could not be admitted. So much of the information, even if it amounted to a confession made to a Police officer, may be proved as related to the discovery of the articles stolen. The conduct or acts of the accused were not dealt with by S. 27 and were relevant under S. 8. (1909) 6 A. L. J. 839=31 A. 592=3 Ind. Cas. 975=10 Cr. L. J. 439 (F. B.)

——S. 24—Confession—Admissibility.

That it is not sufficient to render a confession irrelevant under S. 24 that there may have been added to it a statement which has been improperly induced by threat or promise. In order to make a confession irrelevant it must be shown that the confession itself was improperly induced. Per **Beaman, J.**—Had it been open to us to decide whether the confession ought to have been admitted it was doubtful whether S. 24 might not have shut them out. (1907) 9 Bom. L.R. 789 =32 Bom. 111 (F. B.).

——S. 24—Confession, admissibility of—Inducement to canfess.

Certain accused persons were sent before a Magistrate to have their statements or confessions recorded. They were warned by the Magistrate, before they made their statement, "not to expect any advantage or disadvantage therefrom. **Held**, that the confessions made by the accused after this warning had been given to them were entirely inadmissible in evidence. (1906) A.W.N. 75.

——S. 24—Admissibility—Statement made by witness or accused during investigation.

Statements made to a Police Officer by witnesses during investigation and reduced to writing are not admissible aganist the accused. Nor can the statements of accused persons under arrest made to a Sub-Inspector of Police and reduced to writing and put in a special diary, be used against the accused. 11 Cr. L.J. 612=8 Ind. Cas. 259 (All.)

——S. 24—Confession, admissibility of.

Where a Police officer read to the accused a number of statements made by others and stated that he knew everything, whereupon the accused made a confession, in consequence of which he was arrested and his confession duly recorded. *Held*, that the confession was free and voluntary and was admissible in evidence. (1901) 3 Bom. L.R. 404.

——S. 24—Confession, admissibility of—Criminal Procedure Code, S. 164—Long police custody.

A confession to be inadmissible need not be alleged to have been procured by torture leaving personal marks of violence. It will be inadmissible if there was anything showing that it was not voluntary. Before admitting a record of confession as evidence, the court should inquire very carefully into all the circumstances under which the confession was made and particularly as to the length of the time the accused was in police custody before the confession. If the record of the confessional statement does not show that the Magistrate put the question as to how long the accused was in custody, but there is reason to think the Magistrate might have put the question and received an answer, the Session Judge should examine the Magistrate and satisfy himself before admitting the confession as evidence. (1901) 3 Bom. L.R. 122=25 B. 543.

3. Approver.

——S. 24—Approver—Approver's confessional statement induced as a result of undue pressure —S. 24 does not exclude such statement made under Criminal P. C., S. 339 (2).

An approver's disclosure is in its very nature always the result of an inducement or promise, namely, the inducement to confess upon a promise of pardon; but should it appear that it was extorted as the result of undue duress, such as threats or violence, to that extent the provisions of S. 24 would be applicable and the confessional statement would have to be ruled out of evidence. Such a statement is not excluded from evidence by S. 24, Evidence Act: 5 A. L J. 691, Foll. 108 Ind. Cas. 514=9 Lah. 608=10 A. I. Cr. R. 76=29 Cr. L. J. 413=29 P.L.R. 165=A.I.R 1928 Lah. 320.

——S. 24—Approver.

Approver tried on the basis of his statement—Statement retracted must be corroborated by other evidence. 108 Ind. Cas. 514=9 Lah. 608=10 A. I. Cr. R. 76=29 Cr. L.J. 413=29 P.L.R. 165=A.I.R 1928 Lah. 320.

——S. 24—Approver—Inducement by police officer —Tender of pardon—Statement made by approver.

The accused made a confession in which he implicated three persons in an offence of murder. At the trial of the three persons the accused was granted a conditional pardon and examined as a witness for

the prosecution. The three persons were acquitted and the accused was tried for the offence of murder.

Held, the confession made by the accused in the first murder trial was inadmissible in evidence against him under S. 24 of the Evidence Act. The statements made by the accused in the first murder trial as a witness under a tender of pardon are admissible for they were removed from the operation of S. 24 by virtue of S. 339, Cl. (2) of the Cr. P. Code. The statements made by the accused in the trial of the Police officer concerned in the investigation of the case could be admitted in evidence against him on his own trial for murder. 59 Ind. Cas. 324=22 Cr. L. J. 68=22 Bom. L.R. 1247.

——S. 24—Approver.

The hope of being made an approver does not show that the confession is not voluntary. 96 Ind. Cas. 509=7 A.I. Cr. R. 75= 5 Pat. 171=27 Cr. L.J. 957 =A.I.R. 1926 Pat. 279.

4. Confession in police custody.

See also EVIDENCE ACT, S. 26.

——S. 24—Confession in police custody—Presence of the police—Accessory after fact.

The evidence was that the accused was kept in charge of a Head Constable and was being questioned by the Sub-Inspector and that after being in that condition for 3 or 4 hours under the continued questioning to which he was subjected, he finally broke down and made a confession to the Magistrate at midnight. *Held*, that that the confession was inadmissible under S. 24 of the Evidence Act as it was not voluntary. A self-exculpatory statement by an accessory after the fact is inadmissible in evidence. 30 Cr. L. J. 503=21 C.L.J. 266=55 Ind. Cas. 282.

——S. 24—Accused in police custody—Presumption that his confession is induced is not correct.

The mere fact of a person being in custody cannot be a good basis for a presumption that any confession he may make is caused by an inducement, threat or promise having reference to the charge against him, proceeding from some police officer and sufficient to make him believe that he would be benefitted in the trial by making it. 95 Ind. Cas. 59=27 Cr. L.J. 731= A.I.R. 1926 Nag. 368.

——S. 24—Confession in custody.

Statements of accused in Excise case in custody and after their removal to Excise barracks were held inadmissible. 98 Ind. Cas. 401=53 Cal. 706=30 C. W. N. 854=27 Cr. L. J. 1329=A.I.R. 1926 Cal. 1163.

——S. 24—Confession in police custody—Retracted —Corroboration.

A confession by an accused person made after he has been for a considerable time in police custody and subsequently retracted ought not to be acted on without corroboration. 54 Ind. Cas. 881 (Pat).

——S. 24—Confession in police custody—Inadmissibility of.

When a confession was made after police custody for several days and protracted consultation between the accused and the investigating officers, and was subsequently retracted the confession is inadmissible, 23 C.W.N. 886=20 Cr. L.J. 838=53. Ind. Cas. 929.

——Ss. 24 and 25 26, 27—Confession in police custody and statements, by one accused against another.

Statements made to police, while in custody are not admissible evidence, though those statements may be incriminating. A statement made by the accused against another, and a confirming statement made by another accused, when questioned by Police before the Headman are excluded by the above sections of the Act; and S. 24 does not admit as legal evidence an incriminating statement to Headman at the latter's suggestion to speak the truth, lest witnesses for the other side may let it out when called. 18 Cr. L.J. 106=10 Bur. L. T. 270=37 Ind. Cas. 314.

5. Confession—What is.

——S. 24—Confession, what is.

A confession is a statement which either admits in terms the offence or at any rate substantially all the facts which constitute the offence. The statement of an accused with is not self-exculpatory but which does minimise the part he took in the offence and which ascribes to himself a part much less important and much less active than that ascribed to others named by him is a confession A.I.R. 1946 Cal. 156=I.L.R. (1944) 2 Cal. 312.

——S. 24—Confession—What is.

No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate, substantailly all the facts which con ititute the offence. An admission of gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession. A.I.R 1941 Sind 129=I.L.R. (1941) Kar. 257= 42 Cr. L.J. 741=195 Ind. Cas. 458.

——S. 24—Confession—What is—Statement containing self-execulpatory matter, when amounts to confession.

No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offences alleged to be confessed. Moreover, a confession must either admit in terms the offence, or, at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, **e. g.**, an admission that the accused is the owner of and was in recent possession of the knife or revolver, which caused a death with no explanation of any other man's possession. The definition of 'confession' is not contained in the Evidence Act and in that Act, it would not be consistent with the natural use of language to construe confession as a statement by an accused "suggesting the inference that he committed" the crime. A. I. R. 1939 P.C. 47= 1939 M.W.N. 185=1939 A.W.R. 35=40 Cr.L.J. 364 =1939 O.W.N. 282=20 P.L.T. 265=49 L.W. 349= 43 C.W.N. 473=1939 A.L.J. 298=41 Bom L.R. 428 =41 P.L.R. 272=69 C.L.J. 273=(1939) 1 M.L.J. 756=18 Pat. 234=I.L.R. (1939) Kar. (P.C.) 123, Sup. =6 Cut. L.T. 25=66 I.A. 66=1941 Rang. L.R. 789= 180 Ind. Cas. 1 (P.C.).

——S. 24—Statement, when amounts to confession.

Whether the statements amount to a confession or not depends upon the facts related in the statements and not upon the opinion of the men who made them. A.I.R. 1938 All. 91=1937 A.L.J. 1253=39 Cr. L.J. 364=1937 A..W.R. 1099=173 Ind. Cas. 838.

——S. 24—Distinction between confessions and statements of facts.

A useful test as to the admissibility of statements made so the police is to ascertain the purpose to which they are put by the prosecution. If the prosecution rely on the statement of the accused to the police as being true, then they may, and in many cases will be found to amount to confession. If, on the other hand, the statements of the accused are relied on not because of their truth but because of their falsity, they will be admissible as admissions. A.I.R. 1937 Mad. 209=1936 M.W.N. 1241=45 L.W. 100=(1937) 1 M.L.J. 154=38 Cr. L. J. 323=I.L.R. (1937) Mad. 358=166 Ind. Cas. 917.

——S. 24—Confession—What is—Dishonest intention not admitted—Record of statement not complete.

Where, in his statement, the accused, who is charged under S. 379, I.P.C., does not admit, from the very beginning, his dishonest intention and the record of the statement is not a complete record of all that he has said, the statement should not be relied upon as a confession either in form or in substance. A.I.R. 1934 Pat. 651=15 P.L.T. 586=36 Cr. L.J. 447=153 Ind. Cas. 922.

——S. 24—Confession—What is.

Where the statement did not bear the certificate required from the Magistrate under S. 164, Criminal P.C. and the accused was not an accused person at the time when so-called confession was recorded, and further that there was no Police investigation pending under Chap. XIV, Criminal P.C. in respect of any penal offence alleged to have been committed by him at the time when this so-called confession was being recorded by the Deputy Magistrate, the statement cannot be used as a confession, and is not admissible in evidence under any provision of the Evidence Act or Criminal P.C. A.I.R. 1935 Oudh 477=36 Cr.L.J. 1007=1935 O.W.N. 781=11 Luck. 327=156 Ind. Cas. 819.

——S. 24, 25, 26—Statement that accused made counterfeit coin in presence of witness.

A statement made by a witness that the accused made a conterfeit coin in his presence is not inadmissible in evidence under Ss. 24, 25 or 26 as making of a coin is not a statement. A.I.R. 1931 All. 9=32 Cr. L.J. 1006=133 Ind. Cas. 154

——S. 24—Test of true confession.

A true confession made by the person who takes part in a murder invariably adds something to the knowledge already possessed by the investigating officer and that is the greatest test of its truth. A. I. R. 1931 Oudh 166=8 O. W. N. 228=32 Cr. L. J. 854=132 Ind. Cas. 228.

——S. 24—Confession what is—'Confession' and 'admission' meaning of.

There is a clear distinction between an admission and confession; "confession" does not include a new inculpatory admission, which falls short of being an admission of guilt. 11 Bom. L. R. 633=10 Cr. L. J. 369=3 Ind. Cas. 742.

——S. 24—Confession—What is.

The actor determining whether a statement amounts to a confession or not is not the motive of the party making it, but the fact that it leads to an inference of guilt. A confession includes also inculpatory statements which suggest an inference of guilt and from which an inference of guilt necessarily follows. 5 L. B. R. 131=3 Bur. L. T. 63=11 Cr. L. J. 153=4 Ind. Cas. 1028.

——S. 24 — Confession — What is — Making of counterfeit coin — Evidence regarding —Admissibility.

A confession is an admission by an accused person in a criminal case. The making of a counterfeit coin is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by Ss. 24, 25 or 26. 1931 Cr C. 9.

——S. 24—What is confession—Definition,

A confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime. 120 Ind. Cas. 257=31 Cr. L. J. 26=1930 Cr. C. 45=A.I.R. 1930 All. 29.

——S. 24—What is confession—Oral confession—Accused not shown to know language in which questions put but in answer making signs—Conduct held did not amount to confession.

Where an accused, not shown to have understood English, is asked in broken English as to whether he was responsible for the act and he nods his head and salams in reply, the conduct does not amount to confession. It is impossible to determine what the accused understood to be the meaning of remarks addressed to him as to his complicity in the crime and without being satisfied that the accused exactly understood the meaning and the import of the question addressed to him, the signs made by him, standing by themselves are meaningless. He might have completely misunderstood what was sought to be conveyed to him and have thus made the signs which were intended to be in answer to something which was entirely different from what his questioners were anxious to put him and therefore confession remains unproved and so is no confession. 120 Ind. Cas. 539=1930 Cr. C. 100=31 Cr. L. J. 141=31 P. L. R. 391=A. I. R. 1930 Lah. 84.

——S. 24—Confession—What is.

Where an accused charged under S. 380, was asked whether he had stolen the mare and he was arrested while riding it and the accused said "yes". **Held**, that the answer did not amount to a confession. 103 Ind. Cas. 847=28 Cr. L. J. 767=A.I.R. 1927 Lah. 650.

——S. 24—Exculpatory statement made to Magistrate is not confession.

The statement made by the accused to the Magistrate by way of confession but of self-exculpatory nature is not really a confession. 92 Ind. Cas. 439=42 C. L. J. 524=27 Cr. L.J. 263=A.I.R. 1926 Cal. 320.

6. Duty of Court.

——S. 24—Duty of Court—Duration of accused's being in custody of police.

All parts of a confession are not entitled to equal weight. It is the duty of Court to enquire very carefully into all the circumstances which lead to the making of the confession, and the length of time during which an accused person is in police custody before he makes his confession. The admissibility of each confessios

must be decided on all the facts and surrounding circumstances and also from the intrinsic value of the confession itself. In order to determine the admissibility of the confession it must be read as a whole. A.I.R. 1941 Bom. 50=42 Bom. L.R. 938=I.L.R. (1941) Bom. 27=192 Ind. Cas. 671.

——Ss. 24 to 26—Duty of Court—Admission—Rejection of.

It is an ordinary rule of prudence that a Court should reject an admission made by an accused under such circumstances that, if the admission amounted to a confession, it would be excluded by any of the Ss. 24 to 26, Evidence Act. A.I.R. 1941 Sind. 129=I.L.R. (1941) Kar. 257=42 Cr.L.J. 741=195 Ind. Cas. 458.

——S. 24—Duty of Court—Circumstances must be considered.

If the circumstances are such as to raise a strong suspicion in the mind of the Judge that the confession has been induced by threats or promises of the nature described in S. 24, Evidence Act, then the confession is irrelevant It is not necessary for the defence to establish conclusively that there was such inducement or threat. It is sufficient if the circumstances afford reasonable grounds for believing that there was such an inducement or threat. A.I.R. 1939 Cal. 610=43 C.W.N. 893=40 Cr.L.J. 880=184 Ind. Cas. 222.

——S. 24—Duty of Court—Circumstances under which confession is made must be seen.

The circumstances under which a confession is made must always be scrutinized with great care and caution, and in all cases, the period of the detention of the accused in police custody before a confession is made is always an important fact to be carefully considered. Though illegal detention does not necessarily vitiate a confession, it is a fact to be carefully considered in every case. A.I.R. 1937 Sind 251=39 Cr.L.J. 10=31 S.L.R. 494=171 Ind. Cas. 737.

——S. 24—Duty of Court—Trial by jury—Jury, if can consider voluntariness or otherwise of confession in considering if it is true—Judge directing jury as to whether it is admissible—If error of law.

A confession which is not hit by the precise terms of S. 24, may, at the same time, not be voluntary in the ordinary sense of the term. The duty of the Judge is to satisfy himself that it is not within the prohibition of that section. When once it has been let into evidence and put before the jury, it is for them to say whether it is true or not. When they have to decide that matter, they cannot ignore the question whether it was voluntary or not. It would be almost impossible to decide the question without considering that matter if the jury are to perform their duty satisfacterily; they must consider all the circumstances under which the confession was made and, it may will be, that in many cases there may be circumstances which would support an inference that the confession was not voluntary. A.I.R. 1936 Cal. 227=40 C.W N. 668=37 Cr.L.J. 676=63 C.L.J. 142=63 Cal. 1089=162 Ind. Cas. 636.

——S. 24—Duty of Court—Partial confession.

Under S. 24, a confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which appear to him reasonable for supposing that by making it, he would gain any advantage are avoid any evil of a temporal nature in reference to the proceedings against him. The question to consider, therefore, is in the first place, whether the confession is relevant or not. If it is not relevant, it does not matter how many true facts were mentioned in it; it cannot be used against the other persons accused in the case. A.I.R. 1935 All. 882 =36 Cr.L.J. 925=1935 A.W.R. 937=1935 A.L.J. 960=156 Ind. Cas. 357,

——S. 24—Duty of Court.

Before placing the confession before the jury, the Judge should carefully consider all the circumstances disclosed in the evidence and come to a decision whether these circumstances do justify a well founded conjecture which may be sufficient for excluding it from evidence. A.I.R. 1934 Cal. 636=61 Cal. 399=38 C.W.N. 659=35 Cr. L.J. 1479=152 Ind. Cas. 44.

——S. 24—Duty of Court.

Case entirely resting on confession—Manner in which confession obtained uncertain—Accused should get benefit of doubt. 119 Ind. Cas 420=1930 Cr. C. 104 =30 Cr.L.J 1080=A.I.R. 1930 Lah. 88.

——S. 24—Duty of Court—Admissibility of confession must be decided before contents of confession are looked at.

When the admissibility of a confession depends upon a conclusion as to the truth about conflicting evidence antecedent to the making of the confession and tending to show that it is liable to rejection under S. 24, the trial Judge must make up his mind upon this issue, and decide the question of admissibility before relying upon the contents of the confession. 86 Ind. Cas. 1001=26 Cr.L.J. 937=6 L.R.A. Cr. 89=A.I.R. 1925 All. 606.

——S. 24—Doubt as to—Admissibility—Court should lean in favour of of accused.

In a case of doubt on the question of admissibility of evidence when it is of such vital importance to the prisoners as their own confessions one should not hold them as admissible unless one is affirmatively satisfied as to their relevancy. **R. v. Warringham,** 2 Den. C.C. 447-n, (1851), Foll. 86 Ind. Cas. 414=52 Cal. 67= 29 C.W.N. 300=26 Cr.L.J. 782=A.I.R. 1925 Cal. 587.

——S. 24—Duty of Court—Three-fold function.

In scrutinising a case from the point of view of S. 24, the Court will have to perform a three-fold function. It will have, as a Court, to determine the sufficiency of the inducement, threat, or promise as affording certain grounds; it will have again to clothe itself with the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition that is mentioned in the section; lastly, it will have to judge, as a Court, if the confession appears to have been caused in consequence of the inducement, threat or promise: [52 Cal. 67, Rel.] There is no rule of law which compels a Court to raise an inference of improper inducement from the mere fact that a confession is retracted. 93 Ind. Cas. 978=7 L.L.J. 482=6 Lah. 415=27 Cr.L.J. 514=A.I.R. 1925 Lah. 605.

7. Evidentiary value.

——S. 24—Evidentiary value of—Partial confession.

In a confession before a Magistrates, the accused who was charged with murder of G and his wife stated that he inflicted two injuries on G, one on the neck

and the other on the shoulder and also two injuries on G's wife, one on the head and other on the face. The doctor found a large number of injuries on both the dead persons and two in each case corresponded to the injuries of which mention was made in the confession.

Held, that the fact that accused admitted having caused only two injuries to each of his victims would only go to show that he wanted to minimise his act and the confession was not contradicted by medical evidence. A.I.R. 1945 Lah. 91=47 P.L. R. 11.

——S. 24—Evidentary value.

The judicial confession of an accused is good evidence and he can be convicted on the strength of it. But where such confession is the only evidence, it must be accepted as true in all its details. A. I. R. 1945 Lah. 43=46 P.L.R. 379=46 Cr. L. J. 736=220 Ind. Cas. 325.

——S. 24—Evidentiary value—Exculpatory and inculpatory statements.

It is true that there is no guarantee of truth in a confession in which the maker of the confession entirely exculpates himself and throws the blame on some other person. But it cannot be said of a confession which is not self-exculpatory, which does implicate the maker substantially but gives a more prominent part to other person. A.I.R. 1945 Pat. 470=24 Pat. 131.

——S. 24—Evidentiary value.

A confession is, in itself, sufficient to support conviction of person making it. A.I.R. 1944 Lah 472= I.L.R. (1944) Lah. 463=46 P.L.R. 355=46 Cr. L.J. 152=216 Ind. Cas. 253.

——S. 24—Evidentiary value—Divergences between confessions before police and Magistrate.

Slight divergences between the two confessions, the one made to the Police Officer, and the other to the Magistrate, or the omissions from the confessions of facts spoken to by the prosecution witnesses are not sufficient reasons for rejecting the confessions. A.I.R. 1941 Mad. 267=52 L.W. 258=1940 M.W.N. 767=42 Cr. L.J. 396=193 Ind. Cas. 14.

——S. 24—Evidentiary value—Question by Magistrate, held defective and answer by accused, held, no admission.

Question put to the accused by the Magistrate recording the confession was to the following effect: "did you throw the born child into the well as the result of which he died of drowning?" To this, answer gigen was "Yes":

Held, that question was put in an unfortunate form as it was a question composite in nature to which it was almost impossible to give a direct answer 'yes' or 'no' and it could not therefore, be inferred from it that the accused did actually admit that the child was born alive. A. I. R. 1941 Pesh. 22=42 Cr. L. J. 381= 193 Ind. Cas. 284.

——S. 24—Evidentiary value.

When a confession itself contains a statement that the accused made it under the threat of the police, it must go against the prosecution. The confession made by an accused person is a document which should be taken into consideration with the utmost possible care. A.I.R. 1940 All. 46=1939 A. L. J. 966=41 Cr. L.J. 58=1939 A.W.R. 768=186 Ind. Cas. 192.

——S. 24—Evidentiary value—Accused confessing but introducing in it circumstances to avoid—Conviction for murder—Evidence showing murder—Accused can be convicted of murder on his confession.

Accused confesses to having caused the death of a woman and admits having robbed her after death. But during that confession, he introduces into it circumstance with a view no doubt to excuse himself from a conviction for murder. It is clear from the medical evidence and the Court is satisfied that the woman lost her life not in the least in the manner described by the accused but that by violence to the neck and pushing of the cloth into her mouth by the accused:

Held, that the violence amounts to murder and the accused can be convicted of murder upon his confession. 187 Ind. Cas. 481=1940 M. W. N. 169=41 Cr. L.J.461.

——S. 24—Evidentiary value—Confession to jail warder.

A confession alleged to have been made by the accused in jail to the warder, in the absence of any evidence on the part of the prosecution to prove it was read to the accused and acknowledged by him to be correct is of absolutely of no evidentiary value against the accused. 1930 M.W.N. 1249.

——S. 24—Evidentiary value of.

Although the evidence of admission of guilt to villagers is sufficient to justify the conviction, still the evidence that such an admission was made must be closely scrutinized like all other evidence which is used to prove a case of murder. 117 Ind. Cas. 737=6 O. W.N. 309=30 Cr.L.J. 829=1929 Cr. C. 14=A.I.R. 1929 Oudh 272.

——S 24—Value of confession.

The mere fact that there was a race for pardon does not detract from the value of the confession, if that race for pardon does not appear to have been caused by an inducement or promise held out by one in authority. 113 Ind. Cas. 65=11 Lah. L. J. 5=30 Cr. L.J. 49.

——S. 24—Evidentiary value—All the parts of a confession are not entitled to equal weight—Some may be believed while others rejected.

After the entire statement of a prisoner has been given in evidence, any part of it may be contradicted by the prosecution if they choose to do so, and then the whole testimony is left open for consideration precisely as in other cases where one part of the evidence contradicts another. Even without such contradiction it is not supposed that all the parts of a confession are entitled to equal credit. If sufficient grounds exist the part that charges the prisoner may be believed, while that which is in his favour may be rejected : 40 Cal. 873, Foll. 98 Ind. Cas. 178=1 Luck. 417=29 O. C. 369=13 O.L.J. 809 =3 O.W.N. 800=27 Cr. L. J. 1282=A. I. R. 1926 Outh 618.

——S. 24—Confession—Evidentiary value—Corroboration.

The law does not require that the confession of an accused person should be corroborated before it can be acted upon. It is for the Court to decide whether it believes a confession or not. 20 Cr. L. J. 721=52 Ind. Cas. 881 (All).

——S. 24—Value of confession.

When the story of confession was not told by the witness until after a fortnight of the occurrence, the evidence is unreliable. 71 Ind. Cas. 219=24 Cr. L. J. 91=1 Pat. 130=4 P.L.T. 76=A.I.R. 1922 Pat. 582.

——Ss. 24 and 25—Confession—Evidentiary value—English law—Statement by accused—When admissible.

Under the English Criminal law, no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The fact that a statement was made by an accused under circumstances of hope, fear, or otherwise, strictly speaking, goes only to minimise its weight.

The rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out or fear inspired by a person in authority, is a rule of policy. 18 C.w.N. 705=15 Cr. L.J. 326=1 L.W. 989=23 Ind. Cas. 678 (P.C.).

——S. 24—Confession—Evidentiary value—Admissibility.

A confession to be admissible must be voluntary and made without any pressure. 35 All. 260=14 Cr. L.J. 211=11 A.L.J. 286=19 Ind. Cas. 307.

——S. 24—Confession—Evidentiary value.

The confession and the other statement which a prisoner has made in verification, and the depositions which he has given before the Magistrate are all evidence against him. 38 Cal. 169=15 C.W.N. 25=11 Cr. L.J. 710=8 Ind. Cas. 770.

——S. 24—Confession—Evidentiary value—Voluntary—Admissibility.

A statement of the accused containing an allegation that it was not voluntary cannot be taken to be a voluntary one, simply because the accused has signed the statement. 37 Cal. 735=11 Cr. L. J. 694=8 Ind. Cas. 653.

——Ss. 24 and 25—Confession—Evidentiary value—Voluntary—Evidence of Magistrate.

Where the Magistrate in whose presence a confession was made is called as a witness and swears that the statement was made before him freely and willingly and not in the presence of a policeman, the confession is voluntary and can be acted upon. 2 Lah. L.J. 653.

——S. 24—Confession—Deposition—Contradiction—Value to be estimated of the confessional statements.

The tests for appreciating the evidence of witnesses cannot appropriately be applied in estimating the value to be attached to a confession. The statements of an accused person are not subjected to an examination on oath compelling his attention to accuracy in details. The weight given to such statements when they are voluntary rests on the improbability of an accused person deliberately adhering to a self-criminatory statement which is substantially false. And thus variations in detail are of less importance in considering the effect of confession, than they would be in considering a deposition incriminating a person other then the deponent. (1904) 6 Bom. L.R. 773.

8. Extra-judicial confession.

See also EVIDENCE ACT, S. 21.

——S. 24—Murder case—Confession to witness—Corroboration.

Jury should be cautioned that confessions are not always true, and that they must be checked more particularly in a murder case, in the light of the whole of the evidence on the record in order to see if they carry conviction. The jury should be warned that it would be dangerous in the extreme to act on a confession put into the mouth of the accused by a witness having a strong motive for implicating someone else in the murder and uncorroborated from any other source. A.I.R. 1945 P. C. 181=58 M.L.W. 523=1945 A.L.J. 511=1945 M.W.N. 560 (2)=1946 Pesh. L.J.P.C. 181=224 Ind. Cas. 156=47 Cr. L.J. 575 (P.C.).

——S. 24—Extra-judicial confession—Confession to persons not in authority—Admissibility.

A confession is not hit by S. 24, Evidence Act, where none of the persons to whom it is made is a person in authority, though they may have promised not to tell the police. A.I.R. 1943 Lah. 312=45 P.L.R. 391=45 Cr. L.J. 153=209 Ind. Cas. 546.

——S. 24—Accused refusing to make confession before Magistrate—Previous extra-judicial confession.

A man labouring under great emotion may confess. When time has passed—specially where the accused had already been convicted of murder—and feelings have cooled, discretion may cause him not to confess. But this is no reason for rejecting the confession made at another time and under different circumstances. A.I.R. 1943 Sind 114=I.L.R. (1943) Kar. 125=44 Cr. L.J. 530=206 Ind. Cas. 493.

——S. 24—Extra-judicial confession—Statement made on oath to Assistant Registrar.

A confessional statement made on oath by an accused person before the Assistant Registrar of Co-operative Societies in an inquiry held by him in regard to certain forged cheques is not necessarily inadmissible under S. 24, Evidence Act. A.I.R. 1942 Mad. 654=(1942) 2 M.L.J. 112=55 L.W. 462=1942 M.W.N. 436=44 Cr. L.J. 72=203 Ind. Cas. 479.

——S. 24—Extra-judicial confession—Evidentiary value.

Extra-judicial confessions are to be regarded with caution, but it does not follow that they are always to be rejected. A.I.R. 1951 Sind 129 I.L.R. (1941) Kar 257=42 Cr. L.J. 741=195 Ind. Cas. 458.

——S. 24—Extra-judicial confession.

Admission of guilt in application dictated to petition writer in Court and then presented to Magistrate is admissible under S. 21. Evidence Act. It does not become irrelevant under S. 24 or S. 25, Evidence Act. A.I.R. 1939 All. 242=1939 A.L.J. 107=1939 A.W.R. 190=40 Cr. L.J. 559=I.L.R. (1939) All. 377=181 Ind. Cas. 646.

——S. 24—Extra-judicial confession.

In dealing with an extra-judicial confession, particularly when it is not anywhere recorded the Court must be very careful and should not act upon it unless it is proved by evidence of the most reliable character. A.I.R. 1938 Pat. 308=19 P. L. T. 268=39 Cr. L. J. 428=4 B.R. 451=17 Pat. 396=164 Ind. Cas. 524.

——S. 24—Extra-judicial confession.

Excepting the statement of the accused as to the place of the offence which has led to some discovery, the extra-judicial confession of the accused to the Magistrate must be wholly excluded. A.I.R. 1937 Lah. 208=38 Cr. L.J. 583=39 P.L.R. 419=168 Ind. Cas. 745.

——S. 24—Extra-judicial confession.

Little if any, importance should be attached to an extra-judicial confession often found to bolster up the circumstantial evidence on which a case depends. A.I.R. 1932 Oudh 324=9 O.W.N. 170=33 Cr. L.J. 379=7 Luck. 623=137 Ind. Cas. 63.

——S. 24—Extra-judicial confession is of great importance.

No doubt the extra-judicial confession is of great importance but it must be a true extra-judicial confession and not one fabricated in order to provide additional evidence for what rightly or wrongly the investigation officer considers to be a weak case. 117 Ind. Cas. 737=6 O.W.N. 309=30 Cr. L.J. 829=1929 Cr. C. 14=A.I.R. 1929 Oudh 272.

——S. 24—Extra-judicial confession are not entitled to any weight—To base conviction on such a confession is not safe.

Apart from the question whether or not extra-judicial confessions are inadmissible in evidence they are not of such a nature as to entitle them to any weight, because it is impossible to ascertain the exact words used by the person. To base a conviction on such is not safe: 111 Ind. Cas. 449=29 P.L.R. 486=29 Cr. L.J. 865=A.I.R. 1928 Lah. 858.

——S. 24—Extra-judicial confession.

Confession before villagers who are trustworthy witnesses may be as strong evidence against accused a-confession before Magistrate and requiries no corrobora tion. 112 Ind. Cas. 897=5 O.W.N. 698=30 Cr. L.J. 33=11 A.I.Cr. R. 520=A.I.R. 1928 Oudh 393.

9. Free confession.

——S. 24—Free confession—Consideration of antecedent circumstances.

Where there is no room for any doubt as to the genuineness of the confession arising from the procedure followed or from its contents, the antecedent circumstances may be of material assistance in determining whether the confession should be believed. They may afford substantial support for the belief that it is true or, on the other hand, they may be of such a nature as to suggest doubt. When a few weeks before her murder, a woman writes to the authorities that her life is in danger from a certain person, giving reasons for her apprehensions and when upon the police inquiry, her fears are reported to be well-founded and when shortly after her murder, that person, is arrested and makes a clear and unequivocal confession, almost boasting of his crime, it is not unreasonable to conclude that that confession is probably true. A.I.R. 1946 All. 15=222 Ind. Cas. 538=I.L.R. 1946 A.111=1946 A.L.J. 77=47 Cr. L.J. 311.

——S. 24—Free confession.

If there is the slightest doubt whether the statement was voluntarily made, then this defect would be an important factor in favour of the accused and in favour of rejecting his confession. A.I.R. 1938 Mad. 490=1938 M.W.N. 90=47 M.L.W. 161=(1938) 1 M.L.J. 289=39 Cr. L.J. 585=175 Ind. Cas. 422.

——S. 24—Free confession—Questions put to accused and his statements showing voluntariness of confession—Confession, if can be rejected merely because formal questions were not asked.

The object of putting the questions set out in R. 85 of the Criminal Rules of Practice is to enable the Magistrate to be quite sure that the statement was a voluntary one; and if one can be sure from the other questions and statements made by the accused that the confession was voluntary and was not brought about by coercion and inducement, then the confession cannot be rejected merely because a formal question was not asked. A.I.R. 1937 Mad. 755=1937 M.W.N. 537=46 M.L.W. 144=39 Cr.L.J. 390=I.L.R. (1938) Mad. 348=173 Ind. Cas. 1001.

——S. 24—Nature of, involves mixed question of law and fact.

The voluntary or involuntary nature of a confes. sion involves a mixed question of both fact and law-A.I.R. 1936 Cal. 227=40 C.W.N. 668=37 Cr.L.J. 676=63 C.L.J. 142=63 Cal. 1089=162 Ind. Cas. 636.

——S. 24—Free confession—Should be voluntarily made in whole.

A confession, if it is to be admissibe in evidence, is to be voluntarily made in whole, not in parts. A.I.R 1936 Sind 140=37 Cr.L.J. 1045=164 Ind. Cas. 1036.

——S. 24—Free confession—Confession to zaildar—Absence of evidence of threat or inducement by zaildar.

A confession made by the accused to the **zaildar**, in the absence of any evidence that any threat or inducement was held out by the **zaildar**, must not be excluded from consideration A.I.R. 1933 Lah. 664 =34 P.L.R. 330=34 Cr. L.J. 1173=146 Ind. Cas. 172.

——S. 24—Free confession—Statement by accused that he made it voluntarily, effect of—Retracted confession, value of.

Where a Magistrate, before recording the confession of an accused takes every precaution to protect his interests, namely, warns him against the risk that he was going to incur in making a confession and obtains from him a clear statement that he had not been put in fear or received any inducement and then the accused makes a deliberate confession of the crime, the confession, though subsequently retracted, is in the absence of proof that it was forced out of the accused by torture or of a satisfactory explanation as to how he came to make it if he was not guilty, admissible in evidence and is sufficient for conviction. 132 Ind. Cas. 70=8 O.W.N. 247=32 Cr.L.J. 830.

——S. 24—Confession after being warned—Accused is bound down by language of confession.

When a man of sound mind and full age makes a confessional statement in ordinary simple language after he has been warned, he must be bound by the language of the statement and by its ordinary plain meaning: A.I.R. 1927 Oudh 17, Fool. 7 O.W.N. 527=A.I.R. 1930 Oudh 353=127 Ind. Cas. 247.

——S. 24—Free confession.

Confession, when not in police custody, to respectable person and not obtained as a result of duress is admissible and sufficient to convict the confessor. 99 Ind. Cas. 232=3 O.W.N. 301=28 Cr. L.J. 104=7 A.I. Cr. R. 238.

——S. 24—Free confession.

A man of sound mind and full age, who makes a statement in ordinary simple language, must be bound

by the language of the statement and by its ordinary plain meaning. If the statement is believed by the Court to be true, and if the Court is satisfied that there was nothing of the nature referred to in S. 24 of the Evidence Act, no improper conduct of any body but that the man of his own notion made a confession, and if that confession can legally be receivable in evidence and is corroborated, the plain simple meaning of the words used by him must have their full and proper significance, and the act spoken should be given its legal consequence. 89 Ind. Cas. 903=23 A.L.J. 821=26 Cr. L. J. 1431=6 L.R.A. Cr. 161=A.I.R. 1925 All. 627 (F.B.).

——S. 24—Free confession—Threats made but not influencing accused—Confession admissible.

Where threats are made to the accused but the accused makes the statements deliberately, **i.e.**, uninfluenced by the threats, S. 24 does not apply. 25 Bom. 168, Foll. 89 Ind. Cas. 1046=27 Bom. L. R. 1034=49 Bom. 642=26 Cr. L. J. 1478=A. I. R. 1925 Bom. 529.

10. Inducement.

See also EVIDENCE ACT, S. 24—PERSON IN AUTHORITY AND S. 28.

——S. 24—"Inducement, threat or promise"—Proof—Necessity.

S. 24 does not require that there should be positive proof of improper inducement, threat or promise to justify the rejection of the confession. A well-grounded conjecture, reasonably based upon circumstances disclosed in the evidence would be sufficient. I.L.R. (1948) Nag. 147=49 Cr. L. J. 561=A.I.R. 1948 Nag. 344=1948 N.L.J. 489.

——S. 24—Threat or inducement—Textile Control Officer asking accused to tell truth—Powers of revising Court to revise orders of discharge.

The accused was charged with an offence of storing without a licence large quantities of mill made cloth for sale, the evidence against him being primarily the statements made by him to the Textile Control Officer, and the qnantity of cloth seized. The trial Magistrate refused to attach importance to the statements and discharged the accused. On a revision filed by the Crown, the Sessions Judge, while agreeing with the Magistrate in the appreciation of evidence in regard to other particulars, came to the conclusion that the statements of the accused and the quantity of cloth seized were sufficient legal evidence which rendered the order of discharge unreasonable and ordered further enquiry :

Held, in revision (1) that the mere fact that the Textile Control Officer asked the accused to tell the truth did not amount to a threat or inducement within the meaning of S. 24 of the Evidence Act, and the statements were therefore admissible ; (2) Where the trial Magistrate thought there was no legal evidence from which it could be inferred that the large quantity found with the accused was stored for sale but the Sessions Judge found that there was legal evidence from which it could be inferred that the cloth was stored for sale, it was certainly permissible to the Sessions Judge to set aside the order of discharge and direct further enquiry. 60 L.W. 693=1947 M.W.N. 663=49 Cr. L.J. 385=A.I.R. 1948 Mad. 324=(1947) 2 M. L. J. 359.

——S. 24—Inducement — Confession instigated by police.

A confession made at the intigation of the police should not be submitted to the jury at all. A.I.R. 1944 Cal. 39=45 Cr. L. J. 468=211 Ind. Cas. 624.

——S. 24—Inducement—High Court, in appeal, can decide whether confession is caused by inducement.

Per **Khundkar, J.**—When a confession comes before the High Court either in appeal or upon a reference under S. 307, Criminal P. C., or in any other manner, it is open to the High Court to say whether the making of a confession appears, within the meaning of S. 24, Evidence Act, to have been caused by any inducement, threat, etc., as contemplated by that section. If upon the evidence of a witness, it does appear to the Court that the confession falls within the mischief of S. 24, Evidence Act, it must be excluded. A.I.R. (1943) Cal. 625=I.L.R. (1943) 1 Cal. 487=45 Cr. L. J. 155=209 Ind. Cas. 550.

——S. 24—Inducement—Improper inducement—Circumstances making it appear to have been so induced are sufficient.

Per **Sen J.**—Section 24 clearly lays down that where it appears to the Court that a confession was obtained by an improper inducement such as is mentioned in the section, then that confession is irrelevant in a criminal proceding. It is not necessary that it should be proved that the confession was brought by improper inducement. It is quite sufficient if circumstances are placed before the Court which would make it appear that the confession was so induced. A.I.R. 1943 Cal. 625=I.L.R. (1943) 1 Cal. 487=45 Cr. L. J. 155=209 Ind. Cas. 550.

——S. 24—Inducement.

The mere fact that the accused wished to earn a pardon, held, was no reason to hold that any inducement was held out to him to make the confession. A.I.R. 1943 Oudh 269=1943 O. W. N. (C. C.) 88=44 Cr. L. J. 389=205 Ind. Cas. 514.

——S. 24—Inducement—Mere administering of oath, if tantamount to threat.

Merely administering of an oath is not tantamount to threat to the person under oath that if he does not speak the truth, he will be punished for it, so as to bring it within the mischief of S. 24, Evidence Act.

A statement made on oath may be said in certain cases, to be made as the result of the holding out of a threat, but that is always a question of fact. A. I. R. 1942 Mad. 654=55 M. L. W. 462=(1942) 2 M. L. J. 112=1942 M. W. N. 436=44 Cr. L.J. 72=203 Ind. Cas. 479.

——Ss. 24, 27—Inducement—Promise that nothing would happen.

In a murder case, after their arrest, the accused were questioned by the Sub-Inspector in these words ; " Did you commit the offence ; Produce the sticks and knives used by you. You need not be afraid if you do so." All the accused said: "we admit the offence." Thereupon, the Sub-Inspector took down their statements :

Held, that as these statements were made in answer to a direct inducement, namely, that a promise that nothing would happen to them if they produced the sticks and knives which were used and that request was preceded by the words "Did you commit the offence," the statements were inadmissible in evidence under S. 24, Evidence Act. A. I. R. 1942 Mad. 237=1941 M.W.N. 956=43 Cr. L. J. 463=199 Ind. Cas. 87

——S. 24—Inducement—Accused caught red-handed, making confession before Court—He coming from police custody that day but present before Court for considerable period—Overwhelming evidence recorded against him—Confession subsequently retracted—No inference could be drawn that confession was improperly induced. A. I. R. 1938 Lah. 731=40 Cr. L. J. 81=178 Ind. Cas. 572.

——S. 24—Inducement—Magistrate asking accused to 'make a detailed statement'.

The fact that the Magistrate, while recording a confession, asked the accused to make a detailed statement does not make the statement resulting from that question any the less voluntary. Such a question cannot be construted as a threat. A. I. R. 1937 Lah. 399=38 Cr.L.J. 879=I.L.R. (1937) Lah. 481=39 P.L.R. 834=170 Ind. Cas. 5.

——S 24—Inducement—A confession cannot be held inadmissible mereby because it has been retracted or because of allegations as to its having been induced, in the absence of evidence to support them. A.I.R. 1937 Lah. 208=38 Cr. L. J. 583=39 P.L.R. 419=168 Ind. Cas. 745.

——S. 24—Inducement—Where the accused in his statement says that he was induced to confess by a promise to become a Court witness, in ordinary circumstances, little weight might attach to such a statement.

Held, however. that in this circumstance, coupled with other facts of the case, the confession of the accused should be rejected under S. 24, Evidence Act. A. I. R. 1937 Sind 251=31 S. L. R. 494=39 Cr. L.J. 10=171 Ind. Cas. 737.

——S. 24—Inducement outside S. 24.

If a confession is not voluntary in the wider sense of the term, **ex hypothesi** the person who made it did not do so from any desire to tell the truth. This fact in itself introduces an element of suspicion. In such circumstances if facts are proved which suggest that an inducement of some kind, although outside the terms of S. 24, was in fact given, the Court may well refuse to accept the confession as true. A.I.R. 1936 Cal. 316=63 C.L.J. 232=37 Cr. L. J. 775=63 Cal. 1053=163 Ind. Cas. 41.

——S. 24—Inducement—Confession during cross-examination as approver in another case.

Whether the confession is made by the accused to a Magistrate during his cross-examination as approver in another case, and not because he was requested to do so by any one acting on behalf of the prosecution, the confession cannot be said to be one made under the influence of promise of pardon. 165 Ind. Cas. 795=38 Cr.L.J. 84.

——Ss. 24 and 28—Confession under influence of promise—Admissibility—Influence worn off by time—Admissibility.

Where the confession is made while the accused is strongly influenced by the promise made to him by the Police Officer that if he spoke the truth he would escape punishment, the confession is inadmissible in evidence. But where, however, the effect of the promise had worn off by the time that the confession was made, then, under S. 28, Evidence Act. the confession is admissible. A.I.R. 1936 Rang. 455=37 Cr. L. J. 1137=165 Ind. Cas. 319.

——S. 24—Inducement—Belief of accused that person to whom he confesses is one in authority—Whether sufficient.

Section 24 speaks of "grounds which would appear to an accused person to be reasonable." But it does not speak of a "person who would appear to him to be in authority". A person in authority for the purposes of this Act must be a person who stands in such relation to the accused as to imply some power of control or interference in regard to his prosecution. The belief of an accused that the persons to whom he made a confession were "person in authority." is not sufficient to bring them within the term. A.I.R. 1934 Sind 172=29 S.L.R. 1=36 Cr. L. J. 223=152 Ind. Cas. 1032.

——S. 24—Inducement or pressure—Caution—Duty of Court.

Courts must exercise great caution if there are circumstances which indicate inducement or pressure which is not recognised by law. Inducement by means of promise of pardon is an instance of inducement permitted by law. A. I. R. 1934 Lah. 583=35 Cr. L. J. 752=148 Ind. Cas. 745.

——S. 24—Inducement—Accused in police custody only for short period and never in illegal custody—Confession, if tainted.

Where the accused were not in illegal custody for a single moment and they were in police custody for a very short time, there is no ground for saying that the confessions made by the accused were caused by inducement, threat or promise within the meaning of S. 24, Evidence Act. A.I.R. 1933 Cal. 747=57 C.L.J. 213=34 Cr. L.J. 1222=146 Ind. Cas. 186 (S.B.).

——S. 24—Inducement—Superior Officer of accused holding out inducement to accused—Confession made by accused.

If a Superior Officer holds out some inducement to a subordinate and then any confessional statement is made by that subordinate, it cannot be used against him in a subsequent prosecution.

Where the accused, falling at his Superior Officer's feet, begged to be saved if he disclosed everything and the latter told him that he would try his utmost to save him if he spoke the truth:

Held, that some kind of inducement was held out by the Superior Officer to the accused which had the effect of inducing him to mak a confession of his guilt and hence the confession was inadmissible. A.I.R. 1933 Cal. 644=60 Cal. 719=34 Cr. L. J. 1187=145 Ind. Cas. 962.

——S. 24—Inducement.

Per Coldstream, J—When there is no suggestion that a confession made to a Magistrate was improperly induced, the mere fact that the accused hoped for a pardon will not render the confession inadmissible. Nor will the fact that it was not recorded with the precautions required by S. 164, Criminal P.C., compel its exclusion:

Held, on the facts, that there was no confession and that all that was said to the Magistrate was that the accused had made disclosures to the police on promise of pardon. A.I.R. 1933 Lah. 987=35 Cr. L.J. 654=148 Ind. Cas. 400.

——S. 24—Inducement depends on circumstances—Burden of Proof.

Whether the words used by a person to a confessing accused were intended to convey to the accused an inducement, threat or promise or not, and whether such

inducement, threat or promise was sufficient or not to give the accused reasonable grounds to suppose that he will gain an advantage or avoid an evil of a temporal nature in reference to the crime must depend on the surrounding circumstances in which the words were used. It is upon the prosecution to prove that the confession was not improperly induced.

Where the accused was taken to a person in authority in the place where he had encamped with the police party and he, pointing out a policeman to the accused, reminded him and that the police were tere and asked him to speak the truth:

Held, that although the accused might not strictly, speaking, have been in the custody of the police, yet the words used to him were not intended merely to convey a warning to him that if he did not speak the truth, it would be the worse for him. A.I.R. 1933 Sind 409=28 S. L. R. 5=35 Cr. L.J. 527=147 Ind. Cas. 1083.

——S. 24—Inducement—Discretion of Court.

Section 24 leaves it entirely to the Court to form its opinion as to whether the inducement, threat or promise held out in any particular case was sufficient to lead the accused to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing. A.I,R. 1932 Sind 64=26 S. L. R. 191=33 Cr. L.J. 650=138. Ind. Cas. 618.

——S. 24—Inducement.

Accused making confessing statement to witness--Judge rejecting it thinking that accused made it under belief that it would be to his advantage—Confession is not invalid and should not be rejected. 2 Mr. Cr. C. 56= A.I.R. 1929 Mad. 92.

——S. 24—Inducement—Village Panch telling that truth has come out and the accused had better say what he knew—Confession was held inadmissible.

Whether any threat or inducement was offered or not in a particular case is a question of fact and has to be decided with reference to the circumstances of that case and that it is not safe to make any generalisations merely on the ground that certain set of words used in a particular case or particular cases have been held to be in the nature of an inducement.

When a Village Panch told the accused that the truth had come out, that the villagers, were being worried about the affair and he had better say what he knew and the accused thereupon made a confession.

Held, that there was veiled threat as well as inducement and the confession was inadmissible: A.I.R. 1923 C. 458, Foll. 116 Ind. Cas. 770=8 Pat. 289=10 P.L.T. 549=30 Cr. L.J. 675=1929 Cr. C. 62=13 A.I. Cr. R. 143=A.I.R. 1929 Pat. 275.

——S. 24—Inducement—Confession should not be accepted, when evidence does not show that it was not caused by inducemct.

When the Court is not satisfied on evidence that the confession made by the accused was not caused by any inducement, threat or promise proceding from any person in authority, the confession should not be accepted. 1929 Cr. C. 539=A.I.R. 1929 Sind 245.

——S. 24—Inducement—Statement of accused before a Magistrate: "I want to make a clean breast of everything for the reason that if I serve the Government in any way, the Government may take a pity on me" was held not in itself admissible.

In order to make a confession inadmissible there must he something from which it should be inferred that the inducement or promise was given to the accused by some person who had authority to give it. It is not enough for the accused to entertain a hope, which may turn out to be an idle hope, that in consequence of his giving certain information, he would be rewarded by the Government, it must be shown that the hope was directly inspired by some one who had authority to make the promise.

Where an accused in making a confession to a Magistrate said: "I want to make a clean breast of everything for the reason that if I serve the Government in any way, the Government may take pity on me."

Held, that this was not in itself sufficient to render the confession inadmissible having regard to the provisions of S. 24. 109 Ind. Cas. 225=32 C.W.N. 616=10 A.I.R. Cr. 223=29 Cr. L.J. 497=A.I.R. 1928 Cal. 500.

——S. 24—Inducement—Mukhia of a village, confessed to—Confessor volunteering to make the statement—There is no inducement.

Where. although the Mukhia, the person confessed to, is undoubtedly a man in authority, and would appear to a villager as a person who was able, or likely, to be able, to promise a pardon or some other inducement the confessor volunteered to make the statement if he could get some assurance from the Mukhia that he, the Mukhia, would do his best to help him.

Held, that it is not an inducement proceeding from the person in authority within the meaning of the section so as to make the confession either inadmissible or irrelevant. 97 Ind. Cas. 44=49 All. 57=24 A.L.J. 958=27 Cr. L.J. 1068=7 L.R.A. Cr. 156=A.I.R. 1926 All. 737.

——S. 24—Inducement—Pressure by police inducing accused to suppose that he would get a temporal benefit—Confession is irrelevant.

If the pressure exercised by a police officer in extorting confession from an accused is sufficient to give the accused grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature, the confession would not only be weak in value, but wholly irrelevant under S. 24. 91 Ind. Cas. 894=7 L.R.A. Cr. 1=27 Cr. L.J. 158=A.I.R. 1926 All. 246.

——S. 24—Inducement—Person in authority telling accused that if he gives true account he will be pardoned—Accused's confession is irrelevant, unless the inducement has ceased to operate.

If a man is told by a person in authority that if he gives a true account of the matter he will be pardoned, that is a continuing offer, the thread of which continues unbroken until it is accepted by the confession which completes the bargain, unless there is some circumstance which breaks it so as to show that the inducement no longer operates, and that the person confessing has no longer any hope of gaining anything from the authorities by making confession. 86 Ind. Cas. 1001=26 Cr. L.J. 937=6 L.R.A. Cr. 89=A.I.R. 1925 All. 606.

——S. 24—Inducement—Moral exhortation by direct superior of accused is not objectionable.

If a person who is suspected of an offence is examined by a person in direct authority over him and if it is only in consequence of an inducement by way of benefit or a threat that the person under suspicion makes self-incriminating statements such are, broadly speaking, not receivable in evidence because they are not in law regarded as strictly of a voluntary nature but as having been perhaps induced in the one case by a false hope and in other by fear. On the other hand a merely moral exhortation to tell the truth is in no way objectionable. 89 Ind. Cas. 961=4 Pat. 646=26 Cr. L.J. 1441=A.I.R. 1925 Pat. 772.

——S. 24—Inducement—Promise to consider the prayer for being taken as approver—Confession is inadmissible.

Where accused is told by a person in authority that if he makes a voluntary confession which is considered to be full and true, his prayer for being made an approver will receive due consideration.

Held, the confession made under such circumstances is inadmissible. 74 Ind. Cas. 529=45 All. 633=21 A.L.J. 585=24 Cr. L.J. 785=A.I.R. 1924 All. 72.

——S. 24—Confession under inducement of being made approver is not admissible.

At the end of his confession accused said that he had been told by the **darogha** that he would be made an approver. He explained to the Magistrate in the most convincing fashion that he was telling the truth for this reason, and that he knew that what he said might procure his conviction or his release. The Magistrate wrote the usual certificate in an unusual form. He said: "I believe the above statement was voluntarily made although it is quite possible that the police officers may have told him that he will be made an approver."

Held, that this confession should not have been admitted in the face of this. Section 24 of the Evidence Act makes a confession inadmissible, if it appears to have been caused by any inducement or promise 73 Ind Cas. 62=21 A.L.J. 143=45 All. 300=4 L.R.A. Cr. 13=24 Cr. L.J. 526=A.I.R. 1923 All 352.

——S. 24—Confession on a promise of release is not admissible.

Where the accused told the Magistrate that he had been told to tell the truth by a **Saheb** who told him to tell the truth and he would be released:

Held, that the confession was made under an inducement. 60 Ind. Cas. 1006=45 Bom. 1086=23 Bom. L.R. 338=22 Cr. L. J. 318=A.I.R. 1921 Bom. 70.

——S. 24—Inducement—Confession—Fear encouraged by Police officer—Offer of pardon—Statements are inadmissible.

A confession made by an accused person under fear, encouraged by a police officer in a subtle way in the hours that elapsed before the accused reached the Magistrate, is inadmissible in evidence. Accused made an incriminating statement before a Magistrate and was sent to jail. An application for bail was refused at the instance of the Police. The accused was suddenly released on nominal bail and thereafter he made himself useful to the Police by pointing out various places and in other ways. Subsequently he made a second statement before the Magistrate more detailed than the first, much in the fashion of an approver's statement.

Held, that under such circumstances it was difficult to believe that the accused was not given to understand that a pardon was going to be offered to him. The second statement by the accused was inadmissible in evidence. A confession made by an accused person on inducement by a Police Officer that he would be offered a pardon is admissible in evidence. The evidence of an accomplice, if suspicious, requires corroboration. 60 Ind. Cas. 417=22 Cr. L. J. 225=32 C.L.J. 204.

——S. 24—Inducement—Onus of proving absence of inducement, etc., is on prosecution.

If it appears to the Court that there is reason to suspect that the confession was obtained by inducement so as to bring it under the provisions of Section 24, the prosecution must show that the confession was freely made. 68 Ind. Cas. 413=26 C. W. N. 54=A. I. R. 1921 Cal. 458.

——S. 24—Burden of proving inducement—Confession—Retraction of—Ill-treatment and inducement—Onus.

Where an accused when retracting a confession alleged ill-treatment and inducement by the police to extract the confession, the onus is on him to prove such ill-treatment and inducement. 22 C.W.N. 809=19 Cr. L. J. 959=47 Ind. Cas. 811.

——S. 24—Inducement by police officer—Tender of pardon—Statement made by approver.

The accused made a confession in which he implicated three persons into an offence of murder. At the trial of the three persons the accused was granted a conditional pardon and examined as a witness for the prosecution. The three persons were acquitted and the accused was tried for the offence of murder. **Held,** the confession made by the accused in the first murder trial was inadmissible in evidence against him under S. 24 of the Evidence Act. The statements made by the accused in the first murder trial as a witness under a tender of pardon are admissible for they were removed from the operation of S. 24 by virtue of S. 339, clause (2) of the Cr. P. Code. The statements made by the accused in the trial, of the Police Officer concerned in the investigation of the case could be admitted in evidence against him on his own trial for murder. 22 Bom. L.R. 1247=59 Ind. Cas. 324=22 Cr. L. J. 68.

——Ss. 24 and 27—Inducement and pressure.

A confession caused by illegal inducement or illegal detention of the accused's relatives is irrelevant, and the question of its truth is immaterial. 11 Cr. L.J. 41=4 Ind. Cas. 759 (U. B.)

——S. 24—Confession—Promise by Police.

The confession of an accused person made before a Magistrate cannot be used in evidence against him at his trial when the Police told him that he could get a pardon if he would make a confession, and he made that confession under the hope of obtaining pardon. (1904) 1 A.L.J. 110.

——S. 24—Inducement, threat, etc.

Q as a witness made a statement implicating himself, in the trial of one V. He was then made a co-accused. It was found that the statement was made under circumstances mentioned in S. 24 of the Act. **Held,** that the statement was irrelevant against him. 9 P.R. 1911 Cr.=166 P. L. R. 1911=22 P. W. R. 1911, Cr.=12 Cr. L.J. 267=10 Ind. Cas. 340.

——Ss. 24 and 27—Inducement or pressure—Information given by accused to Police Office on threat, admissibility of—Confession retracted, disagreeing with other evidence in case.

The fact that a Police Officer got by means of threat an information from a prisoner as to a circumstance incriminating the latter does not render that information inadmissible in evidence. An accused's confession subsequently retracted and not tallying with the other evidence in the case, cannot be pressed as strong evidence against him. 17 Cr. L. J. 33=2 O.L.J. 468=38 Ind. Cas. 321.

11. Person in authority.

——S. 24—Person in authority—Mukhia and a Ziledar—Confession made to—Admissibility.

Where an accused charged with murder is alleged to have made a confession of his guilt to a Mukhia and Ziledar who were among the party deputed by the Sub-Inspector, the investigating officer, to arrest the accused, upon an assurance that he would be set free if he spoke the truth, such a confession would be inadmissible in evidenee against the accused as the Mukhia and Ziledar are "persons in authority" within the meaning of S. 24 of the Evidence Act. 1947 A.L.J. 560=1947 A.W.R. (H. C.) 390=A.I.R. 1948 All. 101=49 Cr. L.J. 46=1948 A.L.W. 17.

——Ss.24, 32 and 33—Person in authority—Cart-puller with bags of sugar—Questioning of, by Supervisor Post Raid Information Service—cart-puller making statement that bags belonged to petitioner—Admission by petitioner that sugar was his, on inducement by Supervisor—Cart-puller not put in witness-box—Inadmissibility of statements.

A Supervisor, Post Raid Information Service, saw a hand-cart on which were two bags and being suspicious, he questioned the hand-cart puller who told him that the bags contained sugar and, on being further asked as to where the sugar had been obtained, referred him to the petitioner. The petitioner being questioned, admitted that the sugar was his and that he had brough it from a ration shop. Thereupon, a complaint under R. 81 (4), Defence of India Rules, for contravention of cl. 4, Bengal Essential Food-Stuffs Anti-hoarding Order of 1944 was filed by the Supervisor. The complainant stated in his cross-examination that he told the accused that if he told the truth, he would let him go, otherwise he would take him to the police:

Held, that by making this promise, he undoubtedly gave the accused grounds which would lead him to suppose that he might gain some advantage by making the statement and at that time, the complainant was certainly taking such action as was sufficient to lead the accused to suppose that he had the necessary authority for that action. Once he had disclosed that the statement of the accused was procured by inducement, it was the duty of the prosecution to show by re-examination or otherwise that the complainant was not a person in authority within the meaning of S. 24, Evidence Act.

Consequently, the evidence with regard to the statements by the accused which were elicited by the inducement offered by the Supervisor was inadmissible.

Held also, that as the cart-pulller was not examined as a witness, his statements were inadmissible either under S. 32 or S. 33. A.I.R. 1945 Cal. 360=79 C.L.J. 149=46 Cr.L.J. 683=221 Ind. Cas. 24.

——S. 24—President of Village Vigilance Committee, whether person in authority—Statement elicited by him from accused by promise to try to save him—Relevancy.

The President of the Village Vigilance Committee is a person in authority within the meaning of S, 24, Evi. Act and a statement elicited by him from the accused by a promise that if accused would tell the truth, he would try to save him is irrelevant under S. 24. A.I.R. 1939 Mad. 515=1939 M.W.N. 341=49 L.W. 522=40 Cr.L.J. 809=183 Ind. Cas. 561.

——S. 24—Person in authority—Confession to zamindar—Relevancy in absence of evidence of inducement or promise.

A person in authority within the meaning of S. 24 is one who has authority to interfere in the matter of the charge against the appellant. In the United Provinces, **Zamindar** holds no official position and a **lambardar** who is only appointed to collect revenue from co-sharers in a **mahal** has no authority whatsoever to interfere with criminal matters; and no villager, however ignorant, would ascribe any such power to persons of this kind. A confession alleged to have been made to the **zamindars** is not irrelevant under S. 24, when there is nothing to suggest that any inducement or promise was offered or made because the persons to whom the confession was made could not possibly be described as persons in authority within the meaning of the section. A.I.R. 1936 A/l. 470=1936 A.L.J. 376=1936 A.W.R. 409=37 Cr.L.J. 852 (2)=163 Ind. Cas. 661.

——S. 24—Person in authority—Landlord and member of Union Board.

It is doubtful whether a person who is merely the landlord of the village and a member of tho Union Board, is a person in authority within the meaning of S. 24. A.I.R. 1936 Cal. 227=63 C.L.J. 142=40 C.W.N. 668=37 Cr.L.J. 676=63 Cal. 1089=162 Ind. Cas. 636.

——S. 24—Person in authority—Confession to agent of landlord of accused—Inducement.

A confession was made by the accused before retired **Subedar**, the agent of a big landlord in the village whose tenant the accused was. Before the accused confessed to him, he was told that if he told the truth, it would be to his advantage:

Held, that there was an inducement and the confession was made to a person who held a position of considerable authority in the village which is in no way inferior to that of a **Zaildar** and hence it was not admissible in evidence under S. 24. Evidence Act. A.I.R. 1936 Lah. 264=37 Cr.L.J. 1026=164 Ind. Cas. 891.

——S. 24—Person in authority—Honorary Magistrate also a zaildar.

A Honorary Magistrate who is also a **zaildar** is a person in authority within the meaning of S 24. A.I.R. 1934 Lah. 417=36 Cr.L.J. 211=37 P.L.R. 25=15 L. 856=152 Ind. Cas. 998.

——S. 24—Person in authority—Manager of office.

Where the manager of a company said to the accused who had committed the offences of embezzlement and falsification of accounts, that it would be in his interest if he made a clean breast of the whole affair and gave the substance of what he (accused) told him in writing, and insisted on having something in writing from the accused the same day and the accused complied with the demand;

Held, (i) that the manager did hold out a sort of inducement and threat to the accused and the accused had reason to believe that he would gain by making confession:

(ii) that the manager was a person in authority within the meaning of S. 24, Evidence Act, and the admission was not admissible. A.I.R. 1932 Sind 64=26 S.L.R. 191=33 Cr.L.J. 650=138 Ind. Cas. 618.

——Ss. 24 to 27—"Person in authority", meaning of—Confession by inducement, exclusion of.

The words 'person in authority' in S. 24, Evidence Act, have reference to a person who has authority to interfere in the matter under enquiry. Generally speaking a "person in authority" within the meaning of S. 24 is one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him.

Section 24 excludes a confession procured by inducement, threat or promise having reference to the charge, only when the inducement, threat, or promise is sufficient to give the accused person reasonable grounds for supposing that by making it, he would gain any advantage or avoid any evil in reference to the proceedings against him. A.I.R. 1933 Pat. 149=14 P. L. T. 82=34 Cr. L. J. 349=12 Pat. 241=142 Ind. Cas. 474 (S. B.).

——S. 24—Person in authority—Zamindar connected with investigation.

Where **zamindars** are directly connected with the investigation by the direction of the police, they are persons in authority within the meaning of S. 24, Evidence Act, and any confession made to them by an accused person under an inducement offered to him is inadmissible in evidence. A. I. R. 1932 Sind 55=33 Cr. L.J. 641=138 Ind. Cas. 614.

——S. 24—Person in authority—Co-villager exercising no influence or authority is not "person in authority."

It would be doing violence to the terms of S. 24, to hold that a co-villager who does not exercise any influence or authority in the village is a person in authority, although the accused might have thought him to be such a person. 57 C. 488=A. I. R. 1930 Cal. 633.

——S. 24—Inamdhar is no person in authority.

An Inamdhar, who is in a position inferior to that of an inamdhar cannot be treated as a person in authority. 114 Ind. Cas. 719=30 P.L.R. 269=30 Cr. L. J. 375=1929 Cr. C. 102=A. I. R. 1929 Lah. 558.

——S. 24—Person in authority.

Where the monigar took the accused aside and asked him not to cry but to speak the truth.

Held, that the statement made under those circumstances was not induced by any threat or promise and that it was admissible in evidence.

Quaere: Whether the monigar was a person in authority within the meaning of S. 249. 1929 M. W. N. 791.

——S. 24—Ziladar serving under a great estate is person in authority.

A Ziladar serving under a great estate (such as that of Kapurthala) is a person in authority and if a such person holds out inducement to the accused, the admissions made to him would not be admissible: 117 Ind. Cas. 737=6 O. W. N. 309=30 Cr. L. J. 829=1929 Cr. C. 14=A.I.R. 1929 Oudh 272.

——S. 24—Person in authority.

A Village Panch is a person in authority. A.I.R. 1923 Cal. 458 and 20 C.W.N. 572, Rel. on. 116 Ind. Cas. 770=8 Pat. 289=10 P.L.T. 549=30 Cr L.J. 675=1929 Cr. C. 62=13 A. I. Cr. R. 143=A. I. R. 1929 Pat. 275.

——S. 24—Person in authority—Third party sent by police to induce accused.

Where a third person was sent by police to make the accused confess by an inducement that he would be dealt with leniently if he confessed.

Held, that the inducement proceeded from a person in authority. 112 Ind. Cas. 347=9 Lah. 671=29 Cr. L.J. 1019=11 A. I. R. Cr. R. 284= A. I. R. 1928 Lah. 476.

——S. 24—Person in authority--Zamindar of the village who was also a Magistrate.

Where a confession was made to the Zamindar of the village who was also a Magistrate and was regarded as an important person in the village having authority in the matter.

Held, the Zamindar must be regarded as a person in authority within S. 24. 101 Ind. Cas. 881=28 Cr. L. J. 497=8 P.L.T. 566=8 A. I. Cr. R. 151=A. I. R. 1927 Pat. 257.

——S. 24—Person in authority—Whether includes village headman—Accused speaking truth of her own accord—No proof of inducement—Admissibility of confession.

Where the accused made the confession apparently out of remorse and under an overwhelming impulse to speak the truth and it did not appear that the village headman to whom the statement had been made had told her that if she would tell the truth, she would be let off.

Held, that though the headman was a person in authority within the meaning of the section there was no inducement proved which vitiated the confession. and that it was consequently admissible. 6 O. W. N. 947.

——S. 24—Person in authority.

A Vakil's clerk is not a person in authority within S. 24. 88 Ind. Cas. 514=12 O. L. J. 495=2 O. W. N. 398=26 Cr. L.J. 1154=A.I.R 1923 Oudh 597.

——S. 24—Panchayatdars are not persons in authority.

Panchayatdars are not persons in authority within the meaning of S. 24. Considering the nature of the functions of panchayatdars they are practically private detectives helping the police in finding out the criminals. They cannot be treated as men having any authority over the accused. 76 Ind. Cas. 829=18 M.L.W. 886=25 Cr. L.J. 269=A.I.R. 1924 Mad. 230 =45 M.L.J. 845.

——S. 24—Collecting and assistant panchayats are persons in authority within the section.

The collecting panchayat and the assistant panchayat are both persons in authority within the meaning of the section. Consequently the confession which the accused made after he had been assured that he would be saved from the consequences, was not

admissible by reason of provisions of S. 24 of the Evidence Act. It is difficult for High Court to come to the conclusion that if the accused was induced by the promise which was made to him by assistant panchayat and others to make the first confession, that inducement, was not to some extent the cause of his making the confession before the magistrate. 74 Ind. Cas. 264=50 Cal. 127=24 Cr. L.J. 760=A. I. R. 1923 Cal. 458.

——S. 24—Person in authority—Confession to Lambardar under threats is in admissible.

A Lambardar being a person in authority a confession induced by him by the use of threats is inadmissible in evidence under S. 24 of the Evidence Act. 81 Ind. Cas. 555=4 Lah. L.J. 235=25 Cr.L.J. 939=A.I.R. 1922 Lah. 263.

——S. 24—Person in authority—Confession to excise superintendent—Admissibility of.

A confession made by an accused to the superintendent of excise in a trial for illicit possession of opium is admissible, provided no inducement, threat or promise was held out to the accused for making the confession. 22 C.W.N. 451=19 Cr. L.J. 524=45 Ind. Cas. 284.

——Ss. 24, 25 and 26—'Person in authority'—Statement leading to direct inference of guilt—Military officer assisting in Police investigation—Statements made at police search and before arrest—"Custody."

To constitute a 'confession' under the Evidence Act, it is not necessary that the person confessing should make a full and explicit admission of his guilt so clear as to leave no other hypothesis tenable. It is enough if they lead to an inference of guilt. The words "accused person" in Ss. 24 to 26 include any person who subsequently becomes accused, provided that at the time of making the statement criminal proceedings were in prospect. The expression "person in authority" has a wider meaning than the actual prosecutor and the test is, has the person any authority to interfere in the matter and any concern or interest in it, sufficient to give him authority. 19 Cr. L.J. 189=43 Ind. Cas. 605 (Mad).

——S. 24—Person in authority—President of Panchayat if—Confession.

The president of a panchayat which was to consider a case is a person in authority within S. 24, and confession made to him is not therefore admissible in law. 20 C.W.N. 512=23 C.L.J 477=17 Cr. L.J. 188=33 Ind. Cas. 828.

——Ss. 24, 25 and 28—"Person in authority" explained.

S. 24 refers only to a person in actual authority, the test being the possession of some power or control over the accused with reference to his case. Neither a co-villager, nor a Zamindar is a person in authority unless the Zamindar is directed by the Police to investigate. 10 S.L.R. 140=18 Cr. L.J 58=31 Ind. Cas. 42.

——S. 24—"Person in authority".

The test as to whether a person is a person in authority, is whether that individual had authority to interfere with the matter and had any concern or intetest in it sufficient to given him that authority. Police Patel in a village in such a person. 9 B. H. C. 358 at 369 Foll. 40 Bom. 220=17 Cr. L.J. 133=17 Bom. L.R. 1059=33 Ind. Cas. 309.

——S. 24—Person in authority—Thugyi.

A confession made to a Thugyi by an accused who had been sent for by the former after being told that he would not be punished if he was not a party to the offence is irrelevant and inadmissible in evidence as the Thugyi is a person in authority within the meaning of S. 24 of the Act and what the Thugyi told him was an inducement to make a statement. Other answers and questions based on the inadmissible statement are also inadmissible. 15 Cr. L.J. 681=8 Bur. L. T. 39=8 L.B.R. 94=26 Ind. Cas. 129.

——Ss. 24 and 25—Person in authority—Confession to Zaildar.

A confession made by a suspected person regarding his guilt (murder case) on an inducement of the Zaildar that his own (Zaildar's) brother had put off in a murder case on making a clean breast of the matter, is inadmissible, as the Zaildar, was a leading man holding responsible post. 32 P.W.R. 1916, Cr.=16 Cr. L.J. 226=26 P.R. 1916, Cr.=153 P.L.R. 1916=34 Ind. Cas. 642.

——S. 24—Person in authority—Lambardar—Zaildar.

A Zaildar or Lambardar is an officer who is to help the police in their investigation. A confession made to such an officer, who promised the release of the accused, is not admissible in evidence. 14 P.R. 1911 Cr.=42 P.W.R. 1911, Cr.=12 Cr. L.J. 597=12 Ind. Cas. 973.

——S. 24—Person in authority—Zaildar.

Admissions made to a **zaildar** are not admissible when the **zaildar** cautioned the accused before their statements were recorded that they would get some benefit from Govt if they spoke the truth. 221 P.L.R. 1911=57 P.W.R. (Cr.) 1911=12 Cr. L. J. 554=12 Ind. Cas. 642.

——S. 24—Person in authority—Zamindars.

A confession to certain Zemindars sent for that purpose by the Police who held out an inducement to the accused, that they would save him, is inadmissible under S. 24 because they were investigating the offence just like policemen and must be considered to be persons in authority who procured the confession by their inducement and promise. 4 S.L.R. 209=12 Cr. L.J. 119=9 Ind. Cas. 718.

——S. 24—Person in authority—Panchayat if police officer—Confession.

A panchayat is not a Police officer, but he is a person in authority within the meaning of S. 24 of the Indian Evidence Act. A confession made by an accused before the panchayat who only told the accused to speak the truth is admissible in evidence. (1907) 11 C.W.N. 904. **See also** 9 C.W.N. 474.

——Ss. 24, 29—Confession—Person in authority.

The accused made a confession of his guilt to the medical officer of his regiment, who told the accused, when he was under his treatment in the hospital, that it would be better for him to tell the truth as to how he came about certain wounds. **Held**, that the medical officer was not a person in authority in respect of any proceedings which might be contemplated or taken against the accused who made the confession to him: and that all that he represented to the accused was that on medical grounds it would be for the accused's benefit if he told the truth as to how he came by the wounds. The accused made their confession of guilt to the com-

missioned officer of their regiments, who stated to the accused that he had already obtained information from another person and promised secrecy if they told the truth. **Held,** that the commissioned officer was not shown to be a person in authority relation to any proceedings that were to be taken against him; and that the alleged deception and inducement were covered by the provisions of S. 29 of the Evidence Act, 1872. (1906) 8 Bom. L.R. 507=4 Cr. L. J. 49.

——**S. 24**—The phrase 'person in authority' should not be construed narrowly. (1905) 9 C. W. N. 474.

——**S. 24—Person in authority—Village Magistrate—Misdirection, Material.**

A Village Magistrate is a person in authority within the meaning of S. 24 of the Evidence Act. Where the evidence was that the accused made a confession of his guilt on the Village Magistrate promising to arrange for saving him from prosecution and the Sessions Judge charged the jury to find guilty if they believed the evidence, but made no reference to the relevancy of the evidence. **Held,** that it was a material misdirection likely to lead to an errnous verdict. (1902) 26 M. 38.

12. Proof.

——**See also Cr. P. Code, Ss. 164, 364, 533.**

——**S. 24—Formal proof of its voluntary nature—Presumption as to pressure.**

The wording of S. 24, Evidence Act, suggests that unless it appears to a Court that an inducement, threat, or promise was held out by a person in authority, a confession would be relevant under S. 21, Evidence Act, without any formal proof of the voluntary nature of the statement. It has certainly not been the practice of the Courts of the Madras Presidency to require from the prosecution, formal evidence tha tthe statement was voluntary. It is customary for the Court to consider the suggestions made in cross-examination and the statement of the accused and for the Court that to decide whether there is anything in those suggestions or in the evidence which would lead it to suspect that the confession was not voluntary.

Per **Horwill, J.**—It is frequently assumed wrongly that a person would not make a confession of his guilt which would be prejudicial to his interest unless some pressure were exerted on him. A man who has committed a grave crime—unless he is a hardened offender—has an overwhelming desire to unburden himself and share with somebody his terrible secret. A.I.R. 1942 Mad. 19=(1941) 2 M.L.J. 1070=54 L.W. 327=43 Cr. L.J. 346=1941 M. W. N. 929=198 Ind. Cas. 295.

——**S.24—Proof of—Signature of accused, necessity of taking—Magistrate examined and proving statement—Sufficiency of proof.**

It coud hardly be said that there is any presumption that unsigned piece of paper is a statement made by the accused. It is therefore, necessary that the Magistrate should take the signature of the accused person. If the Magistrate is not examined as a witness, in view of the fact that the appellant signed his own signature in the Judge's Court, it cannot be said that the confession was proved. But when he is examined and he has proved that it was the accused who made the statement, it is sufficiently proved. 165 Ind. Cas. 196=40 C.W.N. 872=37 Cr. L.J. 1101.

——**S. 24—Proof of—Confession—Initial presumption—Confession not regularly recorded—When admissible.**

In the case of a confession recorded according to law there is an initial presumption that it does not offend against S. 24, but if on a consideration of the direct and circumstantial evidence in the case, it does appear to the Court that the confession was obtained by any inducement, threat or promise such as is referred to in the aforesaid section, it will be held to be inadmissible. In the case of a confession not recorded according to law, no such presumption arises and it is apparently the duty of the prosecution to satisfy the Court that the confession did not contravene the provisions of S. 24, before it can be admitted. A.I.R. 1936 Lah. 247=16 L. 912=57 P. L. R. 869=37 Cr. L. J. 432=161 Ind. Cas. 339.

——**S. 24—Proof of—Points to be established by prosecution.**

Where the main foundation for a conviction is a confession, the prosecution must establish : (1) that a confession was made (2) that evidence of it can be given; and (3) that it is true. A. I. R. 1934 Sind 172=29 S.L.R. 1=36 Cr. L.J. 223=152 Ind. Cas. 1032.

——**S.24 Proof of—Presumption of voluntary nature.**

In the case of confession duty certified, it may fairly be assumed that the Magistrate did his best to assure himself that the statements were voluntary and that if he had felt any suspicion, he would not have placed them upon record. A.I.R. 1931 Mad. 42=1930 M.W.N. 350=59 M.L.J. 114=32 L.W. 285=32 Cr. L. J. 262=122 Ind. Cas. 229.

——**S. 24—Proof of—Extra-judicial confession.**

The duty of the Court before which an extra-judical confession, not incorporated in a document, is relied upon is to scrutinise the whole of the material before it, and then to decide whether there is sufficient evidence to prove the confession. A mere general statement to the effect that the prisoner had confessed, is too uncertain a foundation to sustain a finding against him and the Trial Court ought to ascertain as far as possible the very words spoken by an accused who is said to have confessed. There may however be cases in which the evidence gives the substance, though not the actual words of the statement made by the accused and if that evidence is reliable there is no rule of law which precludes the Court from holding, that the confession has been proved. 81 Ind. Cas. 530=5 Lah. 140=6 L.L.J. 208=25 Cr. L. J. 914=A. I. R. 1924 Lah. 498.

13. Retracted confession.

(a) ADMISSIBILITY.
(b) CONVICTION ON.
(c) CORROBORATION.
(d) DUTY OF COURT.
(e) VALUE OF.

(a) Admissibility.

——**S. 24—Retracted confession—Admissibility—Rules regarding admissibility.**

The rules regarding confession which are retracted are (1) that a confession is not to be regarded as involuntary merely because it is retracted ; (2) as against the maker of the confession, the retracted confession may

from the basis of a conviction if it is believed to be true and voluntarily made; (3) as against the co-accused, both prudence and caution require the Court not to rely on a retracted confession without independent and full corroborative evidence. There is, however, no rule of law requiring a retracted confession to be supported by corroborative evidence in material particulars. The use to be made of such a confession is more a matter of prudence than of law. A. I. R. 1941 Bom. 50=42 Bom. L. R. 938=I L. R. 1941 Bom. 27=192 Ind. Cas. 671.

——S. 24—Admissibility—Absence of proof of being made duly and voluntarily.

The retracted confession of an accused when not proved to have been duly and voluntarily made, is not admissible in evidence. A. I. R. 1933 Oudh 315=10 O. W. N. 466=8 Luck. 518=35 Cr. L. J. 10=146 Ind. Cas. 465.

——S. 24—Retracted confession—Admissibility—Confession duly recorded after taking all precautions—Retraction without sufficient explanation as to how the accused came to make the confession, does not make it inadmissible.

Where an accused makes a confession after all the precautions necessary have been taken by the Magistrate recording the confession, the mere fact that the confession has been retracted will not make it inadmissible unless the accused gives any sufficient reason as to how he came to make the confession.

A man of sound mind and full age, who makes a statement in ordinary simple language, must be bound by the language of the statement and by its ordinary plain meaning. 98 Ind. Cas. 106=3 O. W. N. 818=27 Cr. L.J. 1258=A.I.R. 1927 Oudh 17.

——Ss. 24 and 30—Retracted confession—Statement by a convict implicating another—Admissibility.

A convicted prisoner undergoing a term of imprisonment made a statement before a Magistrate implicating the petitioner in the offence for which he had been convicted. But when he was examined as a witness he denied the implication of the petitioner. *Held*, the statement was not admissible in evidence. 18 A.L.J. 87=2 U.P.L.R. (H.C.) 37=54 Ind. Cas. 893.

——S. 24—Confession—Admissibility—Retraction of confeseions—Judge's duty.

Per **Aston, J.**—A Judge ought to be satisfied that a confession was voluntarily made before it can be even admissible in evidence. Per **Beaman, J.**—A Judge should in the first instance see whether a retracted confession is voluntary or has been improperly induced. The mere fact that a prisoner puts in a plea of 'not guilty' and denies having made the confession or explains having made it by allegation of police torture, is enough in itself to put a Judge upon enquiry. And he then has to decide, before admitting the confession at all or allowing it to be looked at, whether it has been improperly induced. That is a question for the court, i.e., the Judge, to answer **in limine**. If, upon weighing all the circumstances, the prisoners denied and the probabilities, it appears to the Judge that the confession has been improperly induced, no matter how true it may be, he is bound to exclude it. If he comes to the conclusion that the confession was not improperly induced and admits it, it then becomes evidence and liable to be appreciated and weighed with the rest of the evidence in the usual way. (1906) 8 Bom. L. R. 697=4Cr.L.J. 332.

——Ss. 24, 33—Retracted confession—Admissibility—Criminal Procedure Code, S. 164—Deposition of a witness who died before trial and who was not cross-examined is admissible in evidence.

A confession duly recorded and certified under S. 164, Criminal Procedure Code, is admissible in evidence against the person making it, unless shut out by the provisions of S. 24 of the Evidence Act. In India the law regarding the admissibility of a confession is contained in S. 24 of the Evidence Act. It is not identical with the law in England (as explained in **The Queen** v **Thompson** L. R. 1893, 2 Q. B. 12) and the cases therein referred to. The question which a court has to decide, when determining on the admissibility of a confession, is whether it appears to the court to have been induced by the means mentioned in that section. The mere subsequent retraction of a confession which has been duly recorded and certified by a Magistrate is not enough in all cases to make it appear to have been unlawfully induced. The remarks made in **Imperatrix** v. **Balyu Dagdu** (2 Cr. R. 3 of 1398), in so far as they may have been intended to prescribe a different practice cannot be accepted as consistent with S. 24 of the Evidence Act. 2 Bom. L.R. 761=25 B. 168.

(b) Conviction on.

——S. 24—Retracted confession—Conviction on—When can be had.

A retracted confession, if the Court believes it, is sufficient for convicting the person who made it. A.I.R. 1946 All. 15=1945 A. W. R. (H. C.) 291=222 Ind. Cas. 538.

——S. 24—Confession—Retracted confession—Absence of corroboration—Conviction—If can be based on. 222 Ind. Cas. 143=47 Cr. L. J. 252=47 Bom. L. R. 648=A.I.R. 1945 Bom. 484.

——S. 24—Conviction on—Independent corroboration, necessity of.

As against the maker, a retracted confession, if believed to be true, may form the basis of a conviction, but as a rule of caution, it is unsafe to base a conviction even of the maker on a retracted confession alone without some independent corroboration. A.I.R. 1942 Lah. 271=44 P.L.R. 448=44 Cr. L.J. 77=203 Ind. Cas. 488.

——S. 24—Conviction on—No material corroboration.

Where the case against the accused rests on a retracted confession which is not materially corroborated; (it is) unsafe to convict the accused on his statement alone. A. I. R. 1942 Mad. 450=1942 M. W. N. 291=(1942) M.L.J. 503=43 Cr.L.J. 810=202 Ind. Cas. 290.

——S. 24—Conviction on.

Retracted confessions must be used with caution, but when it is possible to come to the conclusion that the confessions cannot be otherwise than true, they may be taken into consideration in connection with the evidence appearing in the case, whether they are retracted or not. A.I.R. 1941 Nag. 145=1941 N.L.J. 345=42 Cr. L. J. 363=I.L.R. (1941) Nag. 169=193 Ind. Cas. 265.

——S. 24—Conviction, without corroboration.

A voluntary and genuine confession is legal and sufficient proof of guilt. There is no rule of law that an accused person cannot be convicted on a confession made and subsequently retracted without independent corroborative evidence. A. I. R. 1941 Pat. 303=42 Cr. L. J. 343=22 P. L. T. 297=20 Pat. 547=192 Ind. Cas. 888.

——S. 24—Conviction on—As a rule of prudence, a retracted confession should not be the basis of a conviction unless it is substantially corroborated by independent evidence. A. I. R. 1938 Pat. 290=39 Cr. L. J. 635=175 Ind. Cas. 716.

——S. 24—Conviction on—An accused person can lawfully be convicted on his own confession even when it has later been retracted, if the Court is satisfied of its truth. A. I. R. 1937 Rang. 264=38 Cr. L. J. 948=170 Ind. Cas. 645.

——S. 24—Conviction on retracted confession.

A Court may convict and accused person on his own uncorroborated confession which has been subsequently retracted, provided the Court is satisfied that the confession was made voluntarily and that it is true in fact. 156 Ind. Cas. 972=36 Cr. L.J. 1037.

——S. 24—Not extorted by torture—Absence of other evidence against confessing accused—Confession, if can be relied on.

Where a confession by an accused is confused in its composition and is certainly not the statement that a Police Officer anxious to obtain evidence against the accused or against other persons would impose on an accused person and it is retracted and there is no other evidence against him except his confession and he does not allege that the confession was extorted from him by torture, then the confession can be relied on, so far as his own actions on the date in question are concerned. ('34) 150 Ind. Cas. 1056=35 Cr. L. J. 1180.

——S. 24—Conviction on retracted coufession.

If it be established that the confession is a voluntary one and is not given under the influence of any inducement or promise so as to make it inadmissible under S. 24, then legally a conviction can be sustained solely on it, but ordinarily a Court expects some corroboration in the case of a retracted confession not as a requirement of the law but as an act of prudence. A.I.R. 1934 Lah. 89=35 Cr. L. J. 1453=151 Ind. Cas. 924.

——S. 24—Conviction retracted confession.

It is settled law that a confession, though retracted can be used in evidence against the person making it, if it believed to be true and made voluntarily. A. I. R.1934 Oudh 405=35 Cr. L. J. 1113=11 O. W. N. 851=150 Ind. Cas. 819.

——S. 24—Conviction on retracted confession.

Although a Court is at liberty to base a conviction on the retracted confession of an accused person if it thinks that the confession has a ring of truth about it, yet when the Court is not impressed with it, corroboration, by other satisfactory evidence should be insisted upon. A.I.R. 1934 Oudh 388=35 Cr. L.J. 1154=11 O.W.N. 950=10 Luck. 131=150 Ind. Cas. 862.

——Ss. 24, 114, Illus. (b)—Conviction on retracted confession.

Although the retracted confession of a co-accused is admissible against as accused person, a conviction on such a confession alone, even if legal, can only be justified in the rarest of cases. It shoul not be regarded as evidence of any value against him unless it is supported by some material corroboration upon which reliance can be placed. A.I.R. 1933 Rang. 73=34 Cr. L.J. 558 =143 Ind. Cas. 142.

——Ss. 24, 25, 26—Conviction on retracted confession—Absurdity of reasons for making false confession.

Where the accused has retracted his confession, but the reason given for making a false confession is so absurd as to desire no consideration whatever, the confession may be acted upon. A.I.R. 1932 Mad. 500=55 Mad. 717=35 L.W. 607=62 M.L.J. 680=33 Cr. L.J. 586=1932 M.W.N. 644=138 Ind. Cas. 240.

——S. 24—Conviction on retracted confession—Confession before Magistrate and Sessions Court—Subsequent retraction—Effect.

The retracted confession of an accused if voluntary and true, should be acted upon by the Court and so far as the accused making the same is concerned, is sufficient for his conviction. It cannot be rejected simply on conjectural grounds.

Where the accused made a confession voluntarily before the Magistrate and he pleaded guilty in the Sessions Court, but subsequently retracted his statement before the Sessions Judge and was unable to explain why he stuck to the confession before the committing Court:

Held, that the confession was genuine, and its retraction at the late stage false. 139 Ind. Cas. 756=9 O.W.N. 321=33 Cr. L.J 929.

——S. 24—Conviction on retracted confession.

A retracted confession of an accused person is sufficient for his conviction if it is true and voluntary, even if there is no corroborative evidence. A.I.R. 1932 Oudh 115=9 O.W.N. 96=33 Cr. L. J. 812=139 Ind. Cas. 736.

——S. 24—Retracted confession—Conviction on—Person making confession may be convicted when Court thinks that it is voluntary and true.

There is nothing in law to prevent a Court from convicting a person upon a confession which has been subsequently retracted, provided that the Court is convinced that the statement is voluntary and true. If there be anything from the barest suspicion to positive evidence that the confession has been obtained by threat, persuation etc., such coufession has of course to be discarded. But where a confession is made by a person who is **sui juris** before a Magistrate in an atmosphere untainted by the influence of the police or by any other influence and there are no suspicious features about it there is no reason why statement should not be accepted. 120 Ind. Cas. 257=31 Cr. L.J. 26=1930 Cr. C. 45=A. I. R. 1930 All. 29.

——S. 24—Retracted confession—Conviction.

It is very unsafe to convict an accused person upon a retracted confession unless the confession is confirmed by other evidence. 17 Cr. L.J. 453 (Cal.)=36 Ind. Cas. 133.

——S. 24—Retracted confession—Conviction on—Rule of Practice.

It is a rule of practice not a relay on a retracted confession unless it is corroborated by some evidence to show that the confession is true. As a matter of law it cannot be laid down that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence, and a prisoner may be convicted on his own confession without any corroborative evidence and even when a confession has been retracted. if the jury believe that the confession contains a true account of the prisoner's connection with the crime. 57 Cal. 488= A.I.R. 1930 Cal. 633.

——S. 24—Retracted confession made voluntarily is sufficient to warrant conviction.

A confession made voluntarily without any pressure having been brought to bear upon the accused, is

sufficient to warrant the conviction of the accused even although such confession may subsequently be retracted. 119 Ind. Cas. 420=1930 Cr. C. 104=30 Cr. L.J. 1080=A.I.R. 1930 Lah. 88.

——S. 24—Conviction on retracted confession.

Where the confession was retracted but on the evidence there was no possible doubt as to the truth of the confession,

Held, that the confession could be the basis of a conviction. 1929 M.W.N. 791.

——S. 24—Detailed and voluntary confession subsequent retraction—Parts not found to be true —Sufficient for conviction.

Confession made by an adult man who understood what he was doing, though retracted, is sufficient for the conviction of the person making it, even although certain parts of it are not found to be true, provided that there was a detailed confession and it was made voluntarily and in spite of the fact that he was explained the consequences of making it. 118 Ind. Cas. 757=6 O.W.N. 545=30 Cr. L.J. 967=1929 Cr. C. 220 =A.I.R. 1929 Oudh 381.

——S. 24—Conviction may be based on retracted confession though it must be dealt with caution.

A retracted extra judicial confession can in law be a sufficient basis to support a conviction. Though utmost caution must be used in dealing with retracted confessions, there is no rule that they are not by themselves legal evidence sufficient to justify a conviction. A.I.R, 1921 Sind 129, Foll. 1929 Cr.C. 682=A.I.R. 1929 Sind 253.

——S. 24—Conviction on retracted confession.

Accused retracting his confession—Court believing it to be true and voluntarily made—Conviction on such retracted confession although uncorroborated by independent evidence is not illegal. 104 Ind. Cas. 247=28 Cr.L.J. 807=A.I.R. 1927 Lah. 682.

——S. 24—Conviction based on that confession alone is not illegal.

A conviction based alone on a retracted confession of the accused himself is not bad where the trial Court is satisfied that the confession was made voluntarily and that the accused was under no inducement or threat at the time when he made the confession, that he was informed clearly that if he confessed he would not get a pardon and he stated that he quite under- tood all these circumstances; that he wished to make his statement voluntarily and that he had no idea that he would get a pardon. A.I.R. 1925 All. 627 (F.B.); A.I.R. 1926 Oudh 622 and A.I,R. 1927 Oudh 17, Foll. 103 Ind. Cas. 800=1 L.C. 223=8 A.I.Cr. R. 416= 28 Cr.L.J. 752=A.I.R. 1927 Oudh 597.

——S. 24—Retracted confession may be used against person making it as well as against his co-accused—Retracted confession may form basis of conviction as against person making it, and no corroboration is necessary—Weight to be given to such confession depends upon circumstances.

A retracted confession may be used as evidence, not only against the person making it, but as against persons tried jointly with the confessing accused for the same offence. As against the person making it, a retracted confession may form the basis of a conviction, oven without any corroborative evidence. From the point of view of legality alone the fact that a confession has been retracted is immaterial. The weight to be given to such confessions both as against the person making it and the persons being tried jointly with him is another question and must depend on the circumstances of each case. In deciding whether a retracted confession is to be admitted in evidenee, it is doubtless necessary to examine, not only the statement made by the prisoner as to how he came to make the confession, but all the circumstances of the case. 93 Ind. Cas. 978=6 Lah. 415=7 L.L.J. 482=27 Cr.L.J. 514=A.I.R. 1925 Lah. 605.

——S. 24—Conviction on retracted confession— Legality of.

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to it must depend on the circumstances under which the confession was given and retracted including the reasons given for retracting. There is no statutory bar to a conviction on such evidence, but a confession must not be regarded in the same light as an admission in a civil Cout.

A retracted confession may be impugned on the ground it was not made voluntarily or was not true. 75 Ind. Cas. 152=24 Cr.L.J. 904.

——S. 24—Confession voluntary—Material particulars—Corroboration is not necessary.

A retracted confession need not be supported in independent and material particulars. The one question which the Judge has to decide is whether the confession tendered in evidence before him has been voluntarily made and a conviction can be based on such confession. 23 Bom. 316: 29 All. 434 and 21 Mad. 83, Foll; 10 Mad. 295 and 12 Mad. 123, Diss. from. 81 Ind. Cas. 62=25 Cr.L.J. 574=16 S.L.R. 67= A.I.R. 1921 Sind 129.

——S. 24—Retracted confession—Uncorroborated —Conviction.

A conviction based upon an uncorroborated confession is not bad, if the surrounding circumstances point to the confession having been the outcome of a voluntary act on the part of the confessor, and there is no evidence of coercion either by the Police or any other person. The fact that the confession was retracted before the committing Magistrate would not deprive it of its voluntary character. 20 Cr.L.J. 562=52 Ind. Cas. 50 (Pat.).

(c) Corroboration.

——S. 24—Retracted confession—Corroboration— Accused can be convicted solely on his confession even if retracted—His confession if may be used to convict co-accused.

A confession made by an accused cannot be used to convict his co-accused unless there is corroborative evidence against the co-accused but a person can be convicted solely upon his own confession even if retracted if the Court believes it to be true. A.I.R. 1946 All. 12=1945 A.L.J. 459=I.L.R. 1946 A. 56= 1945 O.W.N. (H.C.) 275=222 Ind. Cas. 399.

——S. 24—Corroboration—Necessity of.

Where the confession is retracted, in order to see how far it is true, it must be seen to what extent it is corroborated. A.I.R. 1945 Pat. 470=24 Pat. 131.

——S. 24—Corroboration—If a confession is made and is not with-drawn, that may furnish the strongest

possible evidence of guilt of an accused. But if that confession is "retracted", then it is certainly desirable, if not absolutely necessary, that there should be some corroboration of what the accused has said about himself even in respect of his own actions. A.I.R. 1939 Cal. 65=68 C.L.J. 206=40 Cr. L.J. 199=I.L.R. (1939) 1 Cal. 1=179 Ind. Cas. 506 (F.B.).

——S. 24—Retraction of confession—Mere fact of showing places, if amounts to corroboration.

Where the accused was alleged to have pointed out the places of commission of the offence but none of these was mentioned in his confession which was subsequently retracted :

Held, that the mere fact that these places were pointed out would not amount to corroboration of any matter in the confession. A.I.R. 1936 All. 373=1936 A.W.R. 185=37 Cr. L.J. 730=162 Ind. Cas. 948.

——S .24—Corroboration—A retracted confession can legally be acted upon and made a basis of the conviction of the maker thereof if it bears the ring of truth. But a Court should, by way of caution, look for corroboration from independent quarters in order to be satisfied that it is true. (Tests of genuineness and truth of confession indicated). A.I.R. 1934 Lah. 715= 36 P.L.R. 2=35 Cr. L.J. 1390=151 Ind. Cas. 716.

——S. 24—Confession by wife retracted—Articles stained with poison recovered in house—Poison dicovered in viscera and vomits of deceased—Whether sufficient corroboration.

In a case of an alleged poisoning of husband by wife, the wife, retracted her confession, but various articles stained with poison were recovered in the viscera and vomits of the deceased:

Held, that there was sufficient corroboration. A.I.R. 1934 Lah. 150 (2)=15 Lah. 310=36 Cr. L.J. 14=37 P.L.R. 67=152 Ind. Cas. 206.

S. 24—Corroboration—As a rule of practice, though not of law, a retracted confession should be corroborated. A.I.R. 1934 Sind 172=36 Cr. L. J. 223=29 S.L.R. 1=152 Ind. Cas. 1032.

——S. 24—Corroboration—It is very necessary as a rule to make certain before acting on a confession which has been retracted that corroborative evidence supports the confession. A.I.R. 1933 Cal. 747=57 C.L.J. 213=34 Cr. L. J. 1222=146 Ind. Cas. 186 (S.B.).

——S. 24—Retracted confession—Corroboration.

There is nothing to prevent a confession although retracted from being given effect to as against the maker. But where the confession has been retracted the general rule is that independent corroboration of the confession should be required in order that the Court may be satisfied that the confession is true. 124 Ind. Cas. 486=31 Cr. L.J. 667=50 C. L. J. 518=1930 Cr. C. 141=A.I.R. 1930 Cal. 141.

——S. 24—Retracted confession—Corroboration.

A confession, although retracted at the very first possible moment, is sufficient to warrant conviction if corroborated by the production of articles for which the accused can offer no explanation. 119 Ind. Cas. 325=30 P.L.R. 646=30 Cr. L. J. 1046=11 Lah. 106= A.I.R. 1930 Lah. 257.

——S. 24—Corroboration—There is no absolute rule that a retracted confession requires corroboration. If the Court is satisfied that a confession was, in the first instance, voluntarily made, the fact that it has on second thought, been retracted is of little significance. 1930 M.W.N. 785.

——S. 24—Corroboration—Absence of—Conviction cannot be based on such confession.

The weight to be given to a retracted confession must depend upon the circumstances under which the confession was originally made and the circumstances under which it was attracted, including the reasons given by the prisoner for its retraction. Unless the confession is corroborated in material particulars by credible independent evidence, or unless the character of the confession and the circumstances under which it was taken indicate its truth it would be unsafe to rely on it.

The accused was appointed approver in a case of murder. He made several confessional statements implicating himself and the other accused in the murder. But at the Sessions trial he unreservedly retracted his previous statements as approver and that he knew nothing of the murder and that he was tutored by the police into making those statements which were false. The conditional pardon granted to him was withdrawn and he was put on his trial on the previous charge of murder. There was no evidence to corroborate his confession and further the various confessional statements made by him were wanting in those natural details which one would ordinarily expect in a free and voluntary confession. The statements also contradicted one another on several important points.

Held, that there was not sufficient evidence to justify his conviction. 124 Ind. Cas. 459=A. I. R. 1930 Nag. 259.

——S. 24—Retracted confession—Corroboration—Independent corroborative evidence—If necessary.

A retracted confession must be supported by independent and reliable evidence corroborating it in material particular, but it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted cannot be accepted as evidence of guilty without independent corroborative evidence. But where the corroborative evidence is insufficient to show beyond reasonable doubt that the accused had committed the murder the accused should be given the benefit of doubt. 126 Ind. Cas. 902=31 Cr. L. J. 1128=1930 Cr. C. 599=A. I. R. 1930 Pat. 289.

——S. 24—Criminal P. C., S. 164—Coroboration is not necessary in every retracted confession.

That a confession, having been retracted, cannot be acted upon without material corroboration, is not an absolute rule. If the reasons given by an accused person for having made a confession, which he subsequently withdraws, are, on the face of them false, it is not apparent why that confession should not be acted on as it stands and without any further corroboration. 1929 Cr. C. 485=30 M. L. W. 642=2 M. Cr. C. 298=1929 M. W. N. 901=A. I. R. 1929 Mad. 837=57 M. L. J. 681.

——S. 24—In the absence of corroboration in material particulars conviction is not safe.

It is not illegal to base a conviction even on the retracted confession of an accused person : but in the absence of corroboration in material particulars, it is not safe to convict on a confession, unless from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine : 30 P. R. 1914 Cr. Foll. 107 Ind. Cas. 614= 29 Cr. L. J. 267=9 A. I. Cr. R. 527=A. I. R. 1928 Lah. 329.

——S. 24—Corroboration.

Where confessions do not stand uncorroborated, and the accused are unable to explain away their confessions though retracted, the confessions alone are sufficient for conviction. A.I.R. 1926 Oudh 622, Foll. 114 Ind. Cas. 123=5 O. W. N. 968=30 Cr. L. J. 228=12 A.I. Cr.R. 229.

——S. 24—Corroboration.

Conviction based on a retracted confession which was voluntary and was sufficiently corroborated is legal. 103 Ind. Cas. 112=28 Cr. L. J. 656=A.I.R. 1927 Lah. 780.

——S. 24—No proper corroboration—Accused should be acquited.

Where the whole case rested on the confession of the accused, which was retracted and there was no corroboration of the confession, but there were many suspicious circumstances about it.

Held, that there was by itself no evidence sufficient to base a conviction. 101 Ind. Cas. 479=8 P. L. T. 555=8 A. I. Cr. R. 92=28 Cr. L. J. 447=A. I.R. 1927 Pat. 429.

——S. 24—Retracted confession—Corroboration.

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by an accused cannot be accepted as evidence of his guilt without independent corroborative evidence, but the weight to be given to such a confession must depend upon the circumstances in which the confession was originally made, and the circumstances in which it was afterwards withdrawn. The credibility of a confession is in each case a matter to be decided by the Court in the light of the circumstances of every particular case. 75 Ind. Cas. 753=27 O.C. 40=25 Cr. L. J. 49= A.I.R. 1925 Oudh 1.

——S. 24—Retracted confession—Corroboration if necessary—If accepted, must be accepted as a whole.

It is the universal practice of the Patna High Court not to rely, nor act on a confession which has been retracted, unless after consideration of the whole evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true.

This procedure will practically effect the same result as a rule requiring proof of the voluntary character of a confession inasmuch as the truth of voluntariness may not unreasonably though not necessarily, be inferred where the truth of the confession is established. There is no rule of law which compels the court to raise an inference of improper inducement from the mere fact that a confession is retracted; but as a rule of prudence the courts in this country have consistently declined to act on a retracted confession, unless the confession is corroborated by credible independent evidence. In the case of admission or confession Courts cannot ignore a portion such admission or confession and act upon what remains of that admission or confession. It is settled law that an admission or confession must be taken and considered as a whole. 72 Ind. Cas. 961=4 P.L.T. 186=24 Cr. L.J. 497=A. I. R. 1923 Pat. 13.

——S. 24—Retracted confession—Corroboration.

A confession prisoner should not be convicted upon a retracted confession unless it is corroborated in material particulars. Where it is a question of using a confession against a co-accused and the Court is not prepared to accept the confession **per se** as sufficient, the corroboration ought to be of the kind that not only confirms the general story of the crime but also unmistakably connects the co-accused with the crime. 70 P.L.R. 1918=19 P.W.R. (Cr.) 1918=19 Cr. L.J. 275= 44 Ind. Cas. 179.

——Ss. 24 and 25—Retracted confession—Corroboration.

When a retracted confession is the sole evidence against an accused, it can be of but little value especially remembering the competition for a pardon which sometimes occurs where a number of persons are suspected of an offence and some have already confessed or are believed to have confessed. 32 P.W.R. 1916 (Cr.)= 17 Cr. L.J. 226=26 P.R. 1916 (Cr.)=153 P.L.R. 1916= 34. Ind. Cas. 642.

——S. 24—Retracted confession—Statement made under grant of pardon—Where admissibile—Conviction based on.

A Court should not convict a person upon a statement made by him but subsequently retracted owing to a promise of pardon, in the absence of corroboration in material particulars unless the peculiar circumstances of making the confession or the reasons of retraction show the genuineness of the confession in spite of its revocation. 16 Cr. L.J. 815=6 P.W.R. 1916 (Cr.)=31. Ind. Cas. 831.

(d) Duty of Court.

——S. 24—Retracted confession—Duty of Court.

Before a Court can act upon a retracted confession, it must be satisfied that it is materially corroborated by other evidence on the record. A.I.R. 1945 Lah. 91=47 P.L.R. 11.

——S. 24—Duty of Court.

No doubt when a confession is retracted and the truth of it denied, the person retracting has lied on one occasion or the other and although in the case where the retractions are merely in respect of the voluntariness of the statements and there is no express denial of the fact that the confessions were true in substance, it must be presumed that if these accused had been asked by the Magisrate, as they should have been, whether the confessions were false in substance or not, they would have replied in the affirmative. This does not absolve the Court from examining the question whether the confessions are in fact true or not and, if true, whether they can be taken into consideration along with the other evidence. A. I. R. 1941 Nag. 144=42 Cr. L.J. 363=I.L.R. (1941) Nag. 169=1941 N.L.J. 345=193 Ind. Cas. 265.

——S. 24—Duty of Court—Accused alleging extortion on part of police by force, resulting in serious injuries—Duty of Magistrate.

Where an accused retracts the confession and alleges that it was not voluntary but was extorted from him by gross torture by the police resulting in serious injuries, it is the duty of the Magistrate to take immediate steps to have the accused examined by a competent doctor.

This is a matter to which the attention of the Local Government might well be drawn, as there is a tendency upon the part of Magistrates, Judges to regard themselves as mere recording machines and not to take obvious steps for the elucidation of matters before them. A. I. R. 1939 Lah. 66=41 P.L.R. 290=40 Cr. L J. 614=I.L.R. (1939) Lah. 216=181 Ind. Cas. 924.

——S. 24—Duty of Court—The Court is entitled to read and look at a confession although it is retracted, but the same credence should not be given to it as it would be given were it not retracted. A. I.R. 1935 Cal. 561=62 Cal. 433=39 C. W. N. 334= 36 Cr. L. J. 1275=157 Ind. Cas. 1070 (S. B.).

——S. 24—Retracted confession—Murder—Duty of court in acting on such confession—Practice.

Where a confession is retracted, it is the duty of the court, especially in cases of murder, to inquire into all the material points and surrounding circumstances and satisfy itself fully that the confession cannot but be true before acting on such confession. (1901) 3 Bom. L.R. 441

(e) Value of.

——S. 24—Retracted confession—Value of—Rule of prudence.

Lokur, J.—There is no absolute rule of law that a retracted confession cannot be acted upon unless there is material corroboration, if it is found to be voluntary. But as a rule of prudence, it is regarded not safe to base a conviction solely on a retracted confession unless there are circumstances which leave no doubt that it is voluntary and true. A. I. R. (1945) Bom. 484=47 Cr. L. J. 252=47 Bom. L. R. 648=222 Ind. Cas. 143.

——S. 24—Value of—An accused can be convicted on his own confession even though it is subsequently retracted. A. I. R. 1943 Oudh 269=1943 A. W. R. (C. C.) 21=1943 O. W. N 88=44 Cr. L. J. 389=205 Ind. Cas. 514.

——S. 24—Value of—Where the confession was regularly recorded, all the necessary formalities being observed by the Magistrate and was corroborated by such circumstantial evidence as was available, the confession must not be regarded as involuntary or unlawfully induced merely because it was retracted at the trial. A. I. R. 1942 Lah. 271=44 P.L.R. 448=44 Cr. L. J. 77=203 Ind. Cas. 488.

——S. 24—Value of—Self-inculpatory confession—How far can be acted upon.

It certainly does not follow because a confession is retracted that it was either untrue or involuntary, and the truth or voluntariness of a confession operates equally—such a confession being self-inculpatory—in respect of the person who made it and the person implicated therein. Merely because these confessions have been retracted in the Court of Session, it cannot be said that they were involuntarily made. The motive for making a self-inculpatory confessian is the very simple one of an expectation of leniency in the matter of sentence and where a number of people are jointly tried and some have made confession to a Magistrate before the trial and some have not, it is again not unnatural that persons who have made confessions should retract them under pressure and persuation by their fellows who have not confessed. A.I.R. 1941 Nag. 145=42 Cr. L. J. 363=1941 N.L.J. 345=I.L.R. (1941) Nag. 169=193 Ind. Cas. 265.

——S. 24—Value of—Confession made under torture of police—Fact of torture must be supported by evidence—Accused cannot get rid of confession by retracting it. A.I.R. 1939 Cal. 65=68 C. L. J. 206=40 Cr. L. J. 199=I.L.R. (1939) 1 Cal. 1=179 Ind. Cas. 506 (F. B.).

——S. 24—Value of—Confession contradictory—Some Policemen interested in investigation when confession made—If good ground for not relying upon them.

In the absence of any direct evidence, it is not safe to rely upon the retracted confessions which are contradictory to each other in material details and which have been contradicted by direct testimony. The facts that the confessions were retracted and that when they were made, some Policemen were interested in the investigation of the case, are good grounds for not relying upon the confessions. A.I.R. 1938 Lah. 101=39 P.L.R. 815=39 Cr. L. J. 290=173 Ind. Cas. 315.

——S. 24—Value of—Suspicion that it was made at instance of Police.

Where there was no evidence to show in what circumstances the accused showed his willingness to the investigating officer to make a confession and there were internal indications in the confession which suggested that the confession was not the outcome of the accused's desire to state what he knew and there were reasons to suspect that the confession was made by him at the instance of the Police who had a hand in shaping it, and it was retracted:

Held, that much importance should not be attached to the confession even against the person who made it. A.I.R. 1936 All. 388=1936 A. W. R. 248=1936 A.L.J. 669=162 Ind. Cas. 914.

——Ss. 24, 26—Value of retracted confession,

The rule of practice that little or no weight should be attached to a retracted confession as against a person other than the maker of it does not apply where it is used against the deponent, and as against person making it, a retracted confession may form the basis of a conviction even without any corroborative evidence.

But every case of this kind must be decided upon its own circumstances and not upon the amount of credibility which was attached in other cases to confessions made. If a Judge believes that a confession made by a prisoner, although subsequently withdrawn, contains a true account of that previous connection with a crime, the Judge is bound to act, so far as that prisoner is concerned, on that confession which he believes to be true.

The mere fact that the accused confessed in the hope of pardon will not justify its rejection as being improperly induced. in the absence of evidence to suggest that any Police Officer or other person in authority did or said anything which could possibly be construed into holding out a hope of pardon. A. I. R. 1933 Lah. 388=34 Cr. L. J, 598=34 P. L. R. 704=143 Ind. Cas. 499.

——S. 24—Value of—It does not necessarily follow because a confession made by an accused person is subsequently retracted and there is little or no evidence on the record to support the confession that, therefore the confession is to be rejected. The credibility of such a confession is a matter to be decided by the Court according to the circumstances of each particular case, and if the Court is of opinion that such a confession is true, the Court is bound to act, so far as the person making it is concerned, upon such belief. A.I.R. 1931 Oudh 412=8 O.W.N. 1033=33 Cr. L. J. 16=134 Ind. Cas. 876.

——S. 24—Retracted confession—Value of—Confession of a co-accused, though subsequently retracted is admissible in evidence against his co-accused, A.I.R. 1929 Oudh 167, Foll. A. I. R. 1930 Lah. 667=125 Ind. Cas. 639.

——S. 24—Retracted confession—Value of.

When the only evidence against the accused is his own confessional statement which was retracted before committing Magistrate as well as before the Sesisons Court, the Court has to be fully satisfied that it is true and really voluntary and reliable. 76 Ind. Cas. 642=18 M.L.W. 606=33 M.L.T. 77=33 M.L.T. 156=1923 M.W.N. 697=25 Cr. L.J. 210=A. I. R. 1924 Mad. 391=45 M.L.J. 613.

——S. 24—Value of—It is a rule of practice not to rely on a retracted confession unless it is corroborated by some evidence to show that the confession is true. But as a matter of law it cannot be laid down that a confession made and subsequently retracted by a prisoner cannot be accepted whithout indpendent corroborative evidence and a prisoner may be convicted on his own confession without and corroborative evidence. 57 C. 488=A.I.R. 1930 Cal. 633.

——S. 24—Value of—The mere fact of the retraction of a confession is not in itself sufficient to make it appear that it was unlawfully induced but will be a corroboration of the approver's statement. 113 Ind. Cas. 65=11 L.L.J. 5=30 Cr. L.J. 49.

——S. 24—Value of—Accused's confession retracted on first opportunity—Confession due probably to promise of pardon and not corroborated by independent evidence—No motive for offence committed established by prosecution—Only evidence against accused being he was last seen in company of victim—Confession is inadmissible in evidence and accused cannot be convicted on the remaining evidence. 104 Ind. Cas. 247=28 Cr. L.J. 807=A. I. R. 1927 Lah. 682.

——S. 24—Value of—Retracting confession of will not necessarily indicate invalidity or illegality but probative farce depends on circumstances.

The mere fact that a confession is retracted will not raise an inference that it was obtained by improper inducement, threat or promise. Such a conclusion can only be arrived at from the evidence on the record or from the surronding circumstances and not upon surmise or conjecture: A.I.R. 1925. Lah. 605, Foll.

The fact that a confession has been retracted is immaterial as regards the legality of the admission of the confession as evidence against the person who made it. But the weight to be attached to a retracted confession depends upon the circumstances of each particular case: A.I.R. 1925 Lah. 605, Foll.

As regards the person making it a retracted confession may without corroboration from the basis of a conviction and though corroboration may be necessary as regards co-accused it is not necessary that this corroborative evidence should by itself by sufficient to support a conviction: 30 P.R.Cr. 1914 and 29 All. 434, Foll. 96 Ind. Cas. 647=27 P.L.R. 387=27 Cr. L.J. 983.

——S. 24—Value of.

A confession in its normal state, is an entirely suspicious article. A retracted confession is worse. The Court should not lose sight of the fact that assuming that a prisoner had been induced to confess he will not unlikely assure the Magistrate that his confession was volunteer knowing that he will leave the Magistrate's presence in the custody of the police and remain in their custody for many days to come. (8 B.H.C.R. 126, Ref.). The use to be made of a confession is really a matter of prudence rather than law. 19 Bom. 728, Foll. 39 Ind. Cas. 903=23 A.L.J. 821=26 Cr. L. J. 1431=6 L. R. A. (Cr.) 161=A. I. R. 1925 All. 627 (F.B.).

——S. 24—Value of—Retracted confession is effective against the accused.

When the accused in full possession of his faculties makes admissions of guilt to various persons, they are not ineffective only because they are subsequently retracted: A.I.R. 1925 All. 627 (F. B.), Rel. on. 98 Ind. Cas. 250=1 Luck. 577=3 O.W.N. 813=27 Cr. L.J. 1306=29 O.C. 396=7 A.I. Cr. R. 283=A.I.R. 1926 Oudh 622.

——S. 24—Value of—No inflexible rule that it cannot be acted upon without corroboration though generally it has very little weight.

It cannot be laid down as an inflexible rule that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend on the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for its retraction. It is unsafe for a Court to rely on and act on a confession which has been retracted unless, after a consideration of the whole of the evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated by credible independent evidence. A retracted confession should carry practically no weight as against a person other than its maker. 71 Ind. Cas. 497==26 C.W.N. 1010=24 Cr. L. J. 145=A. I. R. 1923 Cal. 217.

——S. 24—Value of retracted confession carries little weight.

Per **Shah, J.**—A retracted confession carries much less weight than one which has been adhered to

Per **Crump, J.**—A confessson is after all evidence in so far as it bears upon the crime into which the Court is at the time enquiring and circumstances corroborating the confession in material points are themselves equally materiel. 62 Ind. Cas. 545=22 Cr. L.J. 629=22 Bom. L.R. 1274.

——S. 24—Retracted confession—Value of—Corroboration, if necessary.

There is no rule of law requiring a retracted confession to be supported by corroborative evidence in material particulars. The use to be made of such a confession is more a matter of prudence than of law. 13 C.P.L.R. 107, Foll. 19 Cr. L.J. 861=46. Ind. Cas 1005 (Nag.).

——S. 24—Retracted confession—Value of—Discovery of clothing—Statements under S. 288, Cr. P. Code—Value, of.

A confession made by an accused before the committing Magistrate which he retracts both before and after commitment is of no value as evidence against him. A conviction cannot be based upon statements of witnesses under S. 288, Cr. P. Code, when they came forward after the accused confessed and gave only circumstantial evidence insufficient to connect the accused with the commission of the crime. 15 P. W. R. (Cr.) 1915=16 Cr. L. J. 612=30 Ind. Cas. 436.

——S. 24— Retracted confession—Value of—Against co-accused.

It is not illegal to convict on the uncorroborated confession of the accused provided the Court is satisfied that it was voluntary and free, and it is immaterial from the point of view of pure legality that the confession has been retracted. It is however not safe in general to convict on an uncorroborated confession from the point of view of common experience and prudence, and when it is a question of a confession against a co-accused, the corroboration must not only confirm the general story of the crime but must clearly connect the co-accused with it. 264 P. L. R. 1914=30 P. R. 1914 (Cr.)=50 P.W. R. 1914, (Cr.)=15 Cr. L. J. 626=25 Ind. Cas. 634.

——S. 24—Retracted confession—What is—Value of.

An admission of all the ingredients required to constitute an offence is a confession. A confession taken in conformity with the strict provisions of the law cannot be ruled out of Court simply because the accused was produced before the Magistrate with the sole object of having the confession recorded. (21 P. R. 1869, not applied.) A confession retracted at an early date must be very carefully scrutinised before it is accepted by Courts. In the absence of any evidence connecting the accused with the crime it is not lawful to convict an accused person simply on the strength of the confession of the co-accused. 10 Cr. L. J. 584=25 P.W.R. 1909 (Cr.)=153 P. L. R. 1909=4 Ind. Cas. 429.

——S. 24—Retracted confession—Value of.

A retracted confession uncorroborated in material points by other reliable evidence, is of no value. Conviction on it would be bad. 1 Pat. L. T. 241=5 Pat. L. J. 430=58 Ind. Cas. 49.

——S. 24—Retracted confession—Evidentiary value

Where a confession was taken by a Magistrate in jail with a Police officer in the next room and was subsequently retracted: **Held**—Such a confession could not be acted upon unless supported by very good corroboration. **Quaere**—Whether a person charged under S. 302 as a principal can be convicted under Ss. 302, 114, as an abettor. 11 Cr. L. J. 247=11 C. L. J. 273=5 Ind. Cas. 773.

——S. 24—Value of—Use of retracted confession as against person making it and as against co-accused.

A retracted confession may be taken into consideration, that is, used as evidence, not only as against the person making it, but as against persons tried jointly with the confessing accused for the same offence. As regards the person making it, a retracted confession may, even without any corroborative evidence form the basis of a convictian. As regards other co-accused, although corroborative evidence may be necessary. it is not necessary that such corroborative evidence should by itself be sufficient to support a conviction: and **Semble** that a conviction based on the unsupported evidence afforded by the confession of a co-accused would not be unlawful. 20 A. 133, foll. 5 C. 433 dis. 19 W.R., (Cr.) R. 16 ref. to. (1907) A.W.N. 140=4 A. L. J. 310=29 A. 434.

——S. 24—Retracted confession—Evidentiary value of.

A retracted confession should carry practically no weight at all against a person other than the maker; and the very fullest corroboration would be necessary in such a case, for more than would be demanded for the swarn testimony of an accomplice on oath. A conviction on an uncorroborated and retracted confession of an accomplice is bad in law. (1901) 5 C. W. N. 670.=28 Cal. 689.

14. Scope.

——Ss. 24 and 27—Relative scope—Former, if controlled by latter—Statement leading to discovery made under preasure or after threat or beating—Admissibility.

S. 27, Evidence Act, should be read as a proviso to S. 24, and controls it. If therefore a statement by an accused falls under *S.* 27, institute of she facs that it is bitling. S. 24. namely that the person making the statement may have been threatened or beaten. 25 Pat. 205=230 Ind. Cas. 99=48 Cr. L. J. 497=A. I. R. 1947 Pat. 152.

———S. 34—Scope and applicability—"Accused"—Confession by person not accused at that time but becoming accused subsequently—Admissibility.

The turn "accused" in S. 24, Evidence Act, includes also a person who becomes an accused person subsequent to the making of the confession by him, although at the time of the confession he was not an accused. Hence a confession by a person who becomes later an accused person cannot be used against him in his trial if it offends against the provisions of S. 24. 230 Ind. Cas. 431=48 Cr. L.J. 651.

——S. 24—Scope.

The words "accused person" in Ss. 24 and 26 include any person who subsequently becomes accused. A.I.R. 1941 Bom. 50=42 Bom. L. R. 938=I. L. R. (1941) Bom. 27=192 Ind. Cas. 671.

——S. 24—Scope—Confession admitted—Question as to its relevancy.

Section 24 is a rule of exclusion because it declares that a confession made by an accused person in certain circumstances is irrelevant in a criminal proceeding. The fact that evidence of the confession is admitted is sufficient to make the confession evidence. It is open, no doubt, to the defence to object to the evidence of confession going in on the ground that it is excluded by S. 24, but till such objection is raised, there is no necessity for the Court to pronounce any formal decision on the question of relevancy of the confession. A.I.R. 1939 Mad. 3=1938 M. W. N. 1120=48 L. W. 777=(1938) 2 M.L.J. 1065=40 Cr. L.J. 170=179 Ind. Cas. 143.

——S. 24—Scope—Use of word "appears" in S. 24 object of, stated.

The Legislature used the word "appears" in S. 24 to provide a safeguard in the interests of accused persons. It connotes less positive proof. If it appears to, the Court from the circumstances of a particular case that the confession has not been made voluntarily, it must be rejected as irrelevant. Such circumstances should be presumed to exist in cases where an accused person in Police custody makes a confession. A. I. R. 1939 Rang. 219=1939 Rang. L. R. 97=40 Cr. L.J. 691=182 Ind. Cas. 705.

——Ss. 24, 25, 26—Protection under—Nature of.

The protection given to an accused person by Ss. 24, 25 and 26 should not be dependent upon the ingenuity of the Police Officer or the folly of the prisoner in composing the sentence which conveys the information. On the other hand, the statement made to the Police should not be garbled so as to render it absolutely innocuous to the prisoner and remove it entirely from the nature of a confessional statement. A. I. R. 1936 Nag. 53=18 N.L.J. 116=31 N.L.R. 256=37 Cr. L. J. 460=161 Ind. Cas. 8.

——S. 24—Scope—For rejecting confession positive proof of threat, etc., is not necessary.

Per **Mukerji, J.**—The language of S. 24 will show that to reject a confession it is not necessary that there should be positive proof to establish that the confession has been obtained by use of threat, persuations, etc. Anything from a barest suspicion to positive evidence would be enough for a confession being discarded. The weight, therefore, that has to be attached to a confession, in the view of the Legislature, is small. A.I.R. 1925 Cal. 587, Foll. 89 Ind. Cas. 903=23 A.L.J. 821 =26 Cr. L.J. 1431=6 L.R. A. (Cr.) 161=A. I. R. 1925 All. 627 (F.B.).

——S. 24—Will ovorride S. 27 when they conflict.

A statement though admissible under S. 27 should be excluded if under S. 24 the accused at the time of

making the statement was under the influence of the village Magistrate's promise to save him from punishment. 86 Ind. Cas. 664=26 Cr. L.J. 840=21 M.L.W. 199=A.I.R. 1925 Mad. 574.

——S. 24—Scope—S. 24 will override S. 27 when they conflict.

A statement though admissible under S. 27 should be excluded if under S. 24 the accused at the time of making the statement was under the influence of the village Magistrate's promise to save him from punishment. 86 Ind. Cas. 664=26 Cr. L. J. 840=21 M.L.W. 199=A. I. R. 1925 Mad. 574.

——S. 24—Scope.

There is no conflict between S. 24 and S. 80 of the Act. Where the conditions specified in S. 80 are complied with it must be presumed that the document is genuine and the confeesion duly taken but nevertheless the Court is bound to treat it irrelevant if it should appear to the Court that the confession was procured by inducement, threat or promise. A Court cannot say except on evidence that a confession 'appears' to it to have been caused by inducement, etc. Such a conclusion cannot be reached on surmise or conjecture. 72 Ind. Cas. 961=4 P. L. T. 186=24 Cr. L. J. 497=A. I. R. 1923 Pat. 13.

——S. 24—Scope.

Any statement by a person which would suggest an inference as to his guilt may be a confession within S. 24 of the Act. If it is found that a confession recorded under S. 164 of the Cr. P. C. was procured by a Police Officer by the offer of an inducement, it becomes inadmissible under S. 24 of the Evidence Act.

Per **Shah, J.**—S. 24 will apply even if the person confessing was not a accused person at the time of confession. It is sufficient if he ultimately comes to be the accused person with reference to the charge in respect of which he is said to have confessed. Though a statement of an approver may be given in evidence against him under S. 339 (2) of the Cr. P. C. it canuot be said that the operation of S. 24 is altogether excluded, if it is shown that some influence was proceeding from some authority, simultaneously with the legal tender of pardon, which would invite the application of S. 24 of the Evidence Act, then the confessional part of statement would be inadmissible by virtue of the section. **Semble** :—A statement falling within S. 339 (2) of the Code excludes the operation of S. 24 of the Evidence Act. 59 Ind. Cas. 324=22 Bom. L. R. 1247=22 Cr. L. J. 68.

——Ss. 24 and 27—Scope.

Statements by an accused which are inadmissible under S. 24 cannot be made admissible by S. 27 unless the person giving information was accused of an offence and was in the custody of the police officer, U. P. R. (1916) 11, 114=17 Cr. L. J. 402=35 Ind. Cas. 962.

15. Miscellaneous.

——S. 24—Question as to why a persson should retract confession—Whether one of law.

The mere fact of retractian of confession is not sufficient reoson for believing that the confession must have been false. The question as to why a man should, at one time, make a confession and afterwards retract it is not a question of law but a question of human psychology and of experience. A. I. R. 1936 All. 470=1936 A.L.J. 376=1936 A. W. R. 409=37 Cr. L. J. 852 (2)=163 Ind. Cas. 661.

——S. 24—Omission to comply with the requisites of the Criminal Rules of Practice (Madras) would not vitiate a confession provided S. 164, Criminal P. C. is complied with A.I.R. 1938 Mad. 490=1938 M.W.N. 90=47 L.W. 161=(1938) 1 M.L.J. 289=39 Cr. L. J. 585=175 Ind. Cas. 422.

——S. 24—Criminal P. C., S. 337—No analogy exists between approver's statement and confession of accused.

Necessarily in every case where an accused is made an approver it must be accertained whether he is willing to tell the truth or not. No analogy exists between the case of a confession obtained from an accused person by any inducement and the case of an approver. If it were so, practically all approvers' evidence would be inadmissible. 88 Ind. Cas. 283=26 Cr. L. J. 1115=A.I.R. 1925 Nag. 337.

——S. 24—Stolen articles recovered from accused and other named by him—Confession if rendered untrue because accuscd minimissed his share in offence.

Where a person confessed he had taken part in a dacoity and named his associates and the Police recovered stolen articles from the house of the person making the confession and from the persons named by him

Held, that the confession was not rendered untrue merely because the person making statement minimissed his share in the dacoity. 7 O. W. N. 456=1931 Cr. C. 130=31 Cr. L. J. 1017=126 Ind. Cas. 498=A.I.R. 1931 Oudh 74.

——S. 24—Non-compliance with Govetnment order —Effect — A Government order however salutary, has not the force of law and a confession is not bad merely because the Government complied with though it may be a circumstance to be weighed in considering, whether the confession was voluntary or not. 33 M. 413=9 M. L. T. 135=8 Ind. Cas. 809=11 Cr. L. J. 716.

——S. 25

Synopsis.

1. **Admissibility.**
2. **Co-accused.**
3. **Confession in presence or custody.**
4. **First information report.**
5. **Police Officer.**
6. **Scope.**
7. **Miscellanious.**

1. Admissibility.

——S. 25—Admissibility—Statements by several accused to Police Officer during investigation not amounting to confession when taken seperately—When taken together, showing that accused were engaged in conspiracy—Statements sought to be used to prove conspiracy—Statements amount to confessions and are inadmissible. A.I.R. 1938 Mad. 893=1938 M.W.N. 825=48 M. L. W. 622=46. CR. L. J. 108=178 Ind. Cas. 616.

——S. 25—Admissibility—A report made to the Police by the acccused which is of a self-exculpatory nature should not be excluded under S. 25, Evidence Act, as being of a nature of confession made to the Police Officer. A.I.R. 1949 Oudh 359=1941 O. W.N. 722=1941 A.W.R. (C. C.) 188=42 Cr. L. J. 539=194 Ind. Cas. 236.

——S. 25—Admissibility—Excise Officers lying in wait early morning to detect illicit manufacture of wash

—Accused detected—Confession by accused to Excise Officers—Charge under S. 55 (g), Madras Abkari Act Evidence of Excise Officers only.

Held, that the evidence of the Excise Officers was admissible under the circumstances especially when reinforced by confession. A.I.R. 1938 Mad. 460=1938 M. W. N. 95=47 M. L. W. 275=39 Cr. L. J. 338=(1938) 1 M. L. J. 238=173 Ind. Cas. 448.

——S. 25—Admissibility—Confession relating to different crime

A confession made to the Police in the course of investigating one crime is inadmisssble even though it relates to another crime. The moment a statement is found to amount to a confession, it does not matter in the slightest, of what crime it is said to be a confession. A.I.R. 1937 Mad. 209=1936 M. W. N. 1241=45 M. L. W. 100=(1937) 1 M. L. J. 154=38 Cr. L. J. 323=I. L. R. (1937) Mad. 358=166 Ind. Cas. 917.

——S. 25—Admissibility—Confession to Police Officer before commencement of investigation or after it, is inadmissible. A.I.R. 1936 Lah. 380=37 Cr. L. J. 740=38 P. L. R. 682=163 Ind. Cas. 80.

——Ss. 25, 26, 8—Admissibility—Evidence of Police Officer and of complainant as to pointing out of various places by accused.

The evidence of the Police Officer and of the complainant as to the pointing out of the various places by the accused is really evidence of the confession of his guilt made by the accused while the latter was in the custody of the Police Officer and is, therefore, a statement clearly inadmissible under Ss. 25 and 26 of the Evidence Act and such evidence cannot be treated under S. 8 of the Act as evidence of conduct, apart from the accompanying statements. A.I.R. 1935 Oudh 1=11 O.W.N. 1383=36 Cr. L.J. 166=10 Luck. 281=152 Ind. Cas. 473.

——S. 25—Admissibility—Non-incriminating statement by accused to Police.

Every statement made to the Police by an accused person is not a confession and statements which are not of an incriminatory nature are admissible. The crucial question is what use does the prosecution attempt to make of the accused's statement. If that statement is useful to the Crown because it can be shown to be false, then it is admissible. If, on the other hand, it is useful because it is believed to be true, then it would be analogous to a confession and it cannot safely be admitted. A.I.R. 1934 Sind 100=35 Cr. L.J. 1332=151 Ind. Cas. 437.

——S. 25—Admissibility—Report by accused at the Police Station that he killed the deceased.

The test for deciding whether a report made by the accused at the Police Station that he had killed the deceased is or is not admissible in evidence, is whether it is or is not in the nature of a confession that is, whether it supports any inference as to the guilt of the accused and is relied upon as such. Where the prosecution relies on it as an admission of the very criminal act with which the accused is charged and for no other purpose, it is inadmissible in evidence. A.I.R. 1933 Lah. 899=35 Cr. L.J. 143=34 P.L.R. 1000=146 Ind. Cas. 648.

——S. 25—Admissibility—Confession not during investigation.

To render a confession inadmissible under S. 25, Evidence Act, it is not necessary that it should be a confession of the crime which the Police officer is, at that moment, investigating. A.I.R. 1932 Mad. 24=1931 M.W.N. 1138=34 L.W. 858=61 M.L.J. 860=33 Cr. L.J. 173=135 Ind. Cas. 590 (1).

——S. 25—Admissibility—Confession to police may be used by the Court to bring on record by evidence any material fact that may come to its knowledge.

Confession recorded in a police diary cannot be used for anything other than to assist the presiding Judge in the enquiry or the trial or for the purpose of enabling the defence under certain circumstances to contradict the witnesses for the Crown. It is the duty of Judge to bring on record by evidence any material fact that may come to his knowledge and it is for that purpose that he can and should use the confession. 106 Ind. Cas. 442=8 A. I. Cr. R. 426=8 L. R. A. (Cr.) 153=26 A. L. J. 92=29 Cr. L. J. 26=A. I. R. 1928 All. 25.

——S. 25—Confession before witness—Statement made once before a witness and repeated before him and police is admissible.

The incriminating statement by accused was made to witness in the absence of the police and subsequently repeated before him and the police officer:

Held, the confession is undoubtedly admissible but the weight to be given to it is a matter of consideration. 76 Ind. Cas. 819=25 Cr. L.J. 259=A.I.R. 1923 Lah. 389.

——S. 25—Admissibility in evidence—Confession to police can be used to contradict judicial confession.

Section 25 lays down that a confession made to police officer shall not be used as against a person making it. It does not lay down that such a confession shall be inadmissable for all purposes. The confession to the police may be used for the purpose of the arriving at a conclusion as to whether the subsequent judicial confession should be believed or not. But it is unsafe to act upon a retracted confession 75 Ind. Cas. 693=6 L. L. J. 54=25 Cr. L. J. 5=A. I. R. 1923 Lah. 315.

——S. 25—Confession to a Police officer—Admissibility—Statement of Police.

As a confession made to a Police officer cannot be proved against an accused person, a statement by a Police officer to that effect should not be placed on the Magistrate's record; also, a Police officer should not be permitted to depose that the accused had confessed to him, even though the terms of the confession are not allowed to be proved. 7 C. W. N. 220.

——S 25—Admissibility.

Statement by an accussed to Excise Inspector in answer to question is not be regarded as a confesssion and hence is not inadmissable. 1932 M. W. N. 453.

——S. 25—Evidence regarding making of counterfeit coin—Admissibility.

A confession is an admission by an accused person in a criminal case. The making of a counterfeit coin is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by Ss. 24, 25 or 26. 1931 Cr. C. 9.

——S. 25—Admissibility — House searched—Possession of house being in question—Fact of accused's having put his signature on recovery list is inadmissible.

Where a house was searched and the accused put his signature on the recovery list:

Held, that the fact of the accused putting his signature on the recovery list is not admissible in evidence against him in a case in which the possession of the house was in question because it would be an incriminating statement of the nature of a confession to a police officer and could not be proved by reason of the prohibition contained in S. 25. 100 Ind. Cas. 707=8 Lah. 326=28 P.L.R. 119=28 Cr. L.J. 323=7 A. I. Cr. R. 291=A.I.R. 1927 Lah. 343.

——S. 25—Admissibility—Confession recorded by Village Magistrate even after investigation has begun is admissible.

Rule 195 is not a rule of law, but merely a rule for the guidance of Village Magistrate and therefore, a confession recorded by a Village Magistrate after the police investigation has begun is admissible apart from the fact whether the Magistrate knew that the investigation had begun. 105 Ind. Cas. 667=1927 M. W. N. 824=28 Cr. L. J. 955=9 A. I. Cr. R. 148=A. I. R. 1927 Mad. 974=53 M.L.J. 739.

——S. 25—Admissibility—Repetition to Magistrate.

Confession made to police officer—Accused merely repeating before Magistrate the fact and contents of the previous confession—Statement to Magistrate is inadmissible in evidence. 89 Ind. Cas. 1046=27 Bom. L. R. 1034=49 Bom. 642=26 Cr. L. J. 1478=A. I. R. 1925 Bom. 529.

——S. 25—Admissibility—Statement and confession.

Every statement made by any accused person to a Police Officer is not a confession and is no **ipso facto** excluded from being received in evidence. Where the prosecution do not rely upon the statements of the accused either as true or as containing any incriminating circumstances to prove their guilt or for the purpose of avoiding their obligation of proving one of the ingredents of the offence with which the accused are charged but the statements are relied on as false and not as confession they are admissible. 86 Ind. Cas. 961=19 S. L.R. 6=26 Cr. L.J. 897=A.I.R. 1925 Sind 257.

——S. 25—Criminal P. C., S. 161—Admissibility—Inquiry under S. 161. Criminal P.C.—Incriminating statement by accused is inadmissible.

Any incriminating statement made by an accused person at an inquiry held under S. 161, Cr. P. C., would be excluded at the trial under S. 25 of the Evidence Act, as having been made to a Police Officer, and as such of no material use at the trial. 86. Ind. Cas. 410=26 Cr. L.J. 778=19 S.L.R. 142=A.I.R. 1925 Sind 237.

——S. 25—Explanatory statement of the circumstances is not a confession.

Where the Sub-Inspector of Police deposed to the effect that the accused came with cattle and made a statement to him that they were present in the fight:

Held, that the statement of the accused does not amount to a confession in as much as it was only an explanatory statement of the circumstances under which cattle had been seized and was not an admission of guilt but rather in the nature of complaint against the victim of the fight to the effect that he had illegally attempted to interfere with the arrest of the cattle. 81 Ind. Cas. 347=25 Cr. L.J. 811=A.I.R. 1923 Lah. 232.

——S. 25—Statement not amounting to a confession is admissible against accused.

A Statement made by an accused to a police officer if it does not amount to confession may nevertheless be used against him and more particularly if the statement made turns out to be false in the light of the other evidence in the case. 65 Ind. Cas. 849=20 A.L.J. 178=23 Cr. L.J. 193=A.I.R. 1922 All. 24.

——S. 25—Statement containing confession—Portions not confession are also admissible.

Where in a murder case, the first information was lodged by the accused himself, and the accused had stated therein that he had committed the murder:

Held, that the preliminary portions of the first information giving a history or narrative of events preceding the night of occurrence were admissible as statements or admissions not being confessions.

Though when portions of a statement are admitted persons affected thereby may demand that the statement should be addmitted and considered in its entirety, yet the principle that portions of a statement or confession may be admitted and others excluded is recognised in the Evidence Act itself. 62 Ind. Cas. 578=25 C.W.N. 788=22 Cr. L.J. 562=A.I.R. 1921 Cal. 111.

——S. 25—Admissibitity—Report of confession before Police.

A report made to Police amounting to a confession is not admissible in evidence against the person who makes it. 36 P.R. 1918 (Cr.)=20 Cr. L.J. 83=48. Ind. Cas. 883.

——S. 25—Admission before Police—Relevency.

An admission made by the accused to the Poilice is inadmissible against him under S. 25. 17 Cr. L.J. 51=10 Bur. L. T. 121=36. Ind. Cas. 480.

——S. 25—Information by accused to Police Officer—Admission by accused of his guilt before Sub-Inspector—Admissibility.

An admission made by the accused of his guilt before a Sub-Inspector of Police is not admissible in evidence. 1. O.L.J. 163=15 Cr. L.J. 474=24 Ind. Cas. 562.

——S. 25 and 26—Adminissibility—Confession by way of explanation.

A statement made by an accused person to a police officer by way of an explanation in order to exculpate himself is admissible in evidence. 6. S.L.R. 143=14 Cr. L.J. 252=19 Ind. Cas. 508.

——S. 25—Admissiblity- Confession—Three persons were tried jointly for rioting. During the trial an information lodged by one of them with the Police was proved and in his charge to the jury, the judge said "It (the information) contains an admission that all three accused persons were present at the occurance."—**Held:** The information was not a confession under S. 25 of the Evidence Act, and as against the persons other than the informant, it amounted to an improper admission of evidence against them. (1910) 11 C.L.J. 301=14 C.W.N. 493.=5 Ind. Cas. 315=11 Cr. L.J. 96.

——Ss. 25 and 30—Confession to Police—Admission by a person before he was accused of an offence—Admissibility.

Accused was convicted on the evidence of two excise Sub-Inspectors who stated that he offered them Rs. 10 per ball of opium as a bribe to let him land from a steamer unmolested. **Held,** that the alleged offer by the accused amounted to an admission that he had large quantity of contraband opium in his possession and being an admission of an offence under the Opium Act, amounted to a confession and was thus inadmissable under S. 25 of the Evidence Act. The test, which has to be applied in deciding whether S. 25, Evidence Act, applies, is the position of the person at the time when it is proposed to prove the admission and not his position at the time when he is alleged to have made it. A confession therefore made to a police officer by a person when he is not accused of any offence is inadmissable in evidence against him when he is accused of an offence. A confession made by an accused person to a police officer might be admissable in favour of a co-accued but not against him. 5 Bur. L.T. 92=13 Cr. L.J. 465=15. Ind. Cas. 305.

——S, 25—Statements against accused—Admissibility.

A confession or statement which is in admisible against the person making it, is inadmisible against a person inplicated by it. Previous statements of an approver to the police are inadmissible against the accused under S. 25 of the Act. Per **Miller and Abdur Rahim, JJ:**—The confession that is excluded by S. 25 is only the confession of a person charged with the offence. 35 Mad. 397=13 Cr. L.J. 352=(1912) M.W.N. 549=12 M.L.T. 1=14 Ind. Cas. 896 (F.B.).

——S. 25—Statement of approver to—Police—Admissibility.

The statements of approver to a Police Inspector being really confessions, are inadmissible against the accused under S. 25 of the Evidence Act. 35 Mad. 247=(1912) M. W. N. 207=13 Cr. L. J. 305=22 M.L.J. 490=11 M.L.T. 1 Spp.=14 Ind. Cas. 849 (S.B.)

——Ss. 25, 26—Panchnamas—Admissibility—Record of accused's conduct—Statement in consequence of which nothing was discovered.

Courts should exclude from the record **Panchnamas** which contain statements by an accused person which are clearly inadmissible or which are of doubtful admissibility. 13 Bom. L. R. 499=12 Cr. L. J. 429=11 Ind. Cas. 613.

——S. 25—Admissibility—Confession to Police.

A confession made to a police officer is not admissible. 5 L.B.R. 131=3 Bur. L.T. 63=11 Cr. L.J. 153=4 Ind. Cas. 1028.

——S. 25 and Cr. P. C., S. 533—Admissibiiity—Record by Police officer—Signature on another date.

When the statement of an accused instead of being recorded in questions and answers is written in a narrative form and thereby the accused is not prejudiced or injured in any way in his defence on the merits, the omission to record the questions, specially when they were of a normal character, is an irregularity covered by S. 533, Cr. P. Code and the confession thus recorded is not inadmissible in Evidence. 14 Cal. 539, Foll. 2 C. W. N. 702, 8 C. W. N. 22. Dist. A confession recorded under S. 164, Cr. P. Code, by a police officer, though employed as a mere scribe by a Magistrate, is nadmissible, when the signature of the accused is not taken at the time the confession is made. but is taken the next day, and the Magistrate swears to the authenticity of the confessional statement, the statement is admissible in evidence. A confession recorded under S. 164, Cr. P. Code, by a Magistrate who does not inform the accused that he is a Magistrate, is not inadmissible when the accused seems to be fully aware that the officer who took his statement was a Magistrate. 9 C.L.J. 55=10 Cr. L.J. 325=2 Ind. Cas. 625.

——S. 25—Admissibility—Voluntary confession.

A statement made by accused to a police officer, to the effect that he committed murder, the statement being made before he was arrested by voluntarily going to the thana, is inadmissible, under S. 25. 10 C. L. J. 13=10 Cr. L.J. 193=2 Ind. Cas. 951.

——S. 25—Admissibility—Statement voluntarily made to a Police officer by the accused, not in custody—Confession not admissible—Confession to Police officer, not admissible in evidence—Police Officer's evidence as to conduct or condition of the accused while making the statement admissible.

A person who had committed a murder voluntarily went to a Police station, and made a statement to a Police officer that he had done the deed, and that the instrument of murder was in a place named. He was subsequently arrested. **Held,** that the statement was a confession and was not admissible under S. 25 of the Evidence Act. Evidence of the Poliee officer, however, was admissible to prove the conduct and condition of the murderer at the time when the statement was made. 10 C.L.J. 13=2 Ind. Cas. 951=10 Cr. L.J. 193.

——S. 25—Admissibility of.

Confession made to police officer is admissible to prove the ownership of property regarding which he is charged. 56 Ind. Cas. 62.

——Ss. 25, 17, 19 and 21—Admissibility of confession to Police in Civil Suit.

Admissions of guilt by one of the defendants, in a suit, to a police officer though not receivable in evidence in a criminal trial, may be proved in Civil proceedings under Ss. 17, 18 and 21. 106 P. W. R. 1915=187 P.W.R. 195=32 Ind. Cas. 18.

2. Co-accused.

——S. 25—Co-accused.

Statement of one co-accused made in his own interest cannot be used by the prosecution as substantive evidence against the other. 1936 O.W.N. 671.

——Ss. 25, 30—Statement of accused at Police Station against co-accused—Admissibility of.

Statement of the accused at the Police Station implicating his co-accused is not admissible in evidence. A.I.R. 1933 Lah. 167=34 P.L.R. 259=34 Cr. L.J. 1175 (2) = 146 Ind. Cas. 27.

——S. 25—Statement by accused to Police that co-accused gave him ammunition bundle is inadmissible.

A distinction must be made between statements which are self-exculpatory, and statements, which, although intended to be made in self-exculpation and not as a confession, nevertheless contain an admission of incriminating circumstances. on which the prosecution relies.

It is for the Court to decide, according to the particular circumstances of each case, whether a statement of and accused amounts to a confession or not. Where an accused stated to the police that he got the ammunition bundle from the co-accused:

Held, that the mere fact that the accused in making this statement may have intended it to be self-exculpatory is insufficient to take it out of the section. The statement in effect amounts to an admission that the accused associated with the other accused and is therefore not admissible. 75 Ind. Cas. 70=46 Bom. 961=25 Bom. L.R. 214=24 Cr. L.J. 870=A I.R. 1923 Bom. 65.

——S. 25—Co-accused.

S. 25 only provides that a confession made to a police officer shall not be proved against the accused. Such confession is admissible in evidence on behalf of another co-accused. 4 Bur. L. T. 9=12 Cr. L. J. 70=9 Ind. Cas. 449.

——S. 25—Confession to Police Officer—Admissibility against co-accused.

A confession of an accused person to a Police Officer is inadmissible against him much less is it admissible against his co-accused. 12 Bom. L. R. 899=11 Cr. L.J. 690=8 Ind. Cas. 622.

——S. 25—Co-accused—Counter complaint.

A counter complaint by accused to the police to the effect that all the accused were present at the occurance is admissible as against that accused and is not barred by S. 25, but it is inadmissible as against the remaining accused. 11 C.L.J. 301=14 C. W. N. 493=11 Cr. L. J. 96=5 Ind. Cas. 315.

3. Confession in presence or Custody.

——S. 25—Confession to villagers—Presence of chowkidar—If affects admissibility.

Where a confession is made by the accused to some villagers, the fact that the chowkidar was also present there would not render the confession inadmissible on that ground. The accused could not be said to be in the custody of the chowkidar 1947 A. L. J. 265=1947 A.W.R. (H.C.) 273=1947 A.L.W. 484=A. I. R. 1948 All. 7=48 Cr. L.J. 939.

——S. 25—Confession to large crowd of villagers—Presence of Policeman in the crowd.

Even if a Policeman happens to be a member of a crowd of villagers and a confession is made to the villagers at large, the mere fact that a Policeman happened to be present in the crowd will not make the confession inadmissible in evidence. A.I.R. 1934 All. 132=35 Cr. L. J. 448=3 A. W. R. 419=1934 A. L. J. 143=147 Ind. Cas. 630.

——S. 25—Extra-Judicial confession to private individual in presence of chaukidar.

Although it cannot be said that a confession made to a private individual in the presenec of a **chaukidar** is in every case admissible in evidence, yet where it is not shown that the **chaukidar** has, in any way, influenced the accused, who is not in custody, to make the cot.fession and the **chaukidar** has taken no part in bringing about the confession of the accused than such a confession made to a villager in the presence of a **chaukidar** would not come within the mischief sought to be averted by S. 25. Evidence Act, and would be admissible in evidence.

The fact that a **kara** recovered from the person of the accused was found stained with human blood and the fact that the handle of a weapon ((**kudal**) produced by him was also stained with human blood tend to corroborate the truth of the extra-judicial confession made by the accused.

Even if a confession appears to be untrue as far as it implicates other persons in the crime, the part that appears untrue will, in no way, lesson the culpability of the accused and the confession can be used against him. A. I. R. 1934 Oudh 222=11 O. W. N. 636=35 Cr. L.J. 894=149 Ind. Cas. 69.

——S. 25—Extra-judicial confession while in custody of village chaukidar.

Where the accused makes an extra-judicial confession before certain villagers while he is in the custody of a village **chaukidar**, the confession is inadmissible in evidence, the village **chaukidar** being a Police Officer within the meaning of S. 25, Evidence Act.

The circumstance that the accused is in Police custody before and after making the confession should be regarded as discounting the value of the confession. One important test of the truth of a statement contained in a confession is the revelation of facts which up to the time that the confession was made, had not been discovered by the police. A. I. R. 1933 Oudh 192=10 O. W. N. 348=8 Luck. 410=34 Cr. L. J. 653=43 Ind. Cas. 846.

——S. 25—Presence of Police officer—Confession made to person asked by police officer to take confession—Police officer in near proximity—Confession comes under S. 25.

A confession made to another person in the presence of a police officer, who has asked or instructed that other person to take the confession in such a way as to be his agent where the confession takes place under such circumstances that the police officer is in such proximity as to make his presence likely to affect the mind of the confessing person, is in substance a confession to a polic officer. 97 Ind. Cas. 44=49 All. 57=27 Cr. L. J. 1068=24 A. L. J. 958=7 L. R. A. (Cr.) 156=A. I. R. 1926 All. 737.

——Ss. 25 and 26—Statement by accussd in presence of Excise Officers—Admissiblity.

A statement by an accused arrested on a change of unlawfull possession of opium to Excise Officers, the police servants remaining in a room in another part of the house, is still a statement made while in Police custody and therefore inadmissible. 21 C. W. N. 694=18 Cr. L. J. 609=39 Ind. Cas. 977.

——Ss. 25, 26—Confession of accused while in custody of jailor—Admissibility.

A confession of the accused while in the custody of the jailor and a police officer does not fall under S. 26 or S. 25 and so is admissible in evidence. 20 Bom. 795, Foll. 8 P. R. 1914 Cr. 214=P. L. R. 1914=15 Cr. L. J. 480=24. 33 Ind. Cas. 568.

——S. 25—Confession in presence of Police—Admissibility of.

A confession made by an accused to a private person in the presence of the police is inadmissible in evidence against him. 37 P. W. R. 1913 Cr.=320 P. L. R. 1913= 14 Cr. L. J. 596=21 Ind. Cas. 468.

——S. 25, 26 and 27—Confession.

A confession in jail before a Magistrate, with a police officer in next room, should be corroborated very strongly if it is to be acted upon. 11 C. L. J. 273=11 Cr. L. J. 247=5. Ind. Cas. 773.

4. First information report.

——S. 25—Extent of admissibility of first information report made by accused containing confessional statements.

Where a first information report made by the accused contains confessional statements, the whole of the first information report need not be excluded from admission. The confessional part of the first information report alone should be excluded. A.I.R. 1941 Nag. 86, Foll. A.I.R. 1950 Ajmer 75.

——S. 25—Confession of accused recorded as first information report—Admissibility.

A statement of an accused amounting to a confession made at a police station and taken down as first information report in the case, is inadmissible against him as it amounts to a confession to a Police officer. There is however no legal bar to such a confession being used in his favour. 48 Cr. L. J. 977=A.I.R. 1948 Lah. 43.

——S. 25—Accused giving first information admitting his own guilt.

Where first information is given by the accused to a Police Officer and that information admits his guilt, the information amounts to a confession within the meaning of S. 25, Evidence Act, and it cannot be proved against the accused. Where the confession shows opportunity for the offence, motive for it and its commission, it is not possible to say that the portion of it dealing with opportunity or dealing with motive, can be treated as no part of the confession. A.I.R. 1935 Bom. 26 36 Bom. L. R. 1117=36. Cr. L J. 539=59 Bom. 120=154 Ind. Cas. 621.

——S. 25—First information report.

A confessional statement made to the Police immediately after a murder and which was recorded in the first information report is admissible in evidence. 90 Ind. Cas. 148=26 Cr. L.J. 1942.

5. Police Officer.

——S. 25—Police officer—Prohibition Sub-Inspector under the Madras Prohibition Act, if a "police officer"—Confessional statement recorded by such officer—Admissibility.

A Prohibition Sub-Inspector under the Madras Prohibition Act cannot be deemed to be a "police officer" when the meaning of S. 25 of the Indian Evidence Act. Throughout the Madras Prohibition Act, "Police officer", is mentioned in contradistinction to a Prohibition officer. Hence a confessional statement recorded by a Prohibition Sub-Inspector is not inadmissible in evidence under S. 25 of the Evidence Act. I.L.R. (1948) Mad. 574=49 Cr. L.J 100=A.I.R. 1948 Mad. 116=1947 M.W.N. 524=60 L.W. 530=(1947) 2 M.L.J. 218.

——S. 25—"Police Officer—Assistant Inspector of Customs invested under the Sea Customs Act with powers of arrest, search, seizure—Not a police officer within the meaning of S. 25 of the Evidence Act—Statement made to him admissible in evidence.

The Assistant Inspector of Customs is not a police officer within the meaning of S. 25 of the Evidence Act as the section should not be extended to other classes of officers merely on the ground of similarity of function. So, where statements are made by the accused to the Assistant Inspector of Customs, such statements are not hit by S. 25 of the Evidence Act and are hence admissible in evidence. I.L.R. (1947) Mad. 788 =229 Ind. Cas. 236=1946 M.W.N. 766=59 L. W. 751 =48 Cr. L.J. 326=A.I.R. 1947 Mad. 308=(1946) 2 M.L.J. 420.

——S. 25—Police officer—Foodgrains inspector under U. P. Food Grains Control Order.

Foodgrains inspector under the U. P. Food Grains Control Order is not a "Police Officer" within the meaning of S. 25 of the Evidence Act and hence confessions made to him cannot be said to be inadmissible. 22 Luck. 492=1947 A.W.R. (C.C.) 126=1947 O.W.N. 503=A.I.R. 1948 Oudh 81=49 Cr. L.J. 43.

——Ss. 25 and 26—"Police Officer"—Chowkidar-Confession made to—Admissibility.

A Chowkidar is Police Officer for the purpose of Ss. 25 and 26, Evidence Act. No evidence can therefore be given of a confession made to a Chowkidar. 25 Pat. 356=27 P.L.T. 507=A.I.R. 1947 Pat. 146=229 Ind. Cas. 592=48 Cr. L.J. 412.

——S. 25—"Police Officer"—Special officer of Commercial Tax Department empowered to investigate into offences under the Hoarding and Profiteering Prevention Ordinance. (1946) 1 M.L.J. 368.=A.I.R. 1946 Mad. 430.

——S. 25 Police Officer—Confession to Civic Guard.

A member of the Civic Guard cannot be treated as anything else than a Police Officer when called out on duty, even though he may not have the powers of investigation. But a confession not made to him while he was on duty, or in connection with his duties cannot be regarded as one made to a Police Officer. A.I.R. 1944 Lah. 57=46 P.L.R. 15=45 Cr. L.J. 555=122 Ind. Cas. 156.

——S. 25—Abkari Officer, if a Police Officer.

An **Abkari** Officer investigating an offence against the Bombay Abkari Act in exercise of the powers conferred upon him in Chap. IX of the Act is Police Officer within the scope of S. 25, Evidence Act. A.I.R. 1938 Sind 1=39 Cr. L. J. 239=32 S.L.R 185=172 Ind. Cas. 968 (F.B.),

[Overrules (1) A.I.R. 1925 Sind 70=82 Ind. Cas. 151 (2) A.I.R. 1927 Sind 112=99 Ind. Cas. 594.]

——S. 25—Police Officer—Confession made to chowkidar **appointed under N. W. Province Village and Road Police Act, 1873.**

A village **chowkidar** appointed under North Western Province Village and Road Police Act, 1873, is a Police Officer within the words of S. 25, Evidence Act, and consequently, a confession made to him is inadmissible in evidence. A.I.R. 1936 All. 753=1936 A.L.J. 999=1936 A.W.R. 894=38 Cr. L.J. 40=I.L.R. (1937) All. 85=165 Ind. Cas. 701 (F.B.).

[Overruling A. I. R. 1934 All. 132=147 Ind. Cas. 630.]

——S. 25—Village mukhia, **if a police officer.**

A village **mukhia** is not a Police Officer for the purpose of S. 25, Evidence Act. A.I.R 1935 All. 549= 1935 A. W. R. 388=1935 A.L.J. 478=36 Cr. L.J. 63 =155 Ind. Cas. 119.

——S. 25—Sub-Divisional Officer.

The term "Police Officer" has not been defined anywhere and must be taken, not in any technical sense, but in its more popular meaning. Hence in common parlance and among the generality of people, a Sub-Divisional Officer cannot be taken to be a Police Officer

at all; he is a member not of the Police service, but of the Provincial Civil Service, and much of his work is judicial. Consequently, a confession made to the Sub-Divisional Officer is not inadmissible in evidence. A. I. R. 1934 Pat. 256=35 Cr. L.J. 1217=150 Ind. Cas. 991.

——S. 25—Police officer—Political Muharrir.

The Political Muharrir of Oghi occupies the position of a police Officer and no statement made before him by an accused person by way of confession could be admissible in evidence.

There is no infallible rule of practice that where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole, and cannot accept only the inclupatory element, while rejecting the exculpatory element as inherently incredible. A.I.R. 1933 Pesh. 38=34 Cr. L.J. 804=144 Ind. Cas. 160.

——S. 25—Police officer acting as Magistrate—Police officer acting also as Magistrate—Confession to him is illegal.

An Assistant Superintendent having all the powers of a District Superintendent of Police cannot cease to be a police officer simply because he is also a Magistrate and is acting in that capacity and therefore confession made to him is inadmissible in evidence. 8 Rang. 52=1930 Cr. C. 705=A.I.R. 1930 Rang. 227.

——S. 25—'Police officer'—Officer exercising powers of police is Police officer (Per Shah, J., Kemp, J., contra).

The Police officer within the meaning of S. 25 is an officer who exercises the powers of the police conferred upon him by law, whether he is called a Police officer or he is called by any other name and exercises other functions also under other provisions of law. 99 Ind. Cas. 330=51 Bom. 78=28 Bom. L.R. 1196=28 Cr. L.J. 122=7 A.I. Cr. R. 249=A.I.R. 1927 Bom. 4 (F.B.).

——S. 25—"Police officer" in S. 25 is wider than in Police Act (1861), S. 1.

Primarily the term "Police Officer" in S 25 of the Evidence Act means the same as it does in the Police Act but it can be extended beyond the definition in S. 1 of the Police Act to cover only those persons who, like Police officers, coming within that definition, are so much more interested in obtaining convictions than any member of the community is, that they might possibly resort to improper means for doing so. 101 Ind. Cas. 599=23 N.L.R. 23=28 Cr. L.J. 471=8. A.I. Cr. R. 66=A.I.R. 1927 Nag. 222.

——S 25—Police Patel in Berar is not Police Officer.

A Police Patel in Berar cannot be regarded as a Police Officer for the purposes of S. 24: 101 Ind. Cas. 599=23 N.L.R. 23=28 Cr. L.J. 471=8 A.I. Cr. R. 66=A.I.R. 1927 Nag. 222.

——S. 25—Patel in Berar is Police Officer.

A Patel in Berar is a Police Officer, and the fact that powers are conferred upon him by rules made under the Berar Patels' and Patwaris Law, 1900 makes no difference. Consequently the confession made by an accused to a Patel is inadmissible. 88 Ind. Cas. 32=26 Cr. L.J. 1088=A.I.R. 1925 Nag. 340.

——S. 25—Kotwar in C. P. is not a police officer

The widest and most comprehenive extension of the term "police officer" cannot make it include a Kotwar in the Central Provinces. He is popularly regarded as a subordinate police officer and even that idea arises mainly from the fact that it is his duty to make, or rather to carry, frequent reports to the police. But the making of reports to a department of the Government does not constitute a person who make them, a member of that department even in the popular sense and therefore a confession made before him is admissible in evidence. 76 Ind. Cas. 291=25 Cr. L.J. 147=A.I.R. 1924 Nag. 29.

——S. 25—Village Headman is not a 'Police officer" though invested with power of arrest.

The mere bestowal on a village Headman of some powers of arrest as are given to a police officer, does not make him a police officer any more than it makes a Magistrate a police officer. A confession, therefore, made to him is not inadmissible in evidence, but the weight to be attached to such confession will depend on the circumstances of the case and the part he has taken in the elucidation of the crime. 81 Ind. Cas. 540=2 Rang. 31=3 Bur. L.J. 11=25 Cr L.J. 924=A.I.R. 1924 Rang. 245 (F.B.).

——S. 25—Constabulary—Frontier constabulary is a police officer.

For the purpose of Ss. 25 and 26 of the Evidence Act a member of the Frontier Constabulary is a police officer and confession made to him while the accused was in his custody and not in the presence of a Magistrate is inadmissible. The term Police officer in this respect must be construed not in any strict technical sense but according to its most comprehensive and popular meaning. The mere fact that the powers of the police officers have not been actually conferred on certain members of the frontier constabulary does not make them any the less police officers. 71 Ind. Cas. 360=24 Cr. L.J. 136.

——Ss. 25 and 30—Police officer—Meaning—Excise Officers—Self exculpatory statement—Retracted statement—Value of.

Statements made to Excise Officers could not be rejected under S. 26 of the Evidence Act as the Excise Officers are not police officers. Even a retracted confession is admissible against the co-accused though its weight is small. To determine whether the statements were confessions the whole of the statements must be taken into consideration and the statements in question being self exculpatory were inadmissible against the appellant. 46 Cal. 411=22 C.W.N. 834=28 C.L.J. 105=20 Cr. L.J. 94=48 Ind. Cas. 504.

——S. 25—Police Officer—Meaning confession to excise Inspector—Admissibility.

Statement by an accused to the Excise Inspector that the opium found in his house was his, though in the nature of a confession was admissible in evidence, the Excise Inspector not being a Police Officer. 3 P. R. 1918 Cr.=19 Cr. L.J. 364=133 P. L. R. 1918=44 Ind. Cas. 588.

——Ss. 25 and 27—Police officer, meaning—Native states, Police Officer of—Confession—Discovery of fact in pursuance includes discovery of offender.

The expression "Police Officer" in S. 25 of the Evidence Act is used in its usual and mere comprehensive meaning, and includes Police Officers of the

Native States as these of British India. A confession made to a Police Officer in H. H. Nizam's Dominions is not therefore, admissible in evidence. 22 Bom. 235, Foll. The discovery of a person who is afterwards proved to be a decoit is not the discovery of a fact within S. 27. The test of admissibility under S. 27 of an information received from an accused person in the custody of a Police Officer is whether the fact as discovered was a direct, natural and necessary consequence of the information so received. 14 N. L. R. 192 =19 Cr. L.J. 79=43 Ind. Cas. 111.

——S. 25—Police Officer—Meaning.

Quaere.—Whether Excise Officers who have large powers of search, arrest and detention are to be regarded as police officers within the meaning of S. 25 of the Evidence Act. 21 C.W.N. 694=18 Cr L.J. 609=39. Ind. Cas. 977.

——S. 25—Police Officer, meaning—Village chawkidars whether Police Officers.

Village Chawkidars are Police Officers within the meaning of S. 25 of the Evidence Act. 1 O.L.J. 687= 16 Cr. L.J. 62=26 Ind. Cas. 654.

——Ss. 25 and 26—Police Officer, meaning —Confession to foreign Police—Admissibility.

A confession made to a foreign Police Officer is not admissible in evidence according to Ss. 25 and 36 of the Evidence Act. 22 B. 235 Foll. 11 M.L.T. 407=13 Cr. L.J. 528=15 Ind. Cas. 800.

——S. 25—Police Officer—Meaning of.

Since the Excise Supt. is a police officer, proof of an incriminating statement made to him by an accused person is absolutely barred by S. 25 of the Evidence Act. 11 Cr. L. J. 77=4. Ind. Cas. 898 (Bur).

——S. 25—Police Officer, meaning—Village kotwar.

The Police Officer in S. 25 does not include the village watchman or kotwar in central provinces. 57 Ind. Cas. 88 (Nag.).

——S. 25—Police Officer, meaning of—Village officer in Punjab—Confession.

In the Punjab, village chowkidar is not a "Police Officer" or a person in authority within S. 25 of the Evidence Act. A confession made by an accused person to a chowkidar is consequently admissible. 42 P. R. (Cr.) 1917=43 Ind. Cas. 84.=19 Cr. L. J. 52.

——S. 25—Police officer—Whether includes person invested with police powers—Confession made to such person—Admissibility.

Where a confession was made to an Assistant Superintendent of the Pokkoku Hill Tracts who exercised the powers of Additional District Magistrate and who was also an Assistant Commandant of Military Police:

Held, that the confession was made to a police officer and was therefore inadmissible in evidence. 8 R. 52= 125 Ind. Cas. 337=A.I.R. 1930 Rang. 227.

——S. 25—Police officer—Confession to Excise Officer.

An Excise Officer is not a Police Officer. Hence a confession made before him may be proved at the trial. A.I.R. 1945 Lah. 10=46 Cr. L.J. 213=46 P.L.R. 329= 217 Ind. Cas. 172.

——S. 25—Excise officers, if police officers.

Section 25, Evidence Act, refers only to a Police Officer. The restrictive provisions of S. 25 should not, therefore, be applied to Excise Officers. A confession made by an accused to an Excise Officer is, therefore, admissible in evidence against him. A.I.R. 1938 Mad. 460=1938 M. W. N. 95=(1938) 1 M. L. J. 238=47 M.L.W. 275=39 Cr. L.J. 338=173 Ind. Cas. 448.

——S. 25—Excise officers, if police officers.

Officers of the Excise Department are Police Officers for the purpose of S. 25, Evidence Act. A. I. R. 1935 Nag. 13=36 Cr. L. J. 511=154 Ind. Cas. 341.

——Ss. 25, 155—Excise officer, if a police officer.

An Excise Officer is a Police Officer within the meaning of S. 25, Evidence Act, and consequently, a statement made to the investigating Excise Officer by the accused's companion after his arrest is inadmissible as a piece of substantive evidence as against its maker and as against the accused. But if the statement is used merely for the purpose of supporting the evidence given by the latter to the effect that the accused's companion did not tell him after his arrest, that the opium in question belonged to him alone, as stated by him in his evidence and of contradicting the companion himself, such use of the statement of the evidence is permissible under provisions of S. 155, Evidence Act.

There is no authority for assuming that an Excise Officer is to be regarded as a Police Officer for the purposes of S. 162, Criminal P. C. A.I.R. 1934 Cal. 616= 35 Cr. L. J. 1178=38 C. W. N. 1005=61 Cal. 967= 150 Ind. Cas. 980 (2).

——S. 25—Excise Officer.

Per **Full Bench** (**Costello, J.**, dissenting).—An Excise Officer, who, in the conduct of investigation of an offence against the Excise, exercises the powers conferred by the Criminal P. C., upon an officer in charge of a Police Station for the investigation of a cognizable offence is a Police Officer within the meaning of S. 25, Evidence Act. A. I. R. 1934 Cal. 580=35 Cr. L.J. 1071 =38 C. W. N. 930=59 C. L. J. 555=61 Cal. 607=150 Ind. Cas. 561 (2) (F.B.).

——S. 25—Excise Officer.

Statement to an Excise Officer does not come within S. 25, even if public officers were present when it was made. 1934 M.W.N. 394.

——S. 25—Excise Sub-Inspector.

The admission of the accused to the Sub-Inspector Excise Sub-Inspector is inadmissible under S. 25, Evidence Act. A. I. R. 1934 Nag. 136=35 Cr. L.J. 1233= 150 Ind. Cas. 1144.

——S. 25—Bengal Excise Act, 1909—Confession to Excise officer—If to a police officer.

An Excise Sub-Inspector is not a Police Officer within the meaning of S. 25, Evidence Act, which provides that no confession made to a Policer Officer should be admitted in evidence. A.I.R. 1932 Cal. 122=36 C.W.N. 163=34 Cr. L.J. 21=140 Ind. Cas. 257.

——S. 25—Excise Officer under the Bihar and Orissa Excise Act, 1915.

An Excise Officer under the Bihar and Orissa Excise Act, is not a 'Police Officer' within the meaning of

S. 25, Evidence Act. Therefore, a confession made to an Excise Inspector who, under the Dangerous Drugs Act, 1930, not only has the power to arrest and search but has also been invested by the Local Government with the powers of a officer in charge of a Police Station for the investigation of an offence under that particular Act, is admissible in evidence. A. I. R. 1932 Pat. 293=13 P. L. T. 627=12 Pat. 46=34 Cr. L. J. 1=140 Ind. Cas. 283 (S. B).

——**S. 25—Police officer.**

Excise Officers investigating offence are virtually Police Officers and a confession made to them during investigation is, therefore, inadmissible under S. 25, Evidence Act. A.I.R. 1931 Cal. 350=32 Cr. L.J. 640 =58 Cal. 1260=35 C.W.N. 601=131 Ind. Cas. 113.

——**S. 25—" Police Officer. "**

An excise officer is not a police officer within the meaning of S. 25. Where it was shown that the co-accused told the officer that a man who was with him had run away on seeing the officer. **Held**, that the statement was not made in the course of investigation. 52 C. L. J. 177=1930 Cr. C. 1110=A. I. R. 1930 Cal. 710.

——**S. 25—Excise Officer is not police officer and admission to him is admissible—Burma Excise Act (5 of 1917), Ss. 53, 54, 55, 56.**

Although under Burma Excise Act 5 of 1917 an Excise Officer has power of arrest, search and granting bail he is not a police officer and an admission made to him is admissible in evidence. 121 Ind. Cas. 715=7 Rang. 771=31 Cr. L. J. 303=A.I.R. 1930 Rang. 49.

——**S. 25—Police officer.—Excise Peon is police officer and confession made to him is inadmissible.**

An excise peon having the power to detain, search, seize and arrest any person whom he believes to be guilty of any offence under Opium Act of Bombay Abkari Act has powers which are very similar to those exercised by a police officer. Any confession made to him is therefore inadmissible under the provisions of S. 25. A.I.R. 1927 Bom. 4 (F.B.), Appl. 117 Ind. Cas. 331=31 Bom. L. R. 49=30 Cr. L. J. 783=A. I. R. 1929 Bom. 70.

——**S. 25—Police officer.**

An Excise Officer is not a Police Officer within S 25 of the Evidence Act. 46 Cal. 411, Foll. 102 Ind. Cas. 547=54 Cal. 601=31 C. W. N. 667=28 Cr. L. J. 579= 8 A. I. Cr. R. 114=A. I. R. 1927 Cal. 527.

——**S. 25—Excise officer is not a police officer—Confession made to him is good evidence.**

An excise officer is not a police officer within the meaning of the Evidence Act and hence a confession of guilt made to him is good evidence against the accused. 46 Cal. 411 and A.I.R. 1925 Sind 70, Foll. 99 Ind. Cas. 594=7 A. I. Cr. R. 290=28 Cr. L. J. 162=A.I.R. 1927 Sind 112.

——**S. 25—Police Officer—Statement made to excise officer is admissible as he is not a police officer.** 46 Cal. 411. Foll, 97 Ind. Cas. 665=28 Bom. L. R. 674=27 Cr. L. J. 1145=A.I.R. 1926 Bom. 517.

——**S. 25—Police Officer—Excise officers are not police officers within the section.** 46 Cal. 411, Foll. 82 Ind. Cas. 151=18 S. L. R. 75=25 Cr. L. J. 1223=A. I. R. 1925 Sind 70.

6. Scope.

——**S. 25—Scope—**

There is no bar either in S. 25, Evidence Act or S. 162, Criminal P. C., to a confessional statement of an accused made to a Police Officer during investigation being used for the purpose of S. 517, Criminal P. C., to determine firstly whether the property regarding which an offence appears to have been committed, and secondly for determining the person to whose custody it should be delivered. A.I.R. 1943 Lah. 812=45 P. L. R. 391=45 Cr. L. J. 153=209 Ind. Cas. 546.

——**S. 25—Accused wishing to rely on his own confession—S 25 is no prohibition.**

The prohibition contained in S. 25, Evidence Act, can be treated as applying only to confessions which are to be proved as against the accused, that is, in support of the prosecution case, and cannot apply to statements on which the accused himself wishes to rely in connection either with his conviction or his sentence. In cases where two versions of the same incident are being put forward, it is often of the greatest importance for an accused to be able to show that his own explanation was put forward at the earliest possible opportuni y, and, therefore, an accused person should not be deprived of the right to make use of such a statement, merely because, to a certain extent, it goes against him. A.I.R. 1942 Lah. 37=43 Cr. L. J. 370=I. L. R. (1943) Lah. 77=43 P. L. R. 672=198 Ind. Cas. 441.

——**S. 25—Scope.**

Section 25, Evidence Act requires that the confession made to a Police Officer, in order to be inadmissible, must be by a person accused of an offence. A confession, therefore, made by a person to a police constable that he was a pick-pocket, when he was not accused of any offence, is not inadmissible in proceedings under S. 109, Criminal P. C., and S. 25, Evidence Act has no application to such a case. A.I.R. 1942 Oudh 246= 1942 O. W. N. 3=1942 A. W. R. 34=43 Cr. L. J. 342= 198 Ind. Cas. 276.

——**S. 25—Statement and act, difference.**

The difference between as statement and an act is clear A statement must consist of words, spoken, or written or spelled out, as would be done by a mute person who spells out words on his fingers, and even words would not always be statements, as for instance, if a person recited the numbers from 1 to 10, if one considers a statement in the sense used in S. 162, Criminal P. C. Acts, however, exclude words and cannot be translated into words. It cannot be held therefore that the fact that in the case the accused by taking in his hands certain articles and handing them over, made a statement, much less can it be said that he made a statement which amounts to a confession within the meaning of S. 25, Evidence Act. To such a case S. 8. Evidence Act, applies. A. I. R. 1941 All. 145=1941 A. L. J. 86=1941 O. W. N. 337=I.L.R. (1941) All. 280=1941 A. W. R. 65=42 Cr. L. J. 485=193 Ind. Cas. 873.

——**S. 25—Scope—Admissions not amounting to confessions.**

Under S. 25, Evidence Act only confessions are excluded and not admissions not amounting to confessions.

The accused, a Police Sub-Inspector, made a confession to his subordinate that he had heard a rumour about the murder and that certain persons had approached him to get the matter hushed up and had forced upon him a certain amount :

Held, that the statement as to acceptance of bribe being confession was inadmissible under S. 25 but the statement as to rumour and approach of people to the accused to get the matter hushed up, being admission was admissible. A. I. R. 1941 Lah. 82=42 Cr. L J. 497=193 Ind. Cas. 878.

——S. 25—Scope and applicability.

Section 25, Evidence Act, forbids the proof at a trial of a criminal offence of an admission of an offence made by the accused to a Police Officer, and it makes no difference whether the offence is one of which the accused could have been convicted at the trial, in which it was sought to prove the confession made to a Police Officer. The terms of S. 25 do not limit its applicability only to confessions of offences with which the accused was charged.

Consequently, a confession made by the accused to the Police Officer, of an offence of culpable homicide not amounting to murder is not admissible in his trial for murder upon the same facts. A.I.R. 1941 Sind 134=I.L.R. (1941) Kar. 292=42 Cr. L. J. 805=196 Ind. Cas. 61.

——S. 25—Scope—

Section 10, Evidenee Act, does not avoid in appro priate cases, the operation of S. 25, Evidence Act. A. I. R. 1939 Sind 185=I. L. R. (1939) Kar. 449=40 Cr. L. J. 882=184 Ind. Cas. 145.

——S. 25—Scope and interpretation.

Although the word ' confession ' is not defined in the Evidence Act, it has been judicially interpreted as meaning an admission made at any time, by a person charged with a crime stating or suggesting the inference, that he committed that crime. The statement so made should, however, be considered as a whole. It would not be right to take isolated portions of it and to consider whether any of them, regarded separately, amounts to an admission of guilt or not. A.I.R. 1933 Rang. 326=35 Cr. L.J. 248=147 Ind, Cas. 60.

——S, 25—Scope and object of—Object is to prevent the abuse of powers by Police.

The object of S. 25 is to prevent the abuse of their powers by the police in extorting confessions from persons in their custody. 99 Ind. Cas. 330=51 Bom. 78=28 Bom. L.R. 1196=28 Cr. L.J. 122=7 A. I. Cr. R. 249=A.I.R. 1927 Bom. 4 (F.B.).

——S. 25—Scope—Confession — Meaning — Statement suggesting inference of guilt—Whether a Confession.

The word " confession " in S. 25 is not restricted to actual admissions of guilt but includes inculpatory statements from which inferences of guilt can reasonably be drawn or which suggest the guilt of the person making the statement. 19 Cr. L. J. 42=42 Ind. Cas. 1002 (L.B.).

——S. 25—Scope—Admissions and confessions.

S. 25 excludes only confessions and not every statement made to the police by the accused. There is a distinction between admissions and confessions. The test as to the admissibility of statements made to the police is to ascertain the purpose for which they are used by the prosecution. Such statements are admissible if they are relied on, 41 Cal. 601=15 Cr. L. J. 713=26 Ind. Cas. 161.

——S. 25—Scope of—Effect of S. 162, Cr. P. Code, on.

S. 162, Cr. P. C. does not affect Ss. 21 and 27 of the evidence Act. Therefore, the confessional statements made by an accused persons in Police custody, or to the Police, leading to the discovery of relevant facts, may be admitted, if they have been recorded by the Police and can be proved by oral evidence. S. 25 of the Evidence Act excludes only " confessions " made by persons accused of an offence. Therefore, an admission made by an accused person to a police officer may be proved if it does not amount to a confession. 6 N.L.R. 180=12 Cr. L.J. 60=8 Ind. Cas. 1181.

7. Miscellaneous.

——Ss. 25, 26—Extra-judicial confessions.

The High Court has often had reasons to suspect that confessions were wrong out of villagers by pressure and in some cases something more severe than questioning may have been adopted—Such incidents not only tend to throw doubt on all similar confessions obtained during investigation by **lambardars** and there is grave possibility that on such confession, the whole prosecution case might be built up and an innocent person be hanged. Such suspicion makes Courts very loath to act upon extra-judicial confessions, even where there is nothing on record to show that the case is false. I.L.R. (1937) Lah. 794=40 P.L.R. 186.

——S. 25—Admissions—Evidentiary value.

The prosecution cannot rely upon an admission made by an accused person to the Police without other proof and, even if it could so rely, it would be bound to take the admission as a whole. A.S.R. 1932 Mad. 24=33 Cr. L. J. 173=1931 M.W.N. 1138=34 L. W. 858=61 M. L. J. 860=135 Ind. Cas. 590 (1).

——S. 25—Duty of Court.

Confessional statement before Police—Trial Court should not record statement in truncated fashion. 1931 M.W.N. 725.

——S. 25—Question whether statement is confession should be decided on merits of each case.

Each case must be decided as it arises with reference to the question whether a particular statement positive or negative, verbal or expressed by conduct is or is not a confession. 86 Ind. Cas. 410=19 S. L. R. 142=29 Cr. L.J. 778=A.I.R. 1925 Sind 237.

——S. 25—Probative value of confession—Report of Chemical Examiner—Omission to mention in the first report about rape.

In a case of a rape the confessions of the accused were recorded by a First Class Magistrate the day after the occurance, and the Chemical Examiner's report supported the girl's story. In an appeal, from conviction, **held** that the confessions were validly recorded and appeared to be voluntary and it is but natural that the girl complained in the first instance only of robbery of jewels. 11 Cr .L.J. 665=93 P.L.R. 1910=8Ind. Cas. 491.

—S. 26.

Synopsis.

1. **Admissibility.**
2. **Magistrate.**
3. **Police custody.**
4. **Police officer—Chowkidar.**
5. **Scope.**

1. Admissibility.

——S. 26—Confession made to third parties—Admissibility.

Where an accused person makes a statement in the presence of the police and another persons, the question whether that statement was made to the other person or to the police is a question of fact and not of law. Even if it is an extra-judicial confession, it wold be excluded by S. 26 of the Evidence Act if the accused is in custody and no magistrate is present. 50 C. W. N. 88=A. I. R. 1946 Cal. 452=228 Ind. Cas. 24=48 Cr. L J. 46.

—— S. 26 — Admissibility — Confession — Voluntary nature—Time to accused for reflection—Extent of—Confession made next day after accused was sent to magisterial custody—If bad on ground of want of time for reflection. 221 Ind. Cas. 86=47 Bom. L.R. 63=A.I.R. 1945 Bom. 292=47 Cr. L.J. 51.

——Ss. 26, 27 — Admissibility — Three accused charged with murder—Third accused making statement and promising Police to show place where first accused had buried spear—Police taken to spot—After third accused had searched for spear unsuccessfully, first accused taking it out and producing it— Statement admitted under S. 27—Prosecution casethat first accused had himself hidden spear in that Place :

Held, that the statement did not fall under S. 27 but under S. 26 and was inadmissible. A.I.R. 1940 Mad. 744=51 L.W. 564=(1940) 1 M. L. J. 758=41 Cr. L. J. 917=1940 M.W.N. 542=190 Ind. Cas. 396.

——S. 26—Admissibility—Confession after arrest.

A confession by the accused that he had agreed to commit theft, made to a **dafadar** after his arrest, is in admissible under S. 26, Evidence Act. A.I.R. 1940 Pat. 410=21 P.L.T. 171=41 Cr.L.J. 777=189 Ind Cas. 641.

——Ss. 26, 24—Admissibility—Presence of Magistrate—Whether ipso facto **renders confession admissible—Oral confession to Magistrate.**

It cannot be said that the mere presence of a Magistrate will **ispo facto** render the confession admissible. The correct position is that whenever a Magistrate receives a confession from an accused in custody, he must be satisfied of its voluntary charecter. The Criminal P. C. makes special provision for this in the ordinary case of a recorded confession. For a Magistrate receiving an oral confession, it ought to be enough to be known that the Court will not admit it in evidence unless it is satisfied upon this score. A.I.R. 1935 Mad. 479=1935 M.W.N. 82=36 Cr. L.J. 1107=757 Ind. Cas. 297.

——S. 26—Admissibility.

Evidence of Police Officer and of complainant as to pointing out of various places by accused is really evidence of confession and hence inadmissible under Ss. 25 and 26, Evidence Act. A.I.R. 1935 Oudh 1=11 O. W. N. 1383=36 Cr. L.J. 166=10 Luck. 281=152 Ind. Cas. 473.

——S. 26—Admissibility—Expression 'you had better tell the truth' unqualified—Whether amount to inducement.

There is one form of inducement, namely : 'You had better tell the truth' and equivalent expressions which are regarded as having acquired a fixed meaning in this connection, as if a technical term, and are always held to import a threat or promise. Such words are only held not be inducement where they are qualified in some manner such as by an appeal to the accused's religious sentiment. Where there is no such qualification and it cannot be said that the words as they stand are a mere exhortation to tell the truth and the accused had already been questioned by the Police, the words are susceptible of the interpretation that the accused was told that it would be better for him if he told the truth and that amounts to an inducement. A.I.R. 1934 Lah. 417=36 Cr. L. J. 211=37 P. L. R. 25=15 L. 856=152 Ind. Cas. 998.

——S. 26—Admissibility.

Accused in judicial lock-up—Confession to fellow prisoners—Presence of Policemen guarding lock-up :

Held, that the accused was in Magisterial custody as opposed to Police custody, that the presence of the Policeman on duty was immaterial and the confession was admissible.

In the absence of any suggestion of a close custody inside the jail, such, as may possibly occur when an accused person is watched and guarded by a Police Officer investigating an offence, S. 26, Evidence Act, does not exclude a jailor from giving evidence of what the accused told him while in jail. A. I. R. 1934 Lah. 75=35 Cr. L.J. 1432=151 Ind. Cas. 894.

——S. 26—Admissibility—Presence of Court constable.

The mere fact that the Court constable was present while the co-accused were making their confessions does not involve the total exclusion of the confessions from evidence. A. I. R. 1934 Pat. 586=15 P. L. T. 711=36 Cr. L. J. 12=152 Ind. Cas. 275.

——S. 26—Admissibility—Police Officer taking Magistrate with him while he is conducting investigation—Statement of Magistrate.

Where an accused person makes a statement to a Police Officer who took the Magistrate with him while the Police Officer was conducting his investigation, the evidence of the Magistrate is not admissible. The correct procedure is for the accused to be taken by a Magistrate and not by a Police Officer while the inquiries are being made. For a Magistrate merely to accompany a Police Officer while the Police Officer is making the investigation, does not render the evidence of what happened admissible under the Evidence Act. A. I. R. 1933 All. 394=1933 A. L. J, 1617=34 Cr. L. J. 754=144 Ind. Cas. 357.

——S. 26—Admissibility—Oral confession to Magistrate soon after arrest.

Even an oral confession made to a Magistrate is admissible in evidence under S. 26, Evidence Act, especially when the confession is made so soon after arrest that the Police could have had scarcely any opportunity of bringing pressure upon the confessing accused. A.I.R. 1933 Lah. 998=35 Cr. L. J. 455=35 P. L. R. 201=147 Ind. Cas. 692.

——S. 26—Admissibility—Oral confession before Honorary Magistrate—Non-compliance with provisions of S. 164, Criminal P. C.

An oral cconfession made to an Honorary Magistrate, is admissible in evidence under S. 26, Evidence Act even if is not recorded in accordance with the provisions of 164, Criminal P.C. A.I.R. 1933 Lah. 956=35 Cr. L.J. 2288=35 P.L.R. 115=146 Ind. Cas. 1061.

——S. 26—Making of counterfeit coin—Evidence regarding—Admissibility.

A confession is an admission by an accused person in a criminal case. The making of a counterfeit coin is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by S. 24. 25 or 26. 1931 Cr. C. 9.

——S, 26—Oral confession to Magistrate—Admissibility.

A confession or an incriminating statement made in the presence of a Magistrate by an accused person while in police custody who is not produced before the Magistrate with a view to record his confession can be proved by oral testimony of the Magistrate when it has not been reduced to writing. In absence of any provision of law making it obligatory on the party of a Magistrate to record a confession it is not a matter required by law to be reduced to the form of a document. A.I.R. 1930 Lah. 534=129 Ind. Cas. 289.

——S. 26—Confession at the dock—Admissibility.

A statement made by the accused at the dock before the Magistrate, if it amounts to a clear confession is certainly admissible in evidence against the accused; its value is not discounted by the fact that the accused was at that time in the custody of the police. 1930 M.W.N. 1249.

——S. 26—Admissibility—Presence of police—Statement made in presence of police officer is not admissible.

A statement made in the presence of a Sub-Inspector and a constable who had the accused under arrest at the time and not recorded by Magistrate under S. 164, Cr. P. Code, is not admissible in evidence. 118 Ind. Cas. 46=1929 Cr. C. 408=10 L. R. A. Cr. 141=30 Cr. L.J. 867=12 A. I. Cr. R. 323=A.I.R. 1929 All. 855.

——S. 26—Incriminating admissions of accused before police officers are inadmissible in evidence.

Incriminating admissions of an accused, under admitted circumstances that he took the whole of the investigating staff of the police officers round the scene of offence and admitted before them his own guilt, are inadmissible in evidence under S. 26. 120 Ind. Cas. 210=31 Cr. L. J. 15=13 A. I. Cr. R. 157=1929 Cr. C. 673=A.I.R. 1929 Nag. 350.

——S. 26—Admissibility—Coroners Act, S. 20—Voluntary statement by accused in inquest proceedings is admissible against the accused on his trial.

There is no provision of law which renders a statement made voluntarily by an accused, a suspect, in inquest proceedings before a Coroner inadmissible against the accused on his trial for the offence: 110 Ind. Cas. 107=30 Bom. L. R. 84=10 A. I. Cr. R. 419=29 Cr. L.J. 651=A I.R. 1928 Bom. 52.

——S. 26—Admissibility—Confession made by accused not to Magistrate but Superintendent of Post Offices is not admissible.

Confession made by an accused not to a Magistrate but to the Superintendent of Post Offices, at his house, where he was taken temporarily by the police and was again removed back to police lock-up, is admissible in evidence; 20 Bom. 165, Foll. 108 Ind. Cas. 398=10 L.L.J. 174=29 Cr. L. J. 386=10 A. I. Cr. R. 115=A.I.R. 1928 Lah. 282

——S. 26—Statements to police of incriminating nature are inadmissible.

Statements of accused while in custody of the police officer, and of his having pointed out the places where he committed the offence, are not admissible as being of an incriminating nature. 92 Ind. Cas. 439=42 C.L.J. 524=27 Cr. L.J. 263=A.I.R. 1926 Cal. 320.

——S. 26—Admissibility — Confession while in police custody made before Portuguese Administrator is inadmissible.

Administrator in Portuguese territories is not a Magistrate and therefore confession made by an accused before him while in Police custody is not admissible. 87 Ind. Cas. 520=26 Bom. L. R. 706=26 Cr. L. J. 994=A.I.R. 1924 Bom. 480.

——S. 26—Confession—Oral—Admissibility.

A confession to be admissible in evidence need not be recorded. It may be oral. It is a relevant fact and may be proved by the magistrate to whom the oral confession was made. 11 P. R. 1918 Cr.=19 Cr. L. J. 651=45 Ind. Cas. 843.

——Ss. 26 and 30—Confession—Admissibility.

Where the circumstances of the case compel a tribunal to act only upon a confession, and to reject all other evidence, the confession must be used **Literatim et Verbatim**, and due effect must be given to every statement in it whether in favour of the accused of against him. 15 A.L.J. 15=18 Cr. L.J. 356=38 Ind. Cas. 740.

——S. 26—Police Patel—Confession—Inadmissible.

A confession to a Police Patel is inadmissible. 17 Bom. L.R. 898=16 Cr. L. J. 740=31 Ind. Cas. 340.

——S. 26—Confession made to a person in the presence of a Police Officer—Admissibility of.

An accused's confession to some person other than a police officer is admissible in evidence. 16 Cr. L.J. 62=1 O.L.J. 687=26 Ind. Cas. 654.

——S. 26—Confession by accused—Admissibility of evidence of proof.

Evidence to prove a confession made while an accused person is in police custody is inadmissible. A confession, though made in the presence of a magistrate is of very little value when the accused in not aware of his presence. A confession made in the presence of a magistrate though on leave, is nevertheless relevant and admissible. 8 P. W. R. 1914 Cr.=38 P. L. R. 1914=15 Cr. L.J. 6=22 Ind. Cas. 150.

——S. 26—Admissibility—Confession before Police—Not to be allowed to go in evidence.

A police officer when giving evidence should not be allowed to state that an admission of guilt was made by the accused. 16 C. W. N. 238=13 Cr. L. J. 127=13 Ind. Cas. 783.

(2) Magistrate.

——S 26—Magistrate in Native State, if covered by S. 26.

There is no reason to believe that S. 26, Evidence Act does not include a Magistrate in a Native State. A.I.R. 1934 Sind 103=35 Cr. L. J. 1328=151 Ind. Cas. 311 (2).

—mS. 26—Magistrate—Judge d' 'instruction' is a Magistrate—General Clauses Act, Cl. 31.

'Judge d' instruction' is a Magistrate and so statements made in his immediate presence are admisible in

evidence. The term Magistrate is not restricted to the Magistrates exercising jurisdiction under Cr. P. Code. 121 Ind. Cas. 157=52 Mad. 529=29 M. L. W. 645=1929 M.W.N. 383=2 M. Cr. C. 150=31 Cr. L.J. 223=A.I.R. 1929 Mad. 487=56 M.L.J. 628.

——S. 26—'Police officer' and 'Magistrate.'

The words "Police officer" and "Magistrate" in S. 26 of the Evidence Act include the police officers and Magistrates of Native States. 22 Bom. 235, Foll, but doubted. 89 Ind. Cas. 1046=27 Bom. L. R. 1034=49 Bom. 642=26 Cr. L.J. 1478=A.I.R. 1925 Bom. 529.

——S. 26—The word "Magistrate" in S. 26 of the Evidence Act includes Magistrates in Native States. 22 Bom. 235, Foll. 69 Ind. Cas. 257=17 N.L.R. 113=A.I.R. 1921 Nag. 39.

(3) Police Custody.

——S. 26—Police custody—Statement to police—That it was heard by other person incidentally will not make it extra-judicial—Even so it will be hit by S. 26.

The fact that the statement made to the police was heard by other persons only incidentally will not make it extra judicial confession. Even if it can be so regarded it will be excluded by S. 26 as the accused was in police custody and no Magistrate was present when he made the statement. A.I.R. 1946 Cal. 452=228 Ind. Cas. 24=48 Cr. L.J. 46.

——S. 26—Police custody—Person in immediate presence of Magistrate with Police outside to see that he does not escape.

Per **Bose, J.—(In Order of reference)**—For a Person to be in custody, the immediate presence of the custodian is not necessary. It cannot be said that a person in the immediate presence of a Magistrate with the Police outside to see that he does not escape is not in the custody of the Police simply because they cannot be seen by the prisoner. A.I.R. 1944 Nag. 105=1944 N.L.J. 113=I.L.R. (1944) Nag. 274=45 Cr. L.J. 673=212 Ind. Cas. 449 (F.B.).

——S. 26—Police custody—Confession recorded after accused being in Police custody for six days and in presence of armed Police—Motive of confession not asked—No corroboration=It is unsafe to rely on it. A.I.R. 1942 Pat. 90=8 B. R. 49=43 Cr. L.J. 36=23 P. L. T. 387=196 Ind. Cas. 597.

——S. 26—Police custody—Accused pointing out place of murder.

Evidence of the accused while in custody of a **chaukidar,** pointing out of the alleged place of murder, where nothing incriminating is found, is really evidence of a confession of guilt and is in admissible under S. 26, Evidence Act. A. I. R. 1941 Oudh 563=42 Cr. L. J. 749=1941 A.W.R. 279=1941 O. W. N. 953=195 Ind. Cas. 493.

——S. 26—Police custody—Accused sent to doctor for medical examination, with head-constable—Examination made not in immediate presence of head-constable — Confession to doctor during examination.

Where the accused made a confession to the doctor while being medically examined but not in the immediate presence of the head-constable in whose charge he was sent to the doctor,

Held, that the accused was in the custody of Police when she made the confession to the doctor and hence it was inadmissible under S. 26, Evidence Act. A.I.R. 1941 Pesh. 22=42 Cr. L.J. 381=193 Ind. Cas. 284.

——S. 26—Police custody—Criminal Procedure Code, S. 164—Confession by person in hospital after arrest.

A statement made by a person in the hospital, after he had been arrested, is presumably made in the presence of Police Officer, because even in the hospital, the accused person is always in the immediate custody of a Police Officer. Under S. 26 of the Evidence Act, therefore, no such confession can be proved against the person making it unless it is made in the immediate presence of a Magistrate. A.I.R. 1940 Mad. 562=1940 M. W. N. 358=51 L. W. 535=42 Cr. L. J. 64=191 Ind. Cas. 37.

——S. 26—Police custody—Confession by accused after being kept in Police custody for number of days—Confession is suspicious

When it is found that the man who makes a confession has been kept in Police custody in defiance of the rules on the point for a number of days, then the Court is entiled to ask the procecution to explain why the irregularities were commitsed. A.I.R. 1940 All. 46=Cr. 1939 A.L.J. 966=41 L. J. 258=1939 A.W.R. 768=186 Ind. Cas. 192.

——S. 26—Police custody—Accused in custody of Police officer, who leaving her in temporary custody of private individual—Confession to private individual in absence of police Officer.

When once an accused is arrested by a Police Officer and is in his custody, the mere fact that for some purpose or other, he happens to be temperarily absent, and during his temporary absence, leaves the accused in charge of a private individual does not terminate his custody—the accused shall be deemed to be still in Police custody and a confession made by the accused to such a private individual is inadmissible under S. 26. A.I.R. 1938 Pat. 308=19 P.L.T. 268=39 Cr. L.J. 428=17 Pat. 369=174 Ind. Cas. 524.

——S. 26—Accused to Police custody only for short period and never in illegal custody:

Held, that the confessions made by the accused cannot be said to have been caused by inducement, threat or promise. A.I.R. 1233 Cal. 747=57 C.L.J. 213=34 Cr. L.J. 1222=146 Ind. Cas. 186 (S.B.).

——S. 26—Confessional statement made to Magistrate while in custody—Confession not recorded as such by Magistrate.

The only condition on which S. 26 insists is that a confessional statement made by an accused person while in police custody should be made in the presence of a Magistrate.

Where a Magistrate prepared a memorandum of what was stated to him by the accused during investigation by the Police, in order that the memorandum might help the Magistrate to remember the things said to him if he was to prove the confession orally made to him:

Held, that the evidence as to the confession was admissible although the confession was not duly recorded as such. A.I.R. 1933 Lah. 513=34 Cr. L. J. 1164=34 P.L.R. 896=143 Ind. Cas. 1029.

——S. 26—'Custody', meaning of.

The word 'custody' in S. 26, Evidence Act, though not defined, implies that there must be some limitation imposed upon the liberty of the confessor and that the limitation must be imposed either directly or indirectly by the Police.

The crucial test as to the admissibility of a confession under S. 26 is whether at the time when a person makes an extra-judicial confession, he is a free man or his movements are controlled by the Police either by themselves or through some other agency employed by them for the purpose of securing such a confession. A.I.R. 1932 Sind. 201=26 S.L.R. 302=34 Cr. L.J. 147 =101 Ind. Cas. 392 (2).

——S. 26—Police custody—Confession, value of.

The fact that the accused was in Police custody when he made the confession is a circumstance which may be regarded as discounting its value. 130 Ind. Cas. 751=9 O.W.N. 3=33 Cr. L. J. 920=7 Luck. 511.

——S. 26—Police custody—Confession to Magistrate while in police custody is not inadmissible.

If a confession is made to Magistrate, while the accused is in police custody, such confession is not inadmissible, as it is one in the immediate presence of a Magistrate, within S. 26. 91 Ind. Cas. 806=7 L.L.J. 428=26 P.L.R. 767=27 Cr. L. J. 134=A. I. R. 1925 Lah. 557.

——S. 26—'Custody of police'.—Actual arrest and detention is not necessary.

There are found several cases in which police officers have after detaining a person accused of an offence, put forward the plea that the latter was not in custody because he had not yet been formally arrested. The object of this seems to be either to avoid the operation of S. 26 or to shorten the period of time between the arrest and the confession subsequently made to a Magistrate or to postphone the necessity for applying for a remand order. The idea of "free detention" is altogether mistaken and sometimes even hypocritical. It is an infringement of the spirit. while appearing to conform to the strict letter of the law. As soon as an accused or suspected persons comes into the hands of a police officer he is in the absence of clear and unmistakable evidence to the contrary no longer at liberty and is therefore in custody within the meaning of Ss. 26 and 27. 77 Ind. Cas. 429=1 Rang. 609=25 Cr. L.J. 381=A.I.R. 1924 Rang. 173.

——S. 26—Person is not in police 'custody' merely because he has been invited to explain cirtain circumstances, unless he has been arrested or is under police supervision.

The meaning of words "in custody of the Police" should not be extended by implication to cases beyond what is absolutely necessary, i.e., where the man is really under arrest or in strict supervision and is merely allowed to go out for a few moments. But where the case is not so and the accused is not arrested or under supervision, he merely being invited to explain certain circumstances, he should not be deemed to be in Police custody. It, however, by no means follows, that because the statement is admissible, therefore, it should not be considered with considerable care to see how far reliance should be placed on such extra-judicial confession. The weight to be given to it depends very much on the circumstances of the case, whether suspicion attached to the accused at the time, whether accused was intelligent or ignorant of the possible result of the confession, and the like. 85 Ind. Cas. 833=26 Cr. L.J. 609=16 S.L.R. 743=A.I.R. 1921 Sind. 145.

——S. 26—Confession—Accused in the custody of the Police—Extra Judicial confession.

The accused who was in the lock up of the magistrate under trial was sent up by the magistrate to a hospital for treatment with to police men in charge. The latter waited outside in the verandah. During his examination inside the dispensary by the doctor, the accused made a confession within the hearing of the doctor:

Held, that it was excluded by S. 26, as the accused was in police custody up to his arrival at the hospital and remained in that custody. Police Officers referred to in S. 26 need not be investigating police officers. 42 Bom. 1=19 Bom. L. R. 683=18 Cr. L.J. 981=42 Ind. Cas. 597.

——Ss. 26, 27 and 30—Statement made in Police custody and before Magistrate—Admissibility—Co-accused—Record of Statement.

Any incriminating statement made in writing by accused while in police custody whether amounting to confession or not is not admissible either against him or against a person jointly tried with him, under unless such statement has led to discovery of any fact mentioned in S. 27 of the Evidence Act. Any deposition recorded by a magistrate on solemn affirmation can be admitted only against the deponent and not against a co-accused and record of the statement made by magistrate in a case he subsequently commits to the Sessions, must be in the form laid down in S. 464 Cr. P. Code and any defect in it can be cured by actual evidence of the magistrate. A confession of an accused is not admissible against co-accused under S. 30 of Evidence Act if the former is convicted on his plea of guilty. A plea of guilty can be allowed to be withdrawn if the accused was at the time of making it, enfeebled by illness and was undefended. 222 P.L.R. 1915=44 P.W.R. 1914 Cr. 16 Cr. L.J. 257=28 Ind. Cas. 145.

——S. 26—Confession while in Police custody.

A confession while in police custody is of little value. 10 P.R. 1914, Cr.=261 P.L.R. 1914=15 Cr. L.J. 613 =25 Ind. Cas. 525.

——Ss. 26 and 27—Statement of accused while in custody of police.

A statement of the accused while in custody of the Police as to the Commission of the crime inadmissible; but a statement by him as to the stolen property being found in a certain place, is admissible. 31 M. 127 Foll. 15 Cr. L. J. 533=26 M. L. J. 352=24 Ind. Cas. 845.

(4) "Police officer"—Chowkidar.

——S. 26—Confession while in custody of chowkidar.

The term "Police Officer" includes **chowkidar** and the confession made while the accused were in the custody of **chowkidars** becomes inadmissible by virtue of S. 26, Evidence Act. A. I. R. 1943 Cal. 612=45 Cr. L. J. 170=210 Ind. Cas. 17.

——S. 26—Village chawkidar, if Police Officer.

A village **chaukidar** should be considered a Police Officer for the purpose of S. 26, Evidence Act.

Consequently, a confession is made while the accused is in Police custody if it is made after he had been arrested by the **chawkidar** and was being escorted under his control and the possibility of its having been made during -he temporary absence of the **chawkidar** does not affect its admissibility. Such a statement is inadmissible. A. I. R. 1941 Oudh 563=1941 A. W. R. 279=1941 O. W. N. 953=42 Cr. L. J. 749=195 Ind. Cas. 493.

——S. 26—Village chawkidar, if a Police Officer.

A village **choukidar** is regarded as a member of the village Police and, therefore, is a village Police Officer. It cannot be disputed that a village Police Officer is a Police Officer and he is so within the meaning of S. 26, though he may not be a Police Officer within the meaning of the Criminal P.C., which lays down the powers to be exercised by a Police Officer for the purposes of that Code. AI.R. 1938 Pat. 308=19 P. L. T. 268=39 Cr. L.J. 428=17 Pat. 369=174 Ind. Cas. 524.

——S. 26—Confession to chawkidar after arrest.

A confession made by a person to a **chawkidar** after his arrest is irrelevant as the **chawkidar** is a Police Officer. A. I. R. 1934 Oudh 19=35 Cr. L. J. 664=11 O.W.N. 119=148 Ind. Cas. 475.

——S. 26—Chawkidar.

Quare. Whether a chowkidar is a Palice officer within the meaning of S. 26. (1905) 9 C.W.N. 474.

5. Scope.

——S. 26. If affects statements by persons proceeded against under S. 109, Cr. P. Code. 1949 A. L. J. 413= A. I. R. 1950 A. 134.

——Ss. 26, 24—Words "accused person"—Scope.

The words "accused person" in Ss. 24 and 26 include any person who subsequently becomes accused. A.I.R 1941 Bom. 50=42 Bom. L.R. 938=I.L.R. (1941) Bom. 27=192 Ind. Cas. 671.

——S. 26—Scope and object.

The object of S. 26, Evidence Act, is that the presence of the Coroner who is in the same position as a Magistrate tends to secure the free and voluntary nature of any statement or confession which a person seeks to make before him, and also gives the confessing person an opportunity to make that statement uncontrolled by any fear of the Police before he seeks to make it. A.I.R. 1941 Bom. 50=42 Bom. L.R. 938= I.L.R. (1941) Bom. 27=192 Ind. Cas. 671.

——S. 26—Applicability and scope.

Per **Bhide J.**—Section 26, Evidence Act, has always been taken to apply to confessions made to some person other than a Police Officer. A. I. R. 1940 Lah. 129= I.L.R. (1940) Lah. 242=41 Cr. L. J. 591=188 Ind. Cas. 498 (F.B.).

——S. 26—Scope—Arrest illegal—Confession, admissibility.

The policy of the Legislature appears to be that any statement in the nature of a confession made by an accused while under the custody and control of a Police Officer should be excluded from evidence This is, no doubt, a wholesome policy and this police would be defeated if the section is not to apply when the arrest by the Police Officer has been illegal. Whether the arrest is legal or illegal, the mischief which S. 26 is intended to avert remains all the same. A.I.R. 1938 Pat. 308=19 P.L.T. 268=39 Cr. L.J. 428= 17 Pat. 369=174 Ind. Cas. 524.

——S. 26—Scope—Confession before Magistrate but without precautions required by Ss. 164 and 364, criminal P. C.

Section 26, is very wide in its terms and there is nothing in that section that limits its operations to Magistrates specially empowered under S. 164 Criminal P. C. The Evidence Act recognizes that a confession other than one formally recorded under Ss. 164 and 364 of the Criminal P. C. can be admitted in evidence. Where, the accused was in the custody of the Police but he made the confessional statement in the immediate presence of the Magistrate and the confession has been taken without the precautions that such a confession made under Ss. 164 and 364 requires, there is nothing which prevents this statement being proved against him but it cannot be proved in the same manner as if it were a confession recorded with all the required formalities under Ss. 164 and 364, Criminal P. C. A.I.R. 1937 Sind. 212=38 Cr. L. J. 968=31 S. L. R. 460=170 Ind. Cas. 827.

——S. 26—Confession to honorary Magistrate within Punjab Province.

The confessions made before the Honorary Magistrates in the Punjab where they exercise the powers under the Criminal P. C., come within the scope of S. 26. A.I.R. 1934 Lah. 417=36 Cr. L. J. 211=37 P. L. R. 25=15 L. 856=152 Ind. Cas. 998.

——S. 26—Scope—Bare possibility of inducement.

Section 26, does not lay down, that if there is a bare possibility of an inducement having been offered, it is sufficient ground for holding that the confession is irrelevant. It is only when it appears to the Court that the confession has been made as a result of come inducement held out by a person in authority that it becomes irrelevant. A. I. R. 1934 Lah. 417=36 Cr. L. J. 211= 37 P.L.R. 25=15 L. 856=152 Ind. Cas. 998.

——S. 26—Scope.—Under S. 26, Evidence Act, it is only if the confessing accused is not in the custody of the Police that a confession made by him to a third person becomes admissible in evidence. A. I. R. 1933 Oudh 192=10 O. W. N. 348=34 Cr. L. J. 653 =8 Luck. 410=143 Ind. Cas. 846.

——S. 26—S. 26—Scope.—does not make admission dependent upon knowledge of accused as to identity of Magistrate.

S. 26 does not make the admissibility of the confession dependent upon the knowledge of the accused as to the identity of the Magistrate, the main consideration being the presence of the Magistrate, and the making of the confession in his presence. A. I. R. 1930 Lah. 534=129 Ind. Cas. 289.

——S. 26—Scope—Oral and written confession.

S. 26 as it stands makes no distinction between an oral and written confession but embodies a substantive rule of law. A.I.R. 1930 Lah. 534=129 Ind. Cas. 289.

—S. 27.

Synopsis.

1. Accused.
2. Applicability and Scope.
3. Co-accused.
4. Conviction.
5. Discovery.
6. Discovery of irrelevant fact.
7. Duty of Court.
8. Evidentiary value.
9. How much can be proved.
10. Interpretation.
11. Police custody.
12. Proof of confession.
See also Criminal P. Code, S. 533.
13. Several accused.
14. Statement.
15. Miscellaneous.

1. Accused.

——S. 27—Accused— Information leading to discovery of body of deceased coming from brother of deceased—Body excavated by accused.

When an information leading to the discovery of the body of the deceased, comes from the brother of the deceased, though actual excavation of the body is done by the accused, anything the accused says in the matter is not admissible in evidence and S. 27 cannot be applied. A. I. R. 1939 Mad. 266 = 49 M.L.W. 175=40 Cr. L. J. 606=1938 M.W.N. 1272=181 Ind. Cas. 933.

——S. 27—Accused —Accused in detention as suspect — Statement and discovery of body in consequence.

Where the accused was under detention as a suspect when he made a statement as to the burial of a dead body, and pointed out the place where the body was discovered directly in consequence of this statement:

Held, that the statement was admissible under S. 27. A.I.R.1933 Lah. 516=34 Cr. L. J. 683=34 P. L. R. 637=144 Ind. Cas. 12.

——S. 27—Accused— Person not accused at the time of making statement—Statement is not admissible.

In order to bring the statement within S. 27 the person making it must not only be in the custody of the police but the statement must be of a person who was then an accused. 6 All. 509 (F. B.), Rel. on. 111 Ind. Cas. 118 = 7 Pat. 411 =9 P.L.T. 533=10 A. I. Cr. R. 466=29 Cr. L. J. 790=A.I.R. 1928 Pat. 491.

——S. 27—Accused—Confession—Statement as to burial of dead body.

On a trial for murder a witness stated that the accused offered to point out the place where the dead body was and on being questioned as to who had buried the body he said that he (accused) had done so. Held, that the accused's statement that he buried the body was not admissible in evidence. 14 B. 260; 24 P. W. R. 1916; 50 P. W. R. 1915 Cr., Dist. 125 P. L. R. 1920 = 21 Cr. L.J. 349=55 Ind. Cas. 685. (Lah.)

2. Applicability and Scope.

——S. 27—Applicability — Fact previously discovered.

S. 27 of the Evidence Act permits as much information to be admitted in evidence whether it amounts to a confession or not, "as relates distinctly to the fact thereby discovered". If a fact has been previously discovered by the police the section would not apply. 228 Ind. Cas. 334=49 P.L.R. 16=A.I.R. 1948 Lah. 69=48 Cr. L.J. 200.

——S. 27—Scope—If controls S. 24—Statement leading to discovery made after threat or beating —Admissibility. 25 Pat. 205=A.I.R. 1947 Pat. 152=230 Ind. Cas. 99=48 Cr. L. J. 497.

——S. 27—Scope—If controls Ss. 24 to 26— Statement by person not in police custody.

S. 27 of the Evidence Act controls the prior Ss. 24, 25 and 26. If therefore a confession comes within the purview of S. 27, it is admissible in evidence, even if it is hit by S. 24 of the Act. S. 27 is not merely a proviso to S. 26, but also to Ss. 24 and 25. S. 27, however, only refers to the statement of a person accused of any offence and in the custody of a Police Officer. It does not apply when the person making the confession is not in the custody of a Police Officer at the time when the confession is made. 24 Pat. 671=1946 P.W.N. 192=A.I.R. 1946 Pat. 210=229 Ind. Cas. 557=13 B. R. 401=48 Cr. L. J. 460.

——S. 27—Scope—Admissibility.

Section 27 is an exception to the general principle that a confession made by a person while in police custody cannot by proved as against him unless it has been made before a Magistrate and the exception must be interpreted as strictly as possible. Where in the course of police investigation an accused made a statement to the Sub-Inspector of Police and the panchas, which was recorded in the panchanama as follows: "About three months ago I had gone along with some others and after breaking open the ..... Bank had stolen the amount therefrom and I will produce the amount that is with me now at my house ..... of the ..... Bank dacoity," and thereupon he took the police and the panchas to his house and produced Rs. 40 in the shape of currency notes: Held, that out of the statement of the accused the only part which was admissible under S. 27 was, "I will produce money." 48 Bom. L. R. 542=A.I.R. 1947 Bom. 90=230 Ind. Cas. 113 =48 Cr. L. J. 511.

——S. 27—Scope—Ss. 24, 25, 26 and 27—S. 27 is a proviso not only to S. 26 but also to Ss. 24 and 25.

Section 27 is a proviso not only to S. 26 but also to Ss. 24 and 25. Accordingly, if a confession comes within the purview of S. 27 as leading to the discovery of certain facts it would be admissible in evidence even if it is hit by S. 24 as having been caused by inducement, threat or promise. A.I.R. 1946 Pat. 210=24 Pat. 671=229 Ind. Cas. 557=48 Cr. L. J. 460.

——S. 27—Scope — Statement leading to discovery, if permissible to prove connection between the fact and the offence.

Section 27, Evidence Act, renders admissible so much of a statement which would otherwise be excluded by S. 25 as leads to the discovery of a fact. Only the evidence relevant to the matter under inquiry is admissible. The connection of the thing discovered with the crime renders its discovery a relevant fact. It is true that the connection between the offence and the thing

discovered may be established by evidence other than the statement leading to discovery, but that should not exclude proof of the connection by statement itself. Hence S. 27 should not be read in a restricted sense. 25 P. 279=A.I.R. 1947 Pat. 162=231 Ind. Cas. 94=48 Cr. L. J. 686.

——S. 27—Scope—Proof against other than maker.

It is not permissible to prove statements admissible under S. 27 against persons other than makers of them. A.I.R. 1945 Cal. 137=I.L.R. (1944) 2 Cal. 76=46 Cr.L.J. 580=219 Ind. Cas. 310.

——S. 27—Scope of.

Section 27 itself is a proviso to Ss. 25 and 26 and should be construed strictly and in accordance with the limitations which its language imposes upon the proof of certain statements made by an accused person. It does not matter if upon the limited construction of S. 27 the rest of the statement of an accused which cannot be proved becomes unintelligible. Only so much of the statement made by him can be proved, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered. I.L.R. (1946) Kar. 194=A.I.R. 1947 Sind 36=230 Ind. Cas. 118=48 Cr.L.J. 516.

——S. 27—Scope—statement that accused committed offence, does not fall under S. 27.

A statement that the accused has committed a murder does not fall within S. 27, Evidence Act, because it is not a statement required to lead up to the production of the property. It is quite enough to say that he would show the property which belonged to the deceased. A.I.R. 1943 Bom. 458=45 Bom. L.R. 884=45 Cr.L. J. 221=I.L.R. (1944) Bom. 25=210 Ind. Cas. 362.

——S. 27—Scope—Principle underlying S. 27, explained.

Section 27 is enacted as an excepting or qualifying rule of evidence, being framed as a proviso upon the preceding Ss. 25 and 26. The principle upon which the rejection of confession made by an accused person to Police Officer or whilst he is in the custody of a Police Officer is founded is that a confession thus made or obtained is untrustworthy. If circumstances, however, appear, which rebut the presumption of its being false and demonstrate its truth, the confession should be allowed. When in consequence of information furnished by the accused, a fact is discovered, then the discovery of that fact supplies a guarantee of the truth of the information which may amount to a confession. The confession, in so far as it is confirmed by the discovery should be deemed to be true. A.I.R. 1942 Cal. 593=I.L.R. (1942) 1 Cal. 436 =46 C.W.N. 180=44 Cr.L.J. 145=75 C.L.J. 507= 204 Ind. Cas. 111.

——S. 27—Scope—Principle of S. 27 is guarantee of truth of information.

The ground on which the information received from an accused person is admissible under S. 27, Evidence Act, is that the fact discovered thereby is, to some degree, which will vary with the circumstances of each case and the nature of the fact discovered a guarantee of the truth of the information.

The discovery of an aruval which was not blood-stained, and a cloth, blood-stained indeed, but to what extent not known, from the accused's own home does very little to guarantee either that the accused did make the statement alleged or that, if he did make it, it is true. A.I.R. 1942 Mad. 450= 1942 M.W.N. 291=(1942) 1 M.L.J. 503=43 Cr.L.J. 810=202 Ind. Cas. 290.

——S. 27—Scope—Whether affected by S. 162, Criminal P. C.

Per Somayya J.—The question whether S. 27, Evidence Act, has been altogether abrogated by S. 162, Criminal P. C., ought to be set at rest by the Central Legislature without leaving the matter in a state of confusion. A.I.R. 1942 Mad. 49=54 L.W. 327=1941 M.W.N. 929=(1941) 2 M.L.J. 1070=43 Cr. L.J. 346=198 Ind. Cas. 295.

——Ss. 27, 25, 26—Scope—S. 27, if proviso to Ss. 25 and 26 taken together.

Quaere.—Whether S. 27, Evidence Act should be read as a proviso not only to S. 26 but to Ss. 25 and 26 taken together. A.I.R. 1942 Pat. 156=43 Cr. L. J. 615=23 P. L. T. 475=200 Ind. Cas. 208.

——Ss. 27, 25, 26 — Scope—S. 27, if repealed by S. 162, Criminal P.C. (Act V of 1898).

Section 27, Evidence Act is a special law within the meaning of S. 1 (2), Criminal P.C., and is not specifically repealed by S. 162 of the Criminal P.C. A.I.R. 1942 Pat. 156=23 P.L.T. 475=43 Cr. L. J. 615=200 Ind. Cas. 208.

——S. 27—Scope—If affected by S. 162, Criminal P. C.

Section 27, Evidence Act, is not affected by S. 162, Criminal P. C., being saved by S. 1 (2), Criminal P. C. A.I.R. 1941 Bom. 146=43 Bom. L.R. 157= I.L.R. (1941) Bom. 333=42 Cr. L. J. 519=194 Ind. Cas. 122.

—S. 27—Scope—Amendment of S. 162, Criminal P. C,, whether affects S. 27.

The provisions of S. 27, Evidence Act, are still valid and are not affected by their Lordships' judgment in **Pakala Narayanaswami v. Emperor**, 180 Ind. Cas. 1=40 Cr.L.J. 364=A.I.R. 1939 P. C. 47. Consequently the amendment of S. 162 Criminal P.C. in 1923 does not affect S. 27 Evidence Act. A.I.R. 1941 Nag. 86=1940 N.L.J. 623=I.L.R. (1940) Nag. 679=42 Cr. L. J. 390=193 Ind. Cas. 6.

——S. 27, is 'special law.'

Per **Tek Chand** and Bhide, J J. [**Din Mohammed**, J., contra].—Section 27, Evidence Act contains the "law on a particular subject" and is, therefore, a "special law" as defined in S. 4 (2), Criminal P. C., read with S. 41, I. P. C. A.I.R. 1940 Lah. 129=41 Cr. L. J. 591=I. L. R. (1940) Lah. 242=188 Ind. Cas. 498 (F.B.).

——Ss. 27, 26—Scope—S. 27 is pro tanto repealed by S. 162, Criminal P. C.

Per **Young**, C. J., **Tekchand**, **Din Mohammad**, **Monroe** and **Ram Lall**, JJ. [**Dalip Singh** and **Bhide**, JJ., contra]—Section 27, Evidence Act, is pro tanto repealed by S. 162, Criminal P.C., and evidence of information, whether it amounts to a confession or not, which relates to the fact discovered in consequence of such information must not be considered admissible in evidence. A.I.R. 1940 Lah. 129=41 Cr. L.J. 591=I.L.R. (1940) Lah. 242=188 Ind. Cas. 498 (F.B.)

——S. 27—Scope—Criminal P. C., S. 162—Provisions of, if contradictory—S. 162, if alters S. 27, Evidence Act—Statement of accused to Police that he would point out ornaments of deceased admissibility of.

The provisions of S. 27, are quite independent of S. 162 of the Criminal P. C., and the amendment of that section made in 1923, was not intended to abrogate or impair the effect of S. 27 of the Evidence Act. The statement made by the accused that he would produce deceased's ornaments which distinctly led to the discovery of the ornaments falls within the ambit of S. 27.

Section 27, contemplates the discovery of material evidence. The material discovered would have no value unless it is relevant to the fact in issue and connected in some manner with the crime under investigation. Any information given by an accused person showing the relevancy of a fact to the crime must form an integral part of the discovery of the fact itself, namely material evidence, although it may indirectly amount to a confession. Consequently, the statement made by the accused that he would point out the deceased's ornaments would be admissible. That would only show his knowledge of the ornaments belonging to the deceased but would not prove by itself his complicity in the crime of murder. A.I.R. 1940 Nag. 66=1939 N.L.J. 585=41 Cr. L.J. 158=185 Ind. Cas. 310.

——Ss. 27, 8—Scope—Statement that accused deposited karas belonging to deceased and showing the spot.

Section 27 is in the nature of a proviso relating to the previous sections which lay down the general rules as to the inadmissibility of confession made in certain circumstances. Whether a confession to which S. 27 applies was induced by promises or not is immaterial. The general ground for not admitting confessions made either to a Police Officer, or made under any inducement, or made by persons while in custody, is clearly, the danger of admitting false confessions but the necessity for this precaution disappears when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. The statement therefore, that the accused had deposited two karas belonging to the deceased in a certain place and offered to show the Police the spot is admissible. Such a statement is no more than a bare statement which could be deduced from the fact that he showed the spot. which is evidence of conduct admissible under S. 8 of the Evidence Act. A.I.R. 1937 Nag. 220=38 Cr.L.J. 642=I.L.R. (1937) Nag. 268=168 Ind. Cas. 962.

——S. 27—Applicability.

The mere pointing out of a house of the complainant by the accused charged with theft is not information; it is not a statement incriminating or otherwise admissible under S. 27, Evidence Act. A.I.R. 1937 Sind 251=39 Cr.L.J. 10=31 S.L.R. 494=171 Ind. Cas. 737.

——S. 27—Applicability—Admission of accused—Property not recovered as result of his statements—Admission should be dis-regarded.

In a case under S. 411, Penal Code, the alleged admission of the accused to the Police must be disregarded unless property was recovered as a result of any statements made by them. 18 N.L.J. 140=37 Cr.L.J. 293=160 Ind. Cas. 413.

——S. 27—Scope.

Where the offence charged against the accused was for having taken away a female child and having had sexual intercourse with her, statements made by the accused to the daroga showing the place of occurrence of the offence cannot be admitted in evidence as they are in the nature of a confession made to a Police Officer while in custody. Section 27, Evidence Act, being inapplicable, will not render the statements admissible. A.I.R. 1933 Cal. 146=34 Cr.L.J. 638=143 Ind. Cas. 797.

——S. 27—Scope—Confession—Discovery of property—Statement in composite form—Extent of admissibility.

Section 27, is both, in form and in substance, a proviso on the preceding sections. The fact discovered within the meaning of S. 27 must be some concrete fact to which the information directly relates.

Where the accused gives his information in the form of a compound statement and the Judge gets the evidence of that information, he must, before he records it as evidence or leaves it to the jury, divide the sentence into what are its component parts and only admit that part which has led to the discovery of the particular fact. A.I.R. 1932 Bom. 286=34 Bom. L.R. 303=33 Cr.L.J. 396=56 Bom. 172=137 Ind. Cas. 174.

——S. 27—Scope.

Section 27, Evidence Act, is an exception to the general rule against the proof of statements made to the police by the accused persons in the course of an investigation. A.I.R. 1932 Mad. 391=1932 M.W.N. 305=55 Mad. 903=33 Cr.L.J. 418=35 L.W. 705=62 M.L.J. 742=137 Ind. Cas. 9 (F.B.).

——S. 27—Scope—Out of statement containing confession only such portion as leads to discovery is admissible.

Per Graham, J.—Section 27 being a proviso to the preceding sections must be strictly construed and any relaxation must be sparingly allowed, care being exercised to see that the purpose and object of Ss. 25 and 26 are not rendered nugatory by any lax interpretation.

A statement made by an accused while in police custody which contains a confession of guilt and also supplies information in consequence of which a discovery is made is not admissible in its entirety under S. 27, but only so much of it is admissible as relates distinctly or immediately to the discovery.

Per Lort-Williams, J.—S. 27 is not a proviso to either S. 24 or S. 25. It follows that some restricted or limited meaning narrower than the natural meaning must be attached to the words in S. 27.

The practice in England now is and doubtless was at the time when the Evidence Act was passed to allow to be stated in evidence that in consequence of information received from the prisoner certain facts had been discovered, thus to the extent of fixing the prisoner with knowledge. To this extent evidence under S. 27 may be given. 57 Cal. 1062=125 Ind. Cas. 733=34 C.W.N. 106=A.I.R. 1930 Cal. 291.

——S. 27—Scope.

The provisions of S. 27 must be construed as favourably to the accused as possible for it is a section which makes an exception against the accused contrary to the general sections, namely, 25 and 26, which are in his favour.

When the accused stated: "I buried the shirt, which was my share of the stolen property, under the beri tree." The shirt was accordingly found under the tree.

Held, that the fact that the accused buried that shirt or the fact that it was his share of the stolen property was not "discovered" within S. 27. Both these statements rested purely on the credibility or otherwise of the accused's statements: the fact that it was his share of the stolen property did not relate distinctly to the fact discovered which was merely that a certain article was buried under a certain tree: these facts could not be proved and would not be admissible or relevant against the accused. What could be rendered admissible under S. 27 would be that which the Court would find necessary in order that the statement may be intelligible and the fact that this was the accused's share of the stolen property or that he buried it, would not necessarily be proved by the admission of the statement. A.I.R. 1928 Lah. 308, Expl. and Diss. from. 115 Ind. Cas. 1=30 Cr.L.J. 385=A.I.R. 1929 Lah. 338.

——S. 27—Scope.

The provisions of S. 27, Evidence Act are quite independent of those of S. 162, Cr.P. Code, and the amended S. 162 does not repeal or in any way affect S. 27. A.I.R 1926 Rang. 116 (F.B.); A.I.R. 1926 Lah. 88; A.I.R 1925 Mad. 574 and A.I.R. 1928 Nag. 108. Appr.; A.I.R. 1927 Cal. 17; A.I.R. 1926 Pat. 232; A.I.R. 1925 Rang. 101 and A.I.R. 1926 Rang. 116 (F.B), Ref.; A.I.R. 1926 Nag. 368, Diss. from. 114 Ind. Cas. 273 =24 N.L.R. 158=30 Cr.L.J. 258=12 A.I.Cr.R. 177= A.I.R. 1929 Nag. 17 (F.B.).

——S. 27—Scope.

S. 27 relates to statement of accused while in police custody and not prior to his arrest or detention. 114 Ind. Cas. 273=24 N.L.R. 158=30 Cr.L.J. 258=12 A.I.Cr.R. 177=A.I.R. 1929 Nag. 17 (F.B.).

——S. 27—Scope—S 27 qualifies S. 24 as well as Ss. 25 and 26.

The broad ground for not admitting confessions made under inducement or to a police officer is the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided by S. 27 when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. 112 Ind. Cas. 347=9 Lah. 671=11 A.I.Cr.R. 284=29 Cr.L.J. 1019=A.I.R. 1928 Lah. 476.

——S. 27—Scope—S. 27 is not affected by S. 162, Cr. P. Code.

S. 27, Evidence Act, is not affected by S. 162, Cr.P. Code, but S. 162, is affected by S. 27, Evidence Act. The result is that a special exception to S. 162, Cr.P. Code, exists in the circumstances mentioned in S. 27, Evidence Act. A.I.R. 1926 Rang. 116 (F.B.), Rel. on. 112 Ind. Cas. 682=28 M.L.W. 314=1 M.Cr.C. 201= 51 Mad. 967=29 Cr.L.J. 1098=A.I.R. 1928 Mad. 1028 =55 M.L.J. 351 (F.B.).

——S. 27—Applicability.

S. 27 is not repealed by S. 162, Cr.P. Code—Cr.P. Code, S. 162: A.I.R. 1926 Rang. 116 (F.B.), Foll. 108 Ind. Cas. 442=11 N.L.J. 7=9 A.I.Cr.R. 408=29 Cr. L.J. 400=A.I.R. 1928 Nag. 108.

——S. 27—Scope.

S. 162 of Cr.P. Code, overrides the provisions of S. 27, Evidence Act. 100 Ind. Cas. 820=28 Cr.L.J. 340= 7 A.I.Cr.R. 575=A.I.R. 1927 Nag. 203.

——S. 27—Scope—S. 162, Cr.P. Code, does not override S. 27.

S. 162 applies to the statements of persons examined as witnesses by the police in the course of investigation, and not to the statement of an accused person and it does not override or modify the provisions of S. 27 of the Evidence Act. 94 Ind. Cas. 901=7 Lah. 84=27 Cr.L.J. 709=27 P.L.R. 583=A.I.R. 1926 Lah. 88.

——S. 27—Scope.

The general provisions of the law with regard to the admissibility of statements made by accused persons like other admissions do not seem to be affected by S. 162, Cr.P. Code. 93 Ind. Cas. 884=5 Pat. 63=7 P.L.T. 396=27 Cr.L.J. 484=A.I.R. 1926 Pat. 232.

——S. 27—Scope and operation—Ss. 160, 161 and 162, Cr.P. Code—If overrides S. 27—(Per Curiam, Heald, J., Contra.)

Ss. 160, 161 and 162 do not apply to an accused person and do not affect or override S. 27 of the Evidence Act, which applies only to information received from a person accused of any offence in the custody of a police officer: A.I.R. 1926 Pat. 232 and A.I.R. 1925 Mad. 574, Appr. 96 Ind. Cas. 145=5 Bur. L.J. 30=4 Rang. 72=27 Cr.L.J. 881=A.I.R. 1926 Rang. 116 (F.B.).

——S. 27—Scope—S. 27 is not affected by Cr.P. Code, S. 162 (as amended).

S. 27 of the Evidence Act, which deals with information received from persons accused of an offence and in police custody is not affected by the aforesaid section of the Cr.P. Code. 96 Ind. Cas. 145=5 Bur. L.J. 30=4 Rang. 72=27 Cr.L.J. 881=A.I.R. 1926 Rang. 116 (F.B.).

——S. 27—Scope.

S. 27, Evidence Act is overridden by S. 162, Cr.P. Code. 94 Ind. Cas. 706=27 Cr.L.J. 658=A.I.R. 1926 Rang. 112.

——S. 27—Scope—Section is not repealed by the amended S. 162, Cr P. Code.

The amended S. 162 does not exclude from evidence the fact that the accused made a statement to the police that the weapon with which the crime had been committed was concealed in a prickly pear bush. The section both before and after amendment, is directed against the admission, at the instance of the prosecution of police diaries and other records prepared or copied from diaries of investigating officers. The provisions of the Evidence Act are quite independent of the sections in the Criminal Procedure Code and cannot be treated as impliedly repealed in consequence of the amendment of the Code of Criminal Procedure. 86 Ind. Cas. 664=26 Cr.L.J. 840=21 M.L.W. 199=A.I.R. 1925 Mad. 574.

——S. 27—Scope and operation—Cr.P. Code (1923), S. 162—Overrides S. 27 of the Evidence Act.

S. 162 of the Cr.P. Code in its present form, overrides, S. 27 of the Evidence Act. 84 Ind. Cas. 545=3 Bur. L.J. 245=26 Cr.L.J. 321=A.I.R. 1925 Rang. 101.

——S. 27—Applicability —Confession—Inducement from person in authority.

A confession which appears to have been caused by some inducement from some person in authority is inadmissible in evidence. 6 Bur. L.T. 109=14 Cr.L.J. 417=20 Ind. Cas. 401.

——S. 27—Applicability.

S. 27 is a proviso to Ss. 24, 25 and 26, 31-A, 592, Foll. Statement made to the police is admissible though the accused himself makes the discovery about which the statement is made. Confession to person in authority who holds out inducements to confess is not admissible even so far as it relates to the discovery of articles if the accused was not in police custody. 4 S.L.R. 209=12 Cr.L.J. 119=9 Ind. Cas. 718.

——S. 27—Applicability—Place already discovered.

When a material fact has already been discovered, the accused's statement while in police custody relating thereto, is not admissible under S. 27. 3 P.W.R. 1911 (Cr.)=12 Cr.L J. 35=9 Ind. Cas 232.

——S. 27—Applicability—Information leading to discovery—Place already discovered—Statement to Police.

A statement as to the place where stolen property is concealed, is admissible in evidence though given in the presence of a police officer and though the police had already discovered the place. 11 C.L.J. 182=11 Cr.L.J. 244=5 Ind. Cas. 769.

——Ss. 27 and 24—Applicability—Mutual relation.

S. 27 is not a proviso to S. 24. A confession caused by illegal inducement or illegal detention of the accused's relatives is irrelevant and the question of its truth is immaterial. 11 Cr.L.J. 41=4 Ind. Cas. 759.

——S. 27—Applicability — Statements made by accomplice elsewhere than before the Court.

S. 27 is a proviso to the preceding sections and has nothing to do with what may or may not be proved as against persons other than the maker of confession, when the maker of the alleged confession is not on his trial but is only a witness. 13 O.C. 309=11 Cr.L. J. 631=8 Ind. Cas. 379.

——S. 27—Applicability and, scope of—Cr. P. Code, S. 163.

The admissibility of evidence, that the accused went to a certain place and there produced certain ornament, should be judged by Evidence Act and not by S. 163 (Cr. P. Code. S. 27) Evidence Act, does qualify S. 26 and also Ss. 24 and 25 of the Act. S. 27, Evidence Act provides for the admission of evidence which but for that section cannot be admitted by a virtue of the three preceding sections. That section does not deal with evidence as to the conduct or acts of the accused admissible under S. 8 or any other section of the Evidence Act. 31 All. 592=6 A.L. J. 839=10 Cr.L. J. 439=3 Ind. Cas. 975 (F.B.).

3. Co-accused.

——S. 27 (8)—Co-accused — Statement of co-accused leading to discovery—Statement not admissible, if relevant under S. 8.

Where the mention of the article was first made by one of the accused while the other was present, it cannot be regarded as a statement made by the latter leading to the discovery. The statement that led to that discovery can be admissible against the former but cannot be made admissible against the latter as the discovery cannot be said to have been made in consequence of the information given by the latter.

Even if the statements made by the accused which led to the discoveries were not taken into consideration the conduct of the accused in disclosing the places where these articles were concealed by them and producing the same is relevant under S. 8 of the Evidence Act. A.I.R. 1946 Nag. 120=I.L.R. (1945) Nag. 931=47 Cr.L. J. 441 =222 Ind. Cas. 389.

——Ss. 27, 30—Confession of co-accused—Value of.

A confession by a co-accused may be taken into consideration against another accused and confessional statements under S. 27, Evidence Act come within the terms of S. 30. But there must be admissible evidence pointing to the accused's guilt. In assessing the probative value of that evidence a co-accused's confession may be taken into consideration. Where the evidence against accused is only that he was in the company of the other accused before and after the crime, he cannot be convicted on the basis of the confession of the co-accused, as such a conviction would amount to a treatment of confession as substantive evidence against him. A.I.R. 1941 Mad. 238=52 L.W. 420 (2)=1940 M.W.N. 1045 =42 Cr. L. J. 654=195 Ind. Cas. 53.

——Ss. 27 and 30 — Co-accused — Statement of accused involving other accused but not relating to discovery—Admissibility of statement against other accused.

It is necessary to observe strictly the provisions of S. 27, Evidence Act, by which the only portions of the information given by accused which are admissible, are those which relate distinctly to the facts discovered thereby. Hence, statements by an accused which do not relate to aforesaid facts but invovle other accused are inadmissible under S. 27 against the latter. A.I.R. 1941 Mad. 316=52 M.L.W. 284=1940 M.W.N. 764=I.L.R. (1940) Mad. 1928=42 Cr.L. J. 466=193 Ind. Cas. 814.

——S. 27—Co-accused—If can be used against co-accused.

A confession of an exculpatory nature made by an accused and subsequently retracted cannot be used against a co-accused. A. I. R. 1938 Pat. 352=39 Cr.L. J. 725=176 Ind. Cas. 530.

——S. 27—Co-accused—Statement by one accused is not admissible as against co-accused.

A statement made by an accused to a police officer is inadmissible in evidence against a co-accused. 4 Cal. 601, foll. 65 Ind. Cas. 849=20 A. L. J. 178= 23 Cr. L. J. 193=A.I.R. 1922 All. 24.

4. Conviction.

——S. 27 and I. P. Code, S. 302. Admissible portion of the statement made by accused to the police leading to recovery of knife—Sufficiency to convict accused in the absence of evidence connecting the knife or accused with murder.

Where on a proper view of S. 27 of the Evidence Act the only portion of the statement made to the police by an accused charged with murder was "I have buried in the margin of the eastern ridge of my sugar-cane garden the knife. If you come with me I shall take and give it" and there was no other evidence connecting the knife or the accused with the murder and the chemical analysis of the knife did not disclose stains of human blood.

Held, that the statement did not connect the accused with the murder and in the circumstances the charge of murder cannot be held to have been proved. 60 L.W. 729 (2)=1948 M.W.N. 60=A.I.R. 1948 Mad. 242=49 Cr.L. J. 256=(1947) 2 M.L. J. 427.

——S. 27—"Facts discovered" as a result of confession—Relevancy—Sufficiency of evidence to uphold a conviction.

The fact discovered as a result of a statement to the police officer would become relevant only if such a statement leads to the discovery of the fact that the property is concealed in the place mentioned to the knowledge of the person making the confession and if the property is proved to have been connected with the offence. So where the confession leads to the discovery of certain jewels but there is no evidence to establish that the accused had anything to do with the house in which they were discovered, assuming it is stolen property, it is not sufficient even with the aid of the presumption under S. 114 of the Evidence Act to establish that the accused was guilty of an offence under Ss. 454 and 380 of the Penal Code or even alternatively under S. 411 of the I. P. Code,

But where currency notes are discovered in the bag which had the initials of P. W. 1 whose evidence was that the notes were kept in such a bag, the evidence is enough to establish the identity of the stolen property and it would be a case where the presumption under S. 114, Evidence Act, would apply and the accused would be guilty of an offence either under S. 454, 380 or 411 of the Penal Code. 1947 M. W. N. 665=49 Cr. L. J. 432=A. I. R. 1948 Mad. 261=(1947) 2 M.L. J. 356.

——S. 27 — Conviction — " Fact discovered "— Meaning—Nature of information relating to the "fact discovered" that is admissible.

S. 27 of the Evidence Act provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. It is fallacious to treat the "fact discovered" within S. 27 as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered and so would not be admissible in evidence.

Where evidence has been admitted which ought not to have been admitted, the duty of the appellate Court before which objection is raised is to find whether after discarding the evidence improperly admitted there was left sufficient evidence to justify the conviction. 74 I. A. 65=I. L. R. (1948) Mad. 1=230 Ind. Cas. 135=60 L. W. 258=1947 M. W. N. 217=51 C.W.N. 474=1947 A.L. J. 355=13 P.R. 450=49 Bom. L.R. 508=48 Cr.L. J. 533=A.I.R. 1947 P.C. 67=(1947) 1 M.L. J. 219 (P.C.).

——S. 27—Conviction—"Fact discovered"—Nature of information relating to that is admissible.

Where one of the accused in his confessional statement implicated himself as the person who decoyed the deceased to the rickyard and assisted in his murder by holding the legs and that after the murder he and others carried the dead body and buried it in the burial ground, practically the entire statement will have to be excluded from the evidence except the portion in which it was stated that the body was buried at a particular place, which by itself will not in any manner incriminate any of the accused. (1947) 1 M.L. J. 219=L. R. 74 I.A. 65 (P. C.), followed.

Such confessional statement will not be sufficient to sustain a conviction of any of the accused for offences either under S. 201 or S. 363 of the Indian Penal Code. 60 L. W. 596=1947 M.W.N. 602=A.I.R. 1948 Mad. 104 (2)=49 Cr.L.J. 48 (1)=(1947) 2 M. L. J. 295.

— - S. 27—Conviction on—Retracted confession—Value.

Per **Lokur, J.**—There is no absolute rule of law that a retracted confession cannot be acted upon unless there is material corroboration, if it is found to be voluntary. But as a rule of prudence, it is regarded not safe to base a conviction solely on a retracted confession unless there are circumstances which leave no doubt that it is voluntary and true. A. I. R. 1945 Bom. 484=47 Bom. L.R. 648=47 Cr.L.J. 252=222 Ind. Cas. 143.

——S. 27—Conviction—Approver—Trial of, for resiling—Statement, if to be treated as confession—Corroboration.

An approver resiled form his statement and, therefore he was sent up for trial. He himself had produced from his house ornaments which were stained with human blood and were proved to be stolen from the house of the deceased:

Held, that the statement must be treated as a confession, and on the confession alone conviction might follow without its corroboratiion.

Held, however, that there was sufficient corroboration of his confession for conviction. A.I.R. 1938 Lah. 135=39 P.L.R. 930=39 Cr.L.J. 335 (1)=173 Ind. Cas. 484.

——S. 27—Conviction on. Confession recorded in Dak Bungalow—No reasons assigned for such procedure—Accused subsequently sent back to police custody—Confession and discoveries are not beyond suspicion and conviction cannot be based on such evidence. A.I.R. 1937 Lah. 98=38 P. L. R. 791=38 Cr.L J. 338=166 Ind. Cas. 1003.

——S. 27—Conviction on—Person convicted on mere evidence that he pointed out places from which portions of stolen property were recovered—Legality.

The only evidence on which a person's conviction was based was that he pointed out three places from which portions of the stolen property were recovered. Person's father and brother were also suspected and eventually discharged.

Held, that as his relations were also concerned in the crime, it was possible for the person to have knowledge of the places without himself being guilty of any offence and so the recoveries alone were not sufficient to justify the conviction: 18 P.R. 1917, (Cr.) Dist. 11 L L.J. 439=1930 Cr.C. 107=A.I.R. 1930 Lah. 91.

——S. 27—Conviction on—Offence under Ss. 457 and 380, Penal Code—Tank indicaten by statement of accused—Vessels recovered from the tank not within sole control of accused—Evidencc Is insufficient for conviction of accused.

Where an accused arrested on the charges under Ss. 457 and 380, makes a statement indicating a tank from which vessels, corresponding to the description of articles stolen, are recovered, but where the tank is not the particular property, or within the sole control of the accused, but accessible to the public in general and it is doubtful whether the accused or some other person concealed the stolen articles, such evidence of itself is not sufficient for a conviction: 17 All. 576, Rel. on; 16 C.W. N. 238; 1 P. R. 1917 (Cr.) and A.I.R. 1923 Lah. 335, Ref. 30 M.L.W. 791=1929 M.W.N. 785=2 M. Cr.C. 307=1929 Cr. C. 614=A.I.R. 1929 Mad. 846=57 M.L.J. 548.

——S.27—Conviction on—Weapon forbidden under Arms Act discovered by reason of information from accused—His conviction is valid.

Where an article, the possession of which is forbidden by the Indian Arms Act, has been discovered by reason of information given by an accused person his conviction based upon that evidence is valid: 72 P.L.R. 1916, Foll. 100 Ind. Cas. 122=9 L.L.J. 211=28 P.L.R. 626=28 Cr.L.J. 250=A.I.R. 1927 Lah. 900.

5. Discovery.

——S. 27—'Discovery' — Meaning of—Joint information of accused persons leading to discovery—Admissibility—Evidence vague as to who gave information first.

A thing cannot be discovered several times. If in consequence of an information, given by one of the several accused persons, the incriminating material is discovered, it does not remain to be discovered within meaning of S. 27, Evidence Act, in consequence of any subsequent information given by another. That would amount to dicovery of a thing already discovered. Taken in this sense, the word "discovery" will lose its meaning.

Where in consequence of a joint information given by the accused persons a dead body is discovered and the evidence is too vague as to who gave the information first and who next, the joint statement is not admissible in evidence to establish the guilt of the accused person. 59 C. 140 and A.I.R. 1942 Mad. 532 (1), referred to. A.I.R. Lah. 665, doubted. I. L. R. (1949) Cut. 207=A.I.R. 1949 Orissa 67=51 Cr.L.J. 72.

——S. 27—Discovery — Construction — Statement leading to discovery—When admissible.

Under S. 27 of the Evidence Act, a statement of an accused person made to a Police Officer leading to the discovery of certatin ornaments belonging to a murdered person is admissible in evidence only if it is shown that those ornaments were connected with the crime of murder of the deceased the connection being shown by some such circumstance as presence of blood on the ornaments. Mere proof that the ornaments discovered had been on the person of the deceased before death would not necessarily mean that they were connected with the crime of murder. I.L.R. (1936) Nag. 78, Foll. I.L.R. (1949) Nag. 200=50 Cr. L. J. 713=A.I.R. 1949 Nag. 277=1949 N.L. J. 216.

——S. 27—Discovery—"Fact discovered"—What is.

It is fallacious to treat the "fact discovered" within S. 27 of the Evidence Act as equivalent to the object produced; the fact discovered embraces the place from which the object is discovered and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. I.L.R. (1948) Nag. 147=49 Cr. L. J. 561=A.I R. 1948 Nag. 344=1948 N. L. J. 489.

——S. 27—Discovery— "Fact discovered"—What are included in.

The words "fact discovered" occuring in S. 27 of the Evidence Act embrace the place from which the object is produced, the knowledge of the accused as to this and the information given must relate distinctly to this fact. 74 I.A. 65, Foll. A.I.R. 1950 All. 615.

——S. 27—Discovery—Construction —Information "leading to discovery"—What amounts to.

Where the information given by the accused in his confession leading to the discovery of facts is already known to the police officer before the confession is made and before the panchayatdars appear on the scene, the confession is inadmissible. But the mere circumstance that the police officer sent for the panchayatdars, because the accused was going to give some useful information, cannot lead to the inference that the officer had that information already so as to render the confession inadmissible in evidence under S. 27, Evidence Act. It may be that in some cases the police officer concerned has the information and after having that information from the accused, he sends for the panchayatdars to witness the discovery. In such cases, the confession is inadmissible. But the police officer might learn from some source that the accused was giving information about the articles connected with an offence, and may consequently send for panchayatdars to witness the discovery. From that it cannot be inferred that the police officer had information furnished to him already by the accused, and the information leading to the discovery cannot be excluded or shut out. 1939 Mad. 15, comm.; 49 Mys. H.C.R. 444, dist.; 1940 Mad. 710; 1943 Mad. 316, ref. 27 Mys. L. J. 42.

——S. 27—Discovery—Construction — Statement leading to discovery—Use of to prove connection between fact discovered and offence—Permissibility.

S. 27, Evidence Act, renders admissible in evidence so much of a statement which would otherwise be excluded by S. 25 as leads to the discovery of a fact. The object of S. 27 is to admit evidence which is relevant to the matter under inquiry, **viz.**, the guilt of the accused. The discovery of a material object is of no relevancy to the question whether the accused is guilty of the offence charged against him unless it is connected with the offence. Hence it is the connection of the thing discovered with the crime that renders its discovery a relevant fact. Though the connection between the offence and the thing discovered may be established by evidence other than the statement leading to the discovery that is no reason for excluding proof of the connection by the statement itself. S. 27 should be read so as to make it effective, if it can be so read and not in any restricted sense. 25 Pat. 279=13 B.R. 545=231 Ind. Cas. 94=48 Cr.L.J. 686=A.I.R. 1947 Pat. 162.

——S. 27—Discovery—Only information distinctly relating to fact thereby actually discovered is admissible.

Under S. 27, only so much of the information as distinctly relates to the fact actually thereby discovered is admissible.

The accused while in police custody said they had cut up the dead body in a Khasia field, that they had thrown the pieces of the body into the river and that they had buried the clothes of the deceased. The facts discovered in consequence of the statements were merely that at a place in Khasia field were found a blood-stained log of wood, some pieces of bone and a string said to have been worn by the deceased, that at a place on the river bank were found the clothes said to have been worn by the deceased when he was last seen alive and that a human foot which might have been that of the deceased was recovered from the river:

Held that the statements that they cut up the dead body or that they buried the clothes or that they threw the pieces of the dead body into the river did not relate distinctly to the fact discovered, and therefore were entirely inadmissible in evidence under S. 27. A.I.R. 1946 Cal. 452=48 Cr. L. J. 46=228 Ind. Cas. 24=50 C.W.N. 88.

——S. 27—Discovery—Statement that accused had buried dead body.

Where an accused makes a statement before the police that he had buried the deceased and points out the place from where the dead body is recovered, the statement is admissible under S. 27. 47 Pun. L. R. 254.

——S. 27—Discovery—Articles produced by accused prior to their statements.

Where after the articles are produced by the accused, statements are made by them, it cannot be said that their statements led to the discovery of the articles produced. A.I.R. 1945 Pat. 161=46 Cr. L.J. 613=10 Cut. L.T. 87=219 Ind. Cas. 391.

——S. 27—Discovery—After arrest, accused making statement that revolver given to him by **P** was buried by him in father-in-law's house—Accused then taking

Police Officer to the place, digging out revolver and giving it to Police Officer.

After the accused was arrested by the Circle Inspector, he questioned him and the accused made a statement in which he definitely stated that the revolver which was given to him by **P** was buried by him in his father-in-law's house. After the statement was recorded, the Circle Inspector was taken by the accused to that house and the accused dug it out and gave the Inspector, the revolver:

Held, that it could not be said in the circumstances that the discovery was not in consequence of the information given by the accused. It was not simultaneous and the statement was recorded in the presence of witnesses before they moved to the house from where the property was dug out. Therefore, the confession was admissible under S. 27, Evidence Act. The description of the revolver as a revolver presented by **P** indicated that the accused got possession of it as a donee. It was immaterial that the room in which the revolver was buried was not in the possession of the accused. A.I.R. 1943 Mad. 661=(1943) 2 M.L.J. 283=56 M.L.W. 519=1943 M.W.N. 577=45 Cr.L.J. 124=209 Ind. Cas. 272.

——**S. 27—Discovery—Accused pointing out complainant—Complainant discovered** — Statement of accused, if admissible.

The pointing out of the complainant by the accused is admissible in evidence against him if a complainant is discovered as a result of a statement by the accused; for the material fact discovered as a result of that statement is the theft from the complainant. A.I.R. 1943 Mad. 418=56 M.L.W. 107=1943 M.W.N. 126=(1943) 1 M.L.J. 192=44 Cr.L.J. 585=207 Ind. Cas. 238.

——**S. 27—Discovery—Police coming to know from** evidence of prosecution witnesses where accused hid deceased's jewels—On subsequent information by accused, police discovering jewels—Witnesses' knowledge derived from accused—Jewels must be regarded as discovered in consequence of accused's information.

Where, as a result of the deposition of the prosecution witnesses, the police knew the place where the accused had hidden the deceased's jewels and on a subsequent information given by the accused the police discovered the jewels, it cannot be the said that the jewels were discovered in consequence of the information given by accused, so as to render the information inamissible when the witnesses themselves admit that their knowledge was derived from the accused. A.I.R. 1943 Mad. 315=1943 M.W.N. 11=56 M.L.W. 77=44 Cr.L.J. 489=206 Ind. Cas. 101.

——**S. 27—Discovery—Statement to police while producing materials used by accused in committing offence is inadmissible.**

A statement to the police by the accused while producing the materials used by him in committing the offence is inadmissible since it cannot be said to be a statement in consequence of which a fact was discovered. A.I.R. 1942 Mad. 237=1941 M.W.N. 956=43 Cr.L.J. 463=199 Ind. Cas. 87.

——**S. 27—Discovery—Statement and fact of recovery in consequence thereof.**

Where after his arrest the accused made a statement to the police that he was with the dacoits and that one of his companions had buried some money and he takes the police to a certain place where some money is found buried under the ground, the statement does not amount to a confession and hence the statement and the fact of recovery are admissible in evidence. A.I.R. 1942 Pat. 156=43 Cr.L.J. 615=23 P.L.T. 475=200 Ind. Cas. 808.

——**S. 27—Discovery — Confession leading to discovery.**

Confession before police leading to discovery of articles which are the subject of theft is clearly admissible under S. 27 of the Evidence Act. A.I.R. 1941 Mad. 658=1941 M.W.N. 371=53 L.W. 567=42 Cr.L.J. 631=194 Ind. Cas. 857.

——**S. 27—Discovery— Accused describing murder and part played by other accused and almost simultaneously producing deceased's ear-rings.**

Under S. 27, Evidence Act, cases where a discovery is made in consequence of information given and a disclosure by an accused accompanying a statement must be distinguished.

Where an accused makes a statement to a police officer describing the murder and the part played by the other accused and almost simultaneously produces ear-rings identified as those worn by the deceased, the discovery of the ear-rings cannot be said to have been made in consequence of the information given by the accused and therefore, the statement is inadmissible in evidence under S. 27. A.I.R. 1941 Mad. 306=52 L.W. 898=1940 M.W.N. 1238=42 Cr.L.J. 424=193 Ind. Cas. 465.

——**S. 27—Discovery.**

—Accused's statement to police that he threw away knife on certain spot after killing deceased—Accused leading police to the spot but knife not found—Police broadcasting that whoever has taken knife should return it or houses would be searched—A coming forward and stating that he found a knife on spot mentioned by accused but he has thrown it away—A producing knife from spot where he alleged it was thrown away by him:

Held, that the statement of the accused to the Police was admissible under S. 27, Evidence Act, since it led to the discovery of (1) the fact that a knife had been seen to be thrown away and was later found by A at the spot indicated, and (2) the knife itself; the fact that the knife was not actually found at the spot mentioned by the accused was immaterial. A.I.R. 1941 Mad. 290=1940 M.W.N. 163=42 Cr.L.J. 407=193 Ind. Cas. 347.

——**S. 27—Discovery — Statement by accused—Spear-head and lathi discovered—Absence of corroborative evidence.**

Where an accused makes a statement to the Police Officer that he killed the deceased with a spear and then broke the spear and threw the spear-head in the well and the lathi in the talab and after this statement, the Police Officer is taken by the accused to the talab and there brings out the lathi from under the mud in the talab and then points out the well in which the spear-head is is thrown and on search, it is found there, the statement by the accused to the Police Officer is admissible in evidence.

It would, however, be very unsafe to rely upon an extra-judicial confession of this kind when there is no other corroborative evidence in support of it. A.I.R. 1939 All. 685=1939 A.L.J. 732=40 Cr.L.J. 954=1939 A.W.R. 602=184 Ind. Cas. 390.

——**S. 27—Discovery—Admission of guilt by accused not leading to discovery of relevant facts—Evidence of—If admissible.**

Where an information given by an accused to the police admitting his guilt, does not lead to the discovery of any relevant fact concerning the offence, evidence of what that information was is inadmis-

sible. A.I.R. 1939 Mad. 59=48 L.W. 601=1938-2 M.L.J. 771=1938 M.W.N. 1116=40 Cr. L. J. 211=179 Ind. Cas. 518.

——S. 27—Discovery.

—Information containing admission of guilt not leading to discovery of relevant fact—Evidence of what that information was is inadmissible. A.I.R. 1939 Mad. 59=(1938) 2 M.L.J. 771=48 M.L.W. 601=1938 M.W.N. 1116=40 Cr. L.J. 211=179 Ind. Cas. 518.

——S. 27—Discovery—Police Circle Inspector knowing what accused was going to disclose—For corroboration, witnesses called and deposition taken in their presence.

Where the witnesses were sent for by the Circle Inspector to go to the Police Station where the accused were kept in custody, and when they arrived there the accused was brought out of the lock-up and examined by the Circle Inspector in their presence; this meant that the Circle Inspector knew beforehand precisely what the accused was going to say. His procuring the presence of the witnesses and others who signed the panchayatnama was a mere farce. It was impossible to say that anything was discovered in consequence of the statement made by the accused to the Inspector. Apparently, the Circle Inspector, like so many of his fellow officers was afraid that if he went into the Court and said that he had received such and such information from the accused, the Court would not believe him. He, therefore, found it necessary to have more trustworthy persons than himself present as witnesses when the information should be disclosed. This is regrettable attitude on the part of any Police Officer and much more on the part of an officer of the grade of Circle Inspector. The Circle Inspector ought to expect to be believed when he gives evidence on oath. Consequently the evidence regarding the statements made by the accused and embodied in the panchayatnama and spoken to by the witnesses was wholly inadmissible. A.I.R. 1939 Mad. 15=1938 M.W.N. 1118=48 M.L.W. 780=40 Cr.L.J. 433=180 Ind. Cas. 590.

——S. 27—Discovery.

If the confession as a whole is unreliable, the discovery which is but a part of that confession should also be held to be unreliable. A.I.R. 1938 Lah. 594=39 Cr.L.J. 907 (2)=40 P.L.R. 890=177 Ind. Cas. 617.

——S. 27—Discovery—Portion of statement of accused relating distinctly and positively to fact discovered—Statement that accused buried gun in certain place made while in police custody—Gun subsequently discovered at that place—Arms Act (XI of 1878), S. 19 (f).

The intention of the Legislature in enacting S. 27 was that the minimum portion of a confession made to a police officer or of information given to him should be admitted into evidence which might reasonably be held to relate distinctly and positively to the fact discovered and which is necessary to be proved in order adequately to explain such discovery.

Consequently, the statement of the accused made while in police custody, that he had himself buried a gun at a certain place, leading to the discovery of that gun in that place, is admissible in evidence.

And where on such an information, the unlicensed gun was recovered from the Railway premises within the Railway fencing, which place was accessible to the public:

Held, that although the place was accessible to the public and a path was running close by, no member of the public could have ordinarily got at the gun inasmuch as it was concealed from view, whereas the accused could have access to it at opportune moments and in the eye of the law, he must be deemed to be in possession and control of the gun. A.I.R. 1937 All. 497=1937 A.L.J. 715=38 Cr.L.J. 910 (2)=I.L.R, (1937) All. 710=1937 A.W.R. 616=170 Ind. Cas. 453.

——S. 27—Discovery.

Criminal trial—Recovery of blood-stained knife at instance of accused not self-sufficient evidence when testimony of eye-witnesses is unsatisfactory. 38 P.L.R. 215.

——S. 27—Discovery.

Statement by person not in police custody and which did not lead to discovery of any property by police is inadmissible—Investigating officer deliberately absenting himself when production of stolen property by accused is expected to be made and deputing this business to outsider—Procedure condemned as unusual. 1936 M. W. N. 835 (837).

——S. 27—Discovery.

When the accused, when questioned, offered to indicate the place where the property was and his master's keys having been obtained, he took Police to the spot and entering the room retrieved the currency notes himself from underneath a pile of firewood:

Held, that the statement led to the discovery of the property and was therefore, admissible under S. 27. 18 N. L. J. 342=37 Cr. L. J. 718=162 Ind. Cas. 779.

——S. 27 — Discovery — Fact previously discovered by Police.

Section 27 permits as much information to be admitted in evidence, whether it amounts to a confession or not, "as relates distinctly to the fact thereby discovered". If a fact has been previously discovered by the police, S. 27 would not apply. A.I.R. 1934 Lah. 786 =36 P. L. R. 40=36 Cr. L. J. 313=153 Ind. Cas. 228.

——S. 27—Discovery—Information to the Police—Discovery not in consequence of the information.

Where the accused was the first person to tell the police about the presence of the dead body of the deceased in a well and that he had put it there, and the body was discovered long before the police reached the spot, in consequence of the information, by some one else, though the police had no knowledge of it:

Held, that it could not be said that the body was discovered in consequence of the information of the accused. His statement to the police, therefore, would not come under the purview of S. 27. Under the circumstances the information was tantamount to a statement of incriminating nature and was inadmissible in evidence. A.I.R. 1934 Lah. 313=35 P. L. R. 203=36 Cr. L. J. 189=152 Ind. Cas. 565.

——S. 27—Discovery—Recovery of weapon from accused—Confession of accused mentioning such weapon as weapon of offence—Court

believing and acting upon the confession—Effect of.

Where a weapon has been recovered from the accused and the court believes his confession and acts upon it, the mention of a weapon in the confession as the weapon of offence sufficiently connects the weapon with the offence. A.I.R. 1934 Lah. 51=35 Cr. L. J. 709=148 Ind. Cas. 424.

——S. 27—Discovery—Statements leading to discovery.

A statement which leads to discovery of hidden articles is admissible under S. 27 even if made in the presence of the Police. A.I.R. 1933 Mad. 233=64 M. L. J. 88=1932 M.W.N. 801=37 M. L. W. 220=56 Mad. 231=34 Cr. L. J. 481=143 Ind. Cas. 46.

——S. 27—Discovery—Statements not directly bearing upon discovery.

Only statements which directly bear on the discovery of property are admissible under S. 27, and confessional statements not directly bearing upon the discovery are inadmissible.

Where two guns said to be used in dacoity and taken on loan by two accused were recovered from certain persons on information given by the accused that they used them in the dacoity, and it appeared that the persons from whom they were recovered were both licence-holders of the guns:

Held, that it could not, by any stretch of imagination be held that there was any "discovery" in the case of these guns within the meaning of S. 27. A.I.R. 1933 Nag. 252 =35 Cr. L. J. 594= 148 Ind. Cas. 157.

——S. 27—Discovery—Statement that hatchet produced was the one with which murder was committed—Statement not leading to discovery of hatchet.

Per Smith J.—Section 27 must be strictly construed. Where a statement made to the Police that a certain hatchet was the one with which the murder was committed, has not led to the discovery of the hatchet, the statement should not be allowed to come into evidence. A.I.R. 1933 Oudh 404=10 O. W. N. 937=35 Cr.L.J. 192=146 Ind. Cas. 905.

——S. 27—Discovery—Places already known are not places "discovered" within S. 27.

Incriminating admissions of an accused before police officers cannot be said to lead to the discovery of several places pointed out by the accused where they are already known and cannot be said to have been "discovered" in consequence of the said admissions within the meaning of S. 27. 12 Mad. 153, Foll. 120 Ind. Cas. 210=31 Cr. L. J. 15=13 A. I. Cr. R. 157= 1929 Cr. C. 673= A.I.R. 1929 Nag. 350.

——S. 27—Discovery—Fact known to police cannot be re-discovered on statement of accussed.

A fact known to the police cannot be re-discovered on the statement of an accused person so as to make such statement or such incriminating conduct admissible under S. 27. 120 Ind. Cas. 81=1929 Cr. C. 678=30 Cr. L.J. 1121=A.I.R. 1929 Sind. 250.

——S. 27—Discovery—Accused admitting possession of property—Property produced by accused himself—Statement of accused is admissible.

The statement of an accused that he had in possession certain stolen property is admissible in evidence even though he himself produced the property. (14 M.L.W. 418, Foll.). It makes no difference whether the accused himself digs out the property from the place where it is hidden or whether on information given by him some one else digs up the the ground and produces the property. 26 M.L.J. 352, Appr. 93 Ind. Cas. 42=50 Mad. 274=27 Cr. L.J. 394=A.I.R. 1926 Mad. 638.

——S. 27—Discovery—Information not leading to discovery.

Where the finding of a corpse was due not to anything that the accused had said but to his conduct in pointing out that place, a record of the accused's conduct is admissible in evidence. But statements of the accused in consequence of which nothing was discovered should not be admitted in evidence. 13 Bom. L.R. 499=12 Cr. L. J. 419=11 Ind. Cas, 613.

——S. 27—Discovery of articles by accused in his house is a fact discovered within S. 27.

The discovery of the ornaments at his house by accused is clearly a fact discovered within the meaning of S. 27, and is admissible in evidence. 73 Ind.Cas. 62=21 A.L.J. 143=45 All. 300=4 L.R.A. Cr. 13=24 Cr. L. J. 526=A.I.R. 1923 All. 352.

——S. 27—Discovery — Knowledge of facts by persons other than the police is immaterial.

Though facts are already known to persons other than police officers, such facts cannot be said to be not discovered in consequence of information received within the meaning of S. 27 of the Evidence Act. The language of the section and its place in the Evidence Act make it clear that the discovery therein referred to is discovery to or by police officers. 49 Cal. 167=A.I.R. 1922 Cal. 342.

——S. 27—Discovery—Information leading to discovery of property — Person made to show the places where discovery had already been made—Evidence is not admissible.

Once property has been discovered in consequence of information received from a suspected person, it cannot be re-discovered in consequence of information received from another suspected person. It is only the information that was given by the first person and which led to the actual discovery which may be proved under the terms of S. 27 of the Evidence Act. 64 Ind. Cas. 502=9 P.L.R. 1922=23 Cr. L.J. 22=A.I.R. 1922 Lah. 315.

——S. 27—"Discovery" means discovery to or by Police.

If and when certain facts are deposed to as discovered consequence of information received from the accused when in custody of the police, so much of the information as relates distinctly to the fact or facts there by discovered will become admissible. The discovery referred to in S. 2 is discovery to or by Police Officers. 11 Cal. 635, Foll. 62 Ind. Cas. 578=25 C.W.N. 788=22 Cr. L.J. 562=A.I.R. 1921 Cal. 111.

——Ss. 27 and 26, 25 and 24 — Discovery in pursuance of confession—Police officer—Admissibility of statement.

When a confession as a whole is excluded whether by reason of S. 26 or 25 or 24, so much of the information, given by the person making the confession when the accused was in custody, as distinctly relates to a relevant act thereby discovered, becomes admissible. When the accused himself produced the articles said to be discovered, so

much of the information as set the police in motion and led to the discovery is admissible. **Per Huda J.**—Under S. 27 only so much of the information whether amounting to a confession or not as relates distinctly to the fact thereby discovered may be proved. Even if a single statement contains more information than what is contemplated in S. 24, the statement is not to go in as a whole nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which led to the discovery. S. 27 of the Evidence Act, qualifies not only Ss. 25 and 26 but also S. 24 all three of which lay down general rules excluding confessions and the same broad grounds underlies all the three. 45 Cal. 557=22 C.W.N. 213=27 C.L.J. 148=19 Cr. L.J. 305=44 Ind. Cas. 321.

——S. 27—Discovery—Confession not leading to discovery of anything.

When a person accused of murder offered to show to the police the scene of the murder and the place where the deceased's things concealed both of which had already been disclosed, by an accomplice, **Held,** that the conduct of the accused in this respect was inadmissible in evidence against him. 19 Cr. L.J. 42=42 Ind. Cas. 1002.

——S. 27—Discovery—Information leading to discovery—Hiding place not his own.

Though a person points out a place not his own where stolen property is concealed, the Court should not conclude that the person had received or retained it. (17 A. 576; 20 P. R. 1905 Cr. R.). The mere knowledge of the place of concealment does not show that the person having such knowledge actually received the stolen articles or participated in the act of concealment. 1 P. R. 1917 Cr.=18 Cr. L. J. 490=39 Ind. Cas. 330.

——S. 27—Discovery as a result of a statement of the accused—Statemant, admissibility of

A statement is admissible in evidence under S. 27 when as a consequence of it, there is a discovery incriminating the person making the statement. 72 P.L.R. 1916=24 P.W.R. 1916, Cr.=17 Cr. L. J. 183=50 P.W.R. 1915 Cr. =33 Ind. Cas. 823.

——S. 27—Discovery—Fact discovered—By two persons together.

When two persons are taken together to point out murdered bodies or stolen property, the evidence of joint discovery is altogether inadmissible againgt both unless it is conclusively proved which of the two discovered the bodies. 8 P.W.R. 1909 Cr.=10 Cr. L. J. 321=3 Ind. Cas.. 622.

——S. 27—Discovery—Inducement by police.

In cases of discoveries made on information given by the accused, it is necessary to consider whether it has been the result of a promise held out. In some cases the fact that the discovery was induced by a promise would raise a doubt as to the genuineness of the discovery and render the evidence almost worthless. 31 All. 592=10 Cr. L. J. 212=3 Ind. Cas. 26.

6. Discovery of irrelevant fact.

——S. 27—Discovery of irrelevant fact—Information causing discovery—Mere existence of other information by which discovery was facilitated does not make the information inadmissible under S. 27.

The information received from the accused which has led to the discovery does not cease to be the information causing the discovery simply because such discovery was facilitated by other assistance as well. When a fact is once discovered in consequence of information received from some source, any futher information subsequently received from any other source cannot be said to be the information whereby the fact is discovered. But the mere plurality of information received before discovery shall not necessarily take any of these informations out of the section. In a suitable case, it is possible to ascribe to more than one accused the information which leads to the discovery. A.I.R. 1942 Cal. 593=I.L.R. (1942) 1 Cal. 436=46 C.W.N. 180=44 Cr. L. J. 145=75 C. L. J. 507=204 Ind. Cas. 111.

——Ss. 27, 30—Fact discovered must be relevant fact and object material object—Fact, if can be made relevant by evidence aliunde—Absence of such evidence—Statement connecting fact discovered with offence and making it relevant.

The fact deposed to and the fact discovered obviously must be relevant and the fact or thing discovered can only be relevant if it is connected with the offence of which the accused is charged, and the confession should be a confession of the offence charged and not of anything else. Before the statement is given in evidence, it must be shown that fact discovered is a relevant fact and that the object is a material object. In cases where the things discovered as a result of the accused's information are proved to be property stolen from a person and the subject of the charge or worn by the victim of a murder, just before the murder is committed, the property so discovered is directly connected with the crime and the fact thereby discovered relevant. It can be made relevant by evidence aliunde, and it can be made relevant by the statement of the accused itself. If there is no evidence aliunde, then the Police will not be set in motion unless the fact discovered is connected with the case under investigation and if it is the accused's statement which connects the fact discovered with the offence and makes it relevant, then even though that statement amounts to a confession of the offence, it must be admitted because it is that that has led directly to the discovery of the fact:

Held, applying the above reasoning to the case in question, that the earlier part of the statement that the accused and G killed the victim by gagging his mouth with a cloth and throttling his neck with hands and also by putting a rope and pressing it, connected the rope and the cloth gag directly with the offence and hence was admissible in evidence under S. 27.

Held, also, that the statement that the bottle would be found in the dung heap, etc., was not a confession but it constituted 'information' leading up to the discovery of a fact which fact was made material because there was evidence that at a time material to this case, the accused was in the near vicinity of the scene of murder carrying a bottle and intoxicated. A. I. R. 1937 Mad. 618=1937 M.W.N. 442=46 M.L W. 152=1937-2 M.L.J 60= 38 Cr.L.J. 1027=I.L.R. (1937) Mad. 695=171 Ind. Cas. 245 (F.B).

——S. 27—Discovery of irrelevant fact.

The Court should not, under cover of the provisions of S. 27, allow the discovery of ordinary articles like lathis, knives, stick and clothes to be introduced so as to admit what are practically

confessions to the Police, and the discovery ought to be of a fact which is directy connected with the crime apart from the statement itself. A.I.R 1936 Nag. 23=18 N. L. J. 116=31 N. L. R. 256=37 Cr. L.J.460=161 Ind. Cas. 8.

——S.27—Discovery of irrelevant fact—Production of gandasa neither blood-stained nor proved to have been connected with crime—Confession, if admissible.

Where the accused produced a gandasa from a pond but it was neither blood-stained nor proved to have been connected with the crime:

Held, that the confessional statements were not admissible in evidence. A. I. R. 1935 Lah. 433=37 P.L.R. 83=36 Cr. L. J. 1195=157 Ind. Cas. 735.

——S. 27—Discovery of irrelevant fact.

Section 27 has nothing to do with the question whether the fact discovered is or is not relevant. 115 Ind. Cas. 6=10 Lah. 283=30 P.L.R. 197=11 L.L.J. 159=30 Cr.L.J. 414=12 A. I. Cr. R. 382= A.I.R. 1929 Lah. 344 (F. B.).

——S. 27—Discovery of irrelevent fact—Confession to police—Discovery of fact irrelevant to inquiry does not make confession admissible.

In a case where an accused is charged with murder by poisoning, the fact that at some previous date the accused had treated another person with arsenic for a bad leg is not relevant in any way and the discovery of the fact in consequence of a statement made by the accused to the police cannot make this statement admissible. 105 Ind. Cas. 683=6 Pat. 611=9 P.L.T. 377=28 Cr.L.J. 971 =9 A.I.Cr.R. 118=A.I.R. 1928 Pat. 22.

7. Duty of Court.

——S. 27—Duty of Court—Construction—Statement of accused—How far admissible—Duty of Investigating Officer and of Court.

The use of the words "so much of such information" in S. 27 of the Evidence Act clearly postulates that long and detailed statements unconnected with any fact thereby discovered are not to be proved. That information alone is provable which advances the investigation of the police in any way. It should be information of a relevant fact and there must be some fact discovered as a result of the information. It is for the Investigating Officer to record the words of the accused persons and it is for the Court to see what portion or portions should be allowed to be proved. It is not for the investigating officer to make a selection. He must record the information given by the accused. It is for the Court to consider the admissibility of the information. In doing so the Court must not allow extensive statements unconnected with any fact discovered thereby to be tendered in evidence. I. L. R. (1948) Nag. 57=A.I.R. 1948 Nag. 78=49 Cr. L. J. 66= 1948 N.L.J. 36.

——S. 27—Duty of Court—Statements under S. 27, how to be recorded.

Statements made by an accused person which are or may be provable under S. 27, should be clearly and carefully recorded by the Police Officers concerned. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased. Obviously, if what a man says is to be used in evidence, his own words should be used and not a rendering into third person of the purport of his statement. With such a record of the statement before him, it will then be for the trial Judge to decide how much of it is admissible under the section. A.I.R. 1937 Mad. 618=1937 M.W.N. 442=46 L. W. 152=(1937) 2 M.L.J. 60= I.L.R. (1937) Mad. 695=38 Cr. L. J. 1027=171 Ind. Cas. 245 (F.B).

——S. 27—Duty of Court—Statement by accused how to be recorded by police—Duty of Court in considering such a statement.

Statements made by an accused person which contain information provable in evidence under S. 27 should be clearly and carefully recorded by the Police Officer, and they should be recorded in the first person, that is to say, in the words used by the accused. They should not be paraphrased. Obviously, if what a man says is to be used in evidence, his exact words should be used and not what a Policeman or any one else says he said. When the Police have recorded the statement, it will in each case be for the trial Court to decide how much of the statement is admissible, under S. 27, that is to say, how much of such information as relates distinctly to the fact discoverable may be proved. And in considering that, the Court should bear in mind the fact that so much of such information whether it amounts to a confession or not may be proved, provided that it relates distinctly to the fact thereby discovered. 1937 M. W. N. 441 =(1937) 2 M.L.J. 32=38 Cr. L. J. 1025=171 Ind. Cas. 225.

——S. 27—Duty of Court—Confession induced by threat or promise—Retracted confession challenged by the defence—Duty of Judge.

Where a confession describes in the greatest possible detail a whole series of crimes which had been committed, it has been retracted and it is obvious that the confessing accused was implicated in each one of them, and the confession has been taken at extraordinary length throughout a considerable number of days, and the voluntary character of the confession is challenged by the defence, the Judge should make a thorough enquiry to see whether, in fact, the confession was voluntary, as it is most likely that such a confession has been induced by some promise or hope held out to or threat made to the accused. The proper course in such a case is for the Judge to examine the accused on these points in the absence of the jury and to assertain from him what it was that he stated and what the Police said and promised. A. I.R. 1933 Cal. 835=34 Cr.L.J. 1087=145 Ind. Cas. 863.

——S. 27—Duty of Court.

Per Broomfield, J.—In order to apply S. 27 it is necessary to know exactly what the statements relied upon are; because they are admissible only so far as they lead to the discovery of some fact and no further. 11 B.H.C.R. 242, Rel. on. 32 Bom. L.R. 574=126 Ind. Cas. 876=A.I.R. 1930 Bom. 244.

——S. 27—Duty of Court—Court must be very cautious.

(Obiter).—Bald evidence introduced through the mouth of a prosecution witness to prove the confessions of an accused under cover of S. 27 ought to receive very little credence by the Court, more especially when the accused stands charged with grave offence as as attempt to murder and parti-

cularly, when more direct evidence to prove the same points are available to the prosecution and which they do not take care to produce before the Court. 120 Ind. Cas. 210=13 A. I. Cr. R. 157=31 Cr.L.J. 15=1929 Cr.C. 673=A.I.R. 1929 Nag. 350.

8. Evidentiary value.

——S. 27—Evidentiary value—Police recovering pistol wrapped up in piece of cloth of accused's coat—Information given by accused himself—Evidence indicating Police themselves wrapping up pistol in said piece of cloth.

On information given by the accused a pistol alleged to be wrapped up in a piece of cloth torn from the coat of the accused was recovered. The evidence indicated that the police who had removed the accused's coat from his person must have torn the piece of cloth from the coat and wrapped it round the pistol in order to connect the accused with the murder:

Held, that no value could be attached to the evidence of the recovery of the pistol. A.I.R. 1941 Lah. 471=43 P. L. R. 600=43 Cr.L.J. 268=197 Ind. Cas. 801.

——S. 27—Evidentiary value — Confessional statement must be voluntary.

The general rule that a confession should be voluntary should apply to a confessional statement under S. 27.

Where a person had been persistently questioned for hours, throughout being under arrest, this process is such as to taint any result which may arise from it. It is a clear breach of the police instructions which are not to pester people who are under arrest. The statement thus extracted cannot be considered as voluntary confession and is not receivable in evidence. A.I.R. 1940 Mad. 12=1939 M.W.N. 873=50 L.W. 435=41 Cr. L. J. 242=185 Ind. Cas. 829.

——S. 27—Evidentiary value—Corroboration of particulars not already known to Police—Value of.

Corroborative evidence about particulars not already known to the Police and which are discovered in consequence of information given by an accomplice is of greater value than corroborative evidence about matters known to the Police before any information is received from an accomplice. A.I.R. 1941 Oudh 130=1941 O.W.N. 133=42 Cr.L.J. 165=1941 A.W.R. 59=191 Ind. Cas. 466.

——Ss. 27 and 31—Evidentiary value.

It has long been a well established and salutory practice to require material corroboration of the confession of the accused. It is unsafe to convict the accused upon that evidence alone. 1935 M.W.N. 1288 (2).

——Ss. 27, 30 and 114—Evidentiary value—Information by accused—Retracted confession—Corroboration.

To bring an information by accused under S. 27 the information must have had the direct effect of leading to the discovery of the stolen property. Unless a confession is corroborated in material particulars and by independent testimony it should not be the basis of a conviction. 11 L.W. 8=21 Cr.L.J. 79=54 Ind. Cas. 479.

——S. 27—Evidentiary value—Joint discovery—Track evidence.

Track evidence is of no value if the comparison is made 8 or 9 days after the affairs. Where more than one accused person in custody of the police point out this or produce that jointly, such an evidence of joint discovery is not sufficient for a conviction. 3 Ind. Cas. 622. Foll. 9 P.W.R. 1914 Cr.=63 P.L.R. 1914=15 Cr.L.J. 499=24 Ind. Cas. 587.

——S. 27—Evidentiary value—Information leading to discovery—Place already pointed out.

The fact of pointing out the place where the murdered body is found strongly corroborates the confession in a very material particular. But its value is reduced when the place has already been pointed out by another co-accused. (Rattigan and Shahdin, J. J.) 10 Cr.L.J. 584=24 P.W.R. 1909 Cr.=153 P.L.R. 1909=4 Ind. Cas. 429.

9. How much can be proved.

——S. 27—How much can be proved—Admissibility of first information report by accused—Limits of.

A person accused of murder had made the first information report himself. It consisted of three parts. In the first part the accused described the events, which led to the murder. The second part dealt with the murder proper. The third part dealt with the subsequent events and in the end of the report the accused dictated that he had put the blood-stained axe in a fence.

On a question as to the portions of the first information report that are admissible,

Held: The third portion of the report which led to the discovery of the axe would be admissibie under S. 27 of the Evidence Act. A.I.R. 1950 Ajmer, 75.

——S. 27—How much can be proved—Statement to police leading to discovery—Admissible portions—Test.

It is only that portion of the confession made to a police officer or of information given to him by an accused person which might reasonably be held to relate distinctly and positively to the fact discovered and which is necessary to be proved in order to adequately explain such discovery that would be admissible under S. 27 of the Evidence Act. So where an accused has stated that he had kept the stolen articles with a particular person and they are recovered from that person, the statement of the accused would be admissible in evidence. A.I.R. 1950 All. 615.

——S. 27—How much can be proved—Admissibility under—Statement of accused, "I gave the dynamo and light to V. . . . . I got back from V the dynamo light . . . . . and the dynamo stolen from my next house and sold them to X for Rs. 15."

The charges against accused 1 where in the alternative, (1) that he broke into the house of P.W. 1, and committed theft of a bicycle and (2) that he dishonestly possessed a dynamo and light which formed part of the bicycle alleged to have been stolen. The bicycle was stolen on 6th December, 1946. The bicycle itself was abandoned. Only the light and dynamo were removed. On the day of his arrest on 27th June, 1947 accused 1 made a statement to the Sub-Inspector of Police saying inter alia, "I gave the dynamo and the light to Venkataswami (accused 2). . . . . I got back from Venkataswami the dynamo light . . . . . and the dynamo stolen from my next house and sold them to (X) the proprietor of a

soda factory near the Pillayar temple in Anuppapalayam for Rs. 15."

The light was recovered from the possession of accused 2 but there was no independent evidence to show that accused 1 gave the light to accused 2. The dynamo was recovered from X who also gave evidence that he purchased it from accused 1. In the circumstances,

Held:—(1) The portion of the statement, "I sold the dynamo to X" is admissible in evidence as the statement led to the discovery of the sale by accused 1 to X and the conviction of accused 1 for possession of the dynamo was justified on the admissible portion of the statement and the substantive evidence of X that he purchased the dynamo from accused 1.

(2) All that was discovered on the basis of the statement was possession of the light with accused 2 and not original possession with accused 1 and subsequent transfer of that possession from accused 1 to accused 2. So the portion of the statement, "I gave the dynamo and light to Venkataswami" is not admissible in evidence, since the requirements of S. 27 of the Evidence Act were not satisfied. (1947) 1 M.L.J. 219=L.R. 74 I.A. 65=I.L.R. (1948) Mad. 1 (P. C.) relied on. 1950 M.W.N. 297=A.I.R. 1950 Mad. 613=4 A.I.Cr.D. 575=51 Cr. L. J. 1531=(1950) 1 M.L.J. 467.

——S. 27—How much can be proved—Construction—Statements of accused—Extent of admissibility.

The extent of the statement admissible under S. 27, does not depend upon whether the extent serves to corroborate or not the other evidence in the case. The only limitation is that the extent must relate distinctly to the facts discovered, subject to its relevancy being proved by other evidence. Case-law discussed. 62 L.W. 768=A.I.R. 1950 Mad. 108=51 Cr.L.J. 445=1949 M.W.N. 512=(1949) 2 M.L.J. 451.

——S. 27—How much can be proved—Construction—Statement leading to discovery—What amounts to—Extent of statement admissible.

S. 27 of the Evidence Act, being an exception to the general rule that a confession made by a person while in police custody cannot be proved as against him unless it has been made before a Magistrate, has to be interpreted as strictly as possible. During the police investigation following a dacoity, the accused made a statement to the police Officer and the panchas which was recorded in the panchnama: "About three months ago I had gone along with some others and after breaking open the A. Bank had stolen the amount therefrom and I will produce the amount that is with me now at my house at M. of the A. Bank Dacoity." . . . . "So saying he took us, the panchas and the police, to M. in a bus—and there at his house he produced Rs. 40 in currency notes."

Held, that out of the statement made the only part admissible was "I will produce the money" and the rest was inadmissible under S. 27. 230 Ind. Cas. 113=48 Cr.L.J. 511=A.I.R. 1947 Bom. 90=48 Bom. L.R. 542.

——S. 27—How much can be proved—Construction—Statement leading to discovery—Admissibility—Extent.

A statement made by an accused person while in police custody which contains a confession of guilt, as also supplies information in consequence of which a discovery is made, is not admissible in its entirety under S. 27 of the Evidence Act but only so much of it can go in as relates distinctly or immediately to the discovery. Where the statements made by the accused were that they had cut up the dead body in a Khasia field, that they had thrown the pieces of the body into the river and that they had buried the clothes of the deceased, and the facts discovered in consequence of the statements were merely that at a place in the Khasia field were found blood-stained log of wood, some pieces of bone and a string said to have been worn by the deceased, that at a place on the river bank were found the clothes said to have been worn by the deceased when he was last seen alive and that a human foot which might have been that of the deceased was recovered from the river.

Held, that the statements that they cut up the dead body or that they buried the clothes or that they threw the pieces of the dead body into the river, were entirely inadmissible in evidence as they did not relate distinctly to the facts thereby discovered. 50 C.W.N. 88=A.I.R. 1946 Cal. 452=228 Ind. Cas. 24=48 Cr. L. J. 46.

——S. 27—How much can be proved—Construction—Confession leading to discovery of fact—Admissibility—Extent of confession provable.

S. 27 itself is a proviso to Ss. 25 and 26, and must be construed strictly and in accordance with the limitations which the language of the proviso imposes upon the proof of certain statements made by an accused person. The fact discovered must be connected with the accused so as in itself to be a relevant fact against him. Only such particular part of the confession as set the person to whom it was made in motion, and led to his ascertaining the fact or facts of which he gives evidence can be proved. I.L.R. (1946) Kar. 194=230 Ind. Cas. 118=48 Cr.L.J. 516=A.I.R. 1947 Sind. 36.

——S. 27—How much can be proved—Construction—Information leading to discovery of fact—Admissibility—Extent of.

What can be admitted under S. 27, Evidence Act, is so much alone of the information alleged as distinctly and immediately relates to the facts thereby discovered. Information as to past user, or the past history, of the object discovered or produced cannot be admitted. 1947 P. C. 67; 1932 Bom. 285; 1929 Lah. 344 (F. B.); 26 Mys. C. C. R. 179; 26 Mys. C. C. R. 27 foll.; I. L. R. (1937) Mad. 695, not foll. 3 A.I.Cr.D. 529.

——S. 27—How much can be proved—Joint statements of two accused persons—Admissibility—Extent—Evidence to be led by prosecution.

Where it is alleged that two of the accused persons made statements leading to the discovery of some fact, evidence must be led to indicate which of them first made the statement which led to the discovery, and only the statement made by the first individual and only so much of it as related distinctly to the fact discovered can be admitted in evidence against him under S. 27 of the Evidence Act. The statement of the other accused cannot be used in evidence. If, however, the prosecution are in a position to establish that the statements or the action which led to the discovery were actually made, or took place, simultaneously—a state of affairs which, though not perhaps entirely impossible, is certainly distinctly improbable—evidence in regard to the simultaneous statement or the simultaneous action would not be entirely shut out by the section, but

there must be clear and satisfactory evidence on this point such as will enable the Court to decide and to give a specific direction to the jury whether the evidence is admissible against both of the accused or against either and if so, against which. 50 C. W. N. 88=A.I.R. 1946 Cal. 452=228 Ind. Cas. 24=48 Cr. L. J. 46.

——S. 27—How much can be proved—Portion of confession, admissibility.

Only such portions of a confession as lead to the discovery of some fact material to the case can be admitted. A.I.R. 1942 Mad. 444=55 L.W. 263=(1942) 1 M. L. J. 517=43 Cr. L. J. 750=1942 M.W.N. 443=201 Ind. Cas. 461.

——S. 27—How much can be proved—Scope—only that part of statement of accused which leads to actual discovery of facts is admissible.

An accused who was charged of murder by striking the deceased with an hatchet made two statements; the first being "I am going to produce the hatchet with which the murder was committed" and the second was, "I am going to show you the place where S. (deceased) is buried." With regard to the question whether the two statements could be proved against the accused under S. 27: **Held**, that as regards the first statement, there was not the remotest relation for the purposes of S. 27, between the two parts thereof, i. e., "I am going to produce the hatchet" and "with which the murder was committed." What led to the discovery of the hatchet was the statement "I am going to produce the hatchet." Only that much of the statement made by the accused could be proved under S. 27 which related distinctly to the fact thereby discovered; and therefore the former part and not the latter part could be admissible in evidence as against the accused. The second statement, however was admissible. The part of the second statement, "where S is buried" was distinctly related to another part thereof, i. e., "I am going to show you the place"; and as the dead body of S was found in fact buried, the whole statement was properly proved. I.L.R. (1946) Kar. 194=A. I. R. 1947 Sind. 36=230 Ind. Cas. 118=48 Cr. L. J. 516.

——S. 27—How much can be proved—Statement of accused in police custody—Admissibility, extent of.

Even an incriminating statement made by an accused person in the custody of a Police Officer is admissible provided (1) it has led to the discovery of a fact, that is to say, a fact relevant to the inquiry, and (2) it distinctly relates to the fact thereby discovered. Only so much of the information whether it is incriminating or not, as leads directly and immediately to the discovery of the fact that is admissible. A.I.R. 1944 Bom. 331=46 Bom. L. R. 546=218 Ind. Cas. 43=46 Cr. L. J. 383.

——S. 27—How much can be proved—Confession made to police after long questioning—Statement not voluntary leading to discovery of weapon.

A confession of murder made by the accused to the Police after six hours' questioning is not a voluntary statement and is not admissible in evidence. But the statement, so far as it leads to the discovery of a weapon, would be admissible in evidence under S. 27, Evidence Act, though not voluntary. A.I.R. 1940 Mad. 136=1939 M.W.N. 1134=50 L.W. 742=41 Cr. L. J. 323=(1940) 2 M.L. J. 35=186 Ind. Cas. 484.

——S. 27—How much can be proved—Information by accused, admissibility of.

Under S. 27, Evidence Act, only as much of the information given by the accused as relates distinctly to the fact of the discovery can be proved, whether it amounts to a confession or not. 1937 M.W.N. 881.

——S. 27—How much can be proved.

—On information contained in confession police visiting place where arms were concealed—Arms found—Conversation between accused and police at time of search—Conversation is admissible in evidence. A.I.R. 1936 Cal. 316=63 C. L. J. 232=37 Cr. L. J. 775=63 Cal. 1053=163 Ind. Cas. 41.

——S. 27—How much can be proved.

Where stolen articles were already recovered, evidence regarding a subsequent confession by accused as to mode of disposal and to his pointing of house in which they were disposed, was not admissible. 1936 M.W.N. 1378.

——Ss. 27, 24—How much can be proved—Confession irrelevant under S. 24—If admissible.

Section 27, cannot operate to make admissible in evidence a confession which would otherwise be irrelevant under S. 24. Only that part of the confession will be made admissible in consequence of which a fact deposed to was discovered. A.I.R. 1934 Lah. 417=36 Cr.L.J. 211=37 P.L.R. 25=15 Lah. 856=152 Ind. Cas. 998.

——S. 27—How much can be proved—Whole of statement leading to discovery, if admissible.

Section 27 is an enabling section providing an exception to the previous ones, which exclude confession made to or in presence of the Police. If the conditions of the section are fulfilled, it allows even a confession to be proved. If an accused makes a statement which is admissible under S. 27, the whole of the statement which leads to the discovery of the stolen property is admissible and sentences should not be cut up so as to reduce the statements only to the actual words which the accused may use to express the fact that he has hidden the properties. A.I.R. 1936 Nag. 200=37 Cr.L.J. 1047=I.L.R. (1936) Nag. 78=164 Ind. Cas. 964.

——S. 27—What can be proved.

The accused was charged with the murder of a woman whose corpse was found wrapped up and sewed in a coir mattress. The following statement was made by accused while in custody of police officer at shop of witness: "I purchased mattress from this shop and it was this woman (another witness) that carried the mattress."

—The question was as to the admissibility of this statement:

Held, (Per **Cornish** and **Burn, JJ., Lakshmana Rao, J., contra.**) that the statement was admissible under S. 27. A.I.R. 1935 Mad. 528=58 M. 642=1934 M.W.N. 1479=36 Cr. L. J. 1442 (2)=42 L.W. 124=68 M.L.J. 73 Sup.=158 Ind. Cas. 764 (F.B.).

——S. 27—How much can be proved—Confession by accused to Police — Finding of property—Admissibility.

Where, in the course of investigation, the accused stated to the Sub-Inspector of Police, to the effect that "the throat was cut with a knife, and the knife was on a **paniara** of the **mori** in the kitchen," and in consequence of the statement, the Sub-Inspector found the knife at the place indicated and at the trial of the accused for murder, this statement was sought to be admitted in evidence, for the prosecution:

Held that if a single statement contains more information than is contemplated by S. 27, the whole statement is not admissible but only the particular information which led to the discovery. The first part, which was the incriminating part, and which did not directly lead to the discovery of the knife

should, under S. 27 of the Evidence Act, be excluded because it did not fall under the word "directly" in that section. The latter part, namely, "the knife was on a **paniara** of the **mori** of the kitchen," was the only statement, which directly led to the discovery of the knife in the kitchen, and should be admitted in evidence. A.I.R. 1934 Bom. 233=36 Bom. L.R. 384=35 Cr.L.J. 1444=151 Ind. Cas. 883.

——S. 27—How much can be proved—Statement of accused in the nature of a confession—Conduct of accused, if can be taken into account against him.

Although the statement made by the accused to the Police is not barred under the provisions of S. 162, Criminal P.C., it would not be admissible under S. 27 if it is held to be of the nature of a confession if no material fact was discovered in consequence of the information received. But the conduct of the accused can certainly be taken into account. A.I.R. 1934 Lah. 695=35 P.L.R. 738=36 Cr.L.J. 697=155 Ind. Cas. 260.

——S. 27—How much can be proved—Confession irrelevant under S. 24—If admissible under S. 27.

Section 27, Evidence Act, cannot operate to make admissible in evidence a confession which would otherwise be irrelevant under S. 24, Evidence Act. Only that part of the confession will be made admissible in consequence of which a fact deposed to was discovered. A.I.R. 1934 Lah. 417=36 Cr.L.J. 211=37 P.L.R. 25=15 L. 856=152 Ind. Cas. 998.

——S. 27—How much can be proved—Statements by A, that he handed property to B and by B to C, by C to D, by D to E—Admissibility.

Where **A** stated that he handed over the property to **B** and **B** stated that he handed it on to **C** and **C** to **D** and **D** to **E** and recovery was made from **E**:

Held, that only the statement bearing directly on the recovery of property was admissible. The statements of **A, B, C** and **D** had no direct bearing on the recovery of the property although they might have had no indirect bearing in giving the Police a fresh starting point for investigation and they could not be admitted. A.I.R. 1934 Nag. 71=35 Cr.L.J. 1097=30 N.L.R. 269=150 Ind. Cas. 623.

——S. 27—How much can be proved—Statement of accused leading to discovery of fact.

The mere fact of the pointing out of the place from where some stolen property is discovered is not in itself sufficient for the purpose of conviction. The subsequent denial should not be considered neccssarily as proof of guilty knowledge.

It is a generally accepted principle that only that part of the statement of an accused person which leads to the discovery of any fact by the Police is admissible, and no more. A.I.R. 1934 Sind 159=28 S.L.R. 41=36 Cr.L.J. 704=154 Ind. Cas. 1038.

——S. 27—How much can be proved.

Where statements made by a number of persons in the custody of a Police Officer lead to the discovery of a fact, only so much of the statement of the first person making the statement, as relates distinctly to the fact discovered is admissible in evidence against him. As regards the statements of the other persons, they are not admissible at all. A.I.R. 1932 Cal. 297=36 C.W.N. 373=33 Cr.L.J. 546=59 C. 1040=138 Ind. Cas. 116.

——S. 27—How much can be proved—Confession leading to discovery.

Where a person suspected of murder made a statement to the police that he had put the corpse in a certain mine and the corpse was discovered by the police in that mine in consequence of this information:

Held, that the whole of the accused's statement that he had put the body into the mine was admissible in evidence under S. 27, Evidence Act, though it was really a confession.

Per **Scroope, J.**—The protection given to an accused person by Ss. 24, 25 and 26, Evidence Act, should not be dependent upon the ingenuity of the Police Officer or the folly of the prisoner in composing the sentence which conveys the information. But at the same time, the Court cannot garble the statement made to the police so as to render it absolutely innocuous to the prisoner and remove it entirely from the nature of a confessional statement. A.I.R. 1931 Pat. 145=10 Pat. 153=32 Cr. L. J. 792=12 P.L.T. 481=131 Ind. Cas. 797.

——S. 27—How much can be proved—Incriminating Statement — Production of articles—Police custody.

Where there is practically no evidence at all against an accused except an incriminating statement under S. 27, the latter should be viewed with great caution and suspicion. The statement of an accused that he buried the weapon in a certain place is relevant but not the part of the statement that it was the weapon with which he had committed the crime. If the accused produced the article himself, the fact that he produced it at a particular place may be proved, but the accompanying statement that he buried it there is inadmissible. The statement of the accused that he could point out a spot and that blood-stains would be found there is admissible but not that it was at that spot that he committed the crime. 14 Cr. L.J. 190=15 P.W.R. 1913, Cr.=171 P.L.R. 1913=19 Ind. Cas. 190.

——S. 27—How much can be proved.

Where two or more persons are alleged to have given certain information to the police which lead to the arrest of the accused, it is only the information given first which is admissible under S. 27 of the Evidence Act. 6 All. 509 Foll. 52 P.L.R. 1916=29 and 36 P.W.R. 1916 Cr.=17 Cr.L.J. 273=34 Ind. Cas. 993.

——S. 27—What can be proved.

Only so much of the information given by the accused as relates distinctly to the fact thereby discovered can be proved. A.I.R. 1929 Lah. 344, **Rel. on.** 1930 Cr.C. 865=A.I.R. 1930 Sind 225.

——S. 27—How much can be proved—Only that portion of information which is immediate and proximate cause of discovery of fact can be proved.

The legislature has prescribed two limitations in order to define the scope of the information provable against the accused: (1) The information must be such as has caused the discovery of the fact, and (2) the information must "relate distinctly" to the fact discovered. The requirements of both the conditions specified above must be satisfied before an incriminating statement can be received in evidence. Thus, only that portion of the information is provable which was the immediate or proximate cause of the discovery of the fact. Anything, which is not connected with the fact as its cause, or is connected with it, not as its immediate or direct cause, but as its remote cause, does not come within the ambit of the section and should be excluded.

A was being tried under S. 302, I. P. C., for having committed the murder of **B** who was proved to have suddenly disappeared from his house and whose dead body was recovered from a well two days later. At the

time of his disappearance **B** was wearing certain ornaments, but these ornaments were not found on his body at the time of his recovery from the well. During the investigation **A** was alleged to have made a statement to the police in these terms: "I had removed the karas, had pushed the boy into the well, and had pledged the karas with Alla Din" and in consequence of the information so received the karas were recovered from Alla Din, which were identified as those worn by **B** at the time of his disappearance.

Held, (Per **Full Bench**) that the statement that the accused had pledged with Alla Din the karas subsequently recovered from the latter is admissible under S. 27 but that the rest of the incriminating statement cannot be received in evidence. **Fforde and Jai Lal, JJ. dissenting.**) 9 Lah. 626; A.I.R. 1928 Lah. 308; 111 Ind. Cas. 561, **Overruled**; A.I.R. 1926 Mad. 638; A.I.R. 1928 Pat. 162, **Diss. from**; 12 Mad. 153 **Expl.**

(Per **Fforde J.**)—The information "I had removed the karas and had pledged the karas with Alla Din" may be proved. (**Cases discussed**).

(Per **Jail Lal, J.**)—The statement "had removed the karas and had pledged the karas with Alla Din" is admissible under S. 27 while the statement "had pushed the boy into the well" is not admissible. 115 Ind. Cas. 6=10 Lah. 283=30 P. L. R. 197=11 L.L. J. 159=30 Cr.L. J. 414=12 A.I.Cr.R. 382=A.I.R. 1929 Lah. 344 (F.B.).

——S. 27—How much can be proved.

The words used by the legislature in S. 27 make it absolutely clear that only so much of such information whether it amounts to a confession or not, as relates distinctly to the fact which is deposed to as discovered in consequence of the information received, may be proved.

An accused gave information to the police in these words: "I shall produce the lathi with which I killed Ismail." It had been admitted as evidence under S. 27: The lathi which the accused handed over had no marks of blood whatsoever,

Held, that if the mere fact of the lathi having been handed to the police, might be relied upon, for the purpose of introducing an alleged confession made by the accused to the police, the provisions of S. 26 would become nugatory. 1929 Cr.C. 453=A.I.R. 1929 Sind 175.

——S. 27—How much can be proved.

As S. 27 is intended to enable the prosecution to prove a confession made under certain circumstances, the whole of the information including the confessional portion thereof, given by the prisoner, which relates to the fact includes not only the concrete thing discovered by the investigating officer, but also its description as given by the accused including its connexion with the crime which is under investigation. While only so much of the information can be proved as has led to the discovery of the fact, there is no legal justification for splitting up or cutting down the statement of the prisoner so as to make it a vague and unintelligible statement and thus to defeat the very object with which S. 27 was enacted and, therefore, the information must be proved in the precise terms in which it was given. A. I. R. 1926 Mad. 638 (F.B.), **Rel. on**; 15 P.W.R. 1913 Cr.; 11 P.R. 1915 Cr.; 9 P.W.R. 1918 Cr.; **Doubted**; A.I.R. 1926 Lah. 138 **Dist.**; A. I. R. 1926 Bom. 513 and A.I.R. 1928 Pat. 162, **Appr.**

Fforde J.—The Evidence Act, in express terms, puts the law on the subject on a wider basis than does the common law in England. 111 Ind. Cas. 561=9 Lah. 626=29 P.L.R. 679=29 Cr.L.J. 881=11 A.I.Cr.R. 196=A.I.R. 1928 Lah. 308.

——S. 27—How much can be proved—Confession leading to discovery of anything is admissible.

The whole confession of a prisoner in police custody cannot be admissible, but where the confession includes a statement that a weapon was used for committing the offence charged, that part of the confession can certainly go in if it leads to the discovery of the weapon; A.I.R. 1926 Mad. 638, **Foll.** 106 Ind. Cas. 698=6 Pat. 747=29 Cr.L. J. 106=9 A.I.Cr.R. 379 =A.I.R. 1928 Pat. 162.

——S. 27—What can be proved—Corpse—Discovery on information by accused—Statement of accused to police that he buried body is admissible.

Where a person was murdered and his body was discovered in consequence of information received from the accused, the statement of accused to the police that he in company with his father and brother buried the body is admissible in evidence: 25 Cal. 413; 98 P.L.R. 1918 and 72 P.L.R. 1916, **Foll.** 95 Ind. Cas. 603=8 L. L. J. 519=27 P.L.R. 580=27 Cr. L. J. 827.

——S. 27—How much can be proved—Information by accused that he buried the dead body is not provable under the section.

In a case under S. 302, I. P. C., the information given by the accused that he buried the body does not distinctly relate to the discovery of the body and is not provable under S. 27: 125 P.L R. 1920, **Appl.** 89 Ind. Cas. 901=26 Cr. L. J. 1429=A. I. R. 1926 Lah. 138.

——S. 27—How much can be proved—Statement leading to discovery of property should be admitted as a whole.

If an accused makes a statement which is admissible under S. 27, the whole of the statement which leads to the discovery of the stolen property is admissible and sentences should not be cut up so as to reduce the statements only to the actual words which the accused may use to express the fact that he had hidden the properties. 93 Ind. Cas. 42=50 Mad. 274=27 Cr. L. J. 394=A.I.R. 1926 Mad. 638.

——S. 27—How much can be proved.

The information given by the accused which led to the recovery of certain jewels which had been stolen was held to be admissible in evidence under S. 27. 86 Ind. Cas. 347=7 L.L. J. 51=26 Cr.L. J. 763=A.I.R. 1925 Lah. 371.

——S. 27—How much can be proved—Information given by accused leading to discovery—Statement of co-accused—Admissibility of—Police mashirnamah

Information by two persons which leads to the discovery of a fact is relevant and so much of the statement of each which relates to the fact discovered is admissible against both; statements of co-accused after the discovery are irrelevant. 24 W.R. (Cr. 36. Ref.) After one accused has made a discovery the other should not be asked to do the same. 2 Bom. L.R. 1089 Ref. Police **mashirnamahs** are always very important as a contemporaneous record of events occurring in the investigation and they should generally be exhibited with the exception of irrelevant parts. 10 S.L.R. 7=17 Cr.L. J. 506=36 Ind. Cas. 474.

——S. 27—How much can be proved—Information not leading to discovery.

Statements leading immediately to the discovery of property are properly admissible. Other statements connected with the one thus made and immediately, but not necessrarily or directly connected with the fact discovered are not admissible. 11 B.H.C.R. 242

Rel. A person accused under S. 328 I.P.C. pointed out during the police investigation a **Dhatura** tree and said that he had taken the fruit of it. The statement was inadmissible. 13 A.L.J. 1077=17 Cr.L.J. 8=32 Ind. Cas. 136.

——S. 27—How much can be proved—Confession—Information received from accused—How far relevant.

Where an accused made a statement to the police that he would point out the spot where he had committed the murder and thereafter he conducted the Police to the spot where earth was found saturated with blood, **held**, that so much of the Police Sub-Inspector's evidence as related to the alleged confession by the accused that he committed the murder, was not admissible in evidence. 16 Cr.L.J. 545=11 P.R. 1915 Cr.=61 P.W.R. 1915 Cr.=29 Ind. Cas. 817.

10. Interpretation.

—S. 27—Interpretation—Information, when admissible against accused, stated.

The word 'thereby' in "fact thereby discovered" in S. 27, Evidence Act, refers to that portion of the information only which may be held to be the proximate cause of the discovery. In order, thus, to be admissible against tke accused under S. 27, (1) the information must be the one given by the accused, the statement conveying the information must be his own statement in his own language and then (2) only so much of the information as is necessary and sufficient to cause the discovery will be admissible. A.I.R. 1942 Cal. 593=I.L.R. (1942) 1 Cal. 436=46 C.W.N. 180=44 Cr.L.J. 145=75 C.L.J. 507=204 Ind. Cas. 111.

——Ss. 27, 3—Interpretation—'Fact' in S. 3, meaning of—Whether restricted to something which can be exhibited as material object—Mental fact, if enough.

Per Cornish J.—The definition of 'fact' in S. 3, Evidence Act, does not restrict a fact to something which can be exhibited as material object.

Per Burn J—There is no warrant for holding that the only facts contemplated by S. 27 are actual physical material objects. Material objects have not in themselves any greater probative value than any other facts.

Per Lakshmana Rao J.—The discovery of a fact as the result of the information is a condition precedent to the reception in evidence of the information or any portion thereof. Though the expression "fact" as defined by S. 3, includes not only the physical fact which can be perceived by the sense, but also the psychological fact or mental condition of which any person is conscious, it is in the former sense that the word is used in S. 27. The fact discovered should, therefore, be a material and not mental fact.

Per Burn J.—It is not necessary that the information given by a person in the custody of a Police Officer shall be a confession before it can be proved under the provisions of S. 27. Any information which relates distinctly to the fact deposed to as discovered in consequence of the information received, may be proved. A.I.R. 1935 Mad. 528=58 M. 642=1934 M.W.N. 1479=36 Cr.L.J. 1442 (2)=42 L.W. 124=68 M.L.J. 73 Sup.=158 Ind. Cas. 764 (F.B.).

——S. 27—Interpretation—'Fact'.

The expression "fact" as defined in S. 3 includes not only the physical fact but also the psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in S. 27. 115 Ind. Cas. 6=10 Lah. 283=30 P.L.R. 197=11 L.L.J. 159=30 Cr.L.J. 414=12 A.I.Cr.R. 382=A.I.R. 1929 Lah. 344 (F.B.).

——S. 27—Interpretation—'Confession'.

In construing S. 27 the word "confession" does not necessarily mean a complete confession of guilt but means and includes any incriminating statement. 115 Ind. Cas. 1=30 Cr.L.J. 385=A.I.R. 1929 Lah. 338.

——S. 27—Interpretation—'Discovered'.

Even more important is the word 'discovered'. It is used in a peculiar sense. The test is that the fact discovered must be discovered in the sense, that the proof of the existence of that fact not longer rests on the credibility of the accused's statement but rests on the credibility of the witnesses who depose to the existence of that fact. The rest of the information is not admissible. 115 Ind. Cas. 1=30 Cr.L.J. 385=A.I.R. 1929 Lah. 338.

——S. 27—Interpretation—'Distinctly'.

Under S. 27 the information to be proved must relate distinctly to the fact thereby discovered. The word 'distinctly' in S. 27 is used in some sense other than the word 'directly'. It is meant to exclude certain things and to limit and confine the information which may be proved within the definite limits and not necessarily to include everything which may relate to that information. 115 Ind. Cas. 1=30 Cr.L.J. 385=A.I.R. 1929 Lah. 338.

——S. 27—Interpretation—'Information'.

Fforde, J.—The word 'statement' is used interchangeably with the word 'information' A.I.R. 1929 Lah. 338, **Diss. from.** 115 Ind. Cas. 6=10 Lah. 283=30 P.L.R. 197=11 L.L.J. 159=30 Cr.L.J. 414=12 A.I.Cr.R. 382=A.I.R. 1929 Lah. 344 (F.B.).

——S. 27—Interpretation—'Information'.

The word "information" cannot be used synonymous with the word "statement". The word "information" as distinct from the word "statement" connotes two things, namely, a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by the other person. 115 Ind. Cas. 1=30 Cr.L.J. 385=A.I.R. 1929 Lah. 338.

——S. 27—Interpretation—Section must be strictly construed.

S. 27 must be very strictly construed. Where one accused has agreed to point out a place where a fact would be discovered, in pursuance of his statement to point out that place, the section does not cover similar statements of the other accused in police custody. 91 Ind. Cas. 236=21 N.L.R. 86=27 Cr.L.J. 60=A.I.R. 1925 Nag. 407.

——S. 27—Interpretation—'Custody.'

The submission to the custody of a police officer within the meaning of S. 46 is 'custody' within the meaning of S. 27, Evidence Act. 49 Cal. 167=A.I.R. 1922 Cal. 342.

11. Police custody.

——S. 27—Police Custody—Statements made by accused in Police custody—Admissibility—Extent.

Where statements of an accused made in police custody consist of separable parts some of which are a confession of a general nature, some imputations of guilt on the accomplices, some lead to the discovery, of incriminating articles and while other constitute statements made after the discovery, such statements in their entirety are not admissible. A.I.R. 1945 Cal. 137=I.L.R. (1944) 2 Cal. 76=46 Cr. L.J. 580=219 Ind. Cas. 310.

——**S. 27—Police custody—Accused in jail—Sub-Inspector violating Jail Rules and Police Standing Orders in interviewing accused—Information given by accused is admissible.**

The fact that the Police Sub-Inspector violated the Jail Rules and the Police Standing Orders in interviewing the accused in jail, cannot render the information given by the accused to the Sub-Inspector, leading to the recovery of the deceased's jewels inadmissible. A.I.R. 1943 Mad. 315=1943 M.W.N. 11=56 L.W. 77 =44 Cr.L.J. 489=206 Ind. Cas. 101.

——**S. 27—Police custody—Confessional statement before deponent came into Police custody.**

Section 27, Evidence Act, has no application to a confessional statement made to a Police Officer before the deponent has come into the custody of that Police Officer. Such a statement can be used by the Police Officer only to refresh his memory as to the date or time when the accused appeared before him. It should not be used for any other purpose for throwing light on the motive for the crime. A.I.R. 1941 Mad. 765=(1941) 2 Mad. L. J. 209=54 L. W. 136=1941 M.W.N. 766=I.L.R. (1942) Mad. 77=43 Cr. L.J. 100=197 Ind. Cas. 54.

——**S. 27—Police custody — Accused voluntarily making statement to Police confessing crime.**

A person who makes a statement to a responsible Police Officer, voluntarily confessing that he has committed an act which the I.P.C. regards as an offence, is submitting himself to custody within the meaning of S. 46 (1) of the Criminal P.C., and is then in the custody of a Police Officer within the meaning of S. 27 of the Evidence Act. A.I.R. 1941 Nag. 86=1940 Nag. L.J. 623=42 Cr. L J. 390=I.L.R. (1940) Nag. 679=193 Ind. Cas. 6.

——**S. 27—"Custody" meaning of.**

Per **Bhide** and **Din Mohammad, JJ.**—'Police custody' does not necessarily mean custody after formal arrest and it also includes 'some form of Police surveillance and restriction on the movements of the person concerned by the Police.' It is open to an accused person to prove in every case that arises that he was actually in the custody of a Police Officer, although in the Police diaries, he was not shown to have been formally arrested. A.I.R. 1940 Lah. 129=41 Cr. L. J. 591=I.L.R. (1940) Lah. 242=188 Ind. Cas. 498 (F.B.).

——**S. 27—Police custody—Applicability to cases of persons in actual Police custody, though ordered by Magistrate.**

Although S. 27 is restricted to persons in custody of the Police, it applies to cases of persons who are in actual police custody although that custody had been ordered by the Magistrate. There is nothing in such a case to offend against the principle of the section. A.I.R. 1938 Pat. 60=18 P.L.T. 964=39 Cr. L. J. 302=173 Ind. Cas. 418.

——**S. 27—Police custody—Whether there should be formal arrest—Mere suspect not charged nor arrested—Presence of such person with Police—Statement under such circumstances leading to discovery.**

In order that a statement under S. 27 be admissible, the maker of the statement should be in the custody of the Police; that custody need not be a formal arrest. In the case of mere suspects who have not been formally charged with any offence or arrested under any section of the Criminal P.C., their presence with the Police under some restraint amounts to "custody" which is contemplated by S. 27, Evidence Act. If a statement made by a person in the above circumstances leads to the discovery of any matter, it is admissible in evidence under S. 27, Evidence Act. A.I.R. 1937 Lah. 620=I.L.R. (1937) Lah. 106=38 Cr. L. J. 1082=40 P.L.R. 436=171 Ind. Cas. 377.

——**S. 27—Police custody—Arrest of accused** before his going to spot from which articles are dug out but not when giving information.

Even if the accused is not formally arrested at the time when he gave the information, he is obviously, for all practical purposes, in police custody, where it is proved that he was arrested before he went to the spot from which the ornaments alleged to have been stolen from the child murdered, have been dug out. A.I.R. 1936 Nag. 200=37 Cr. L.J. 1047=I.L.R. (1936) Nag. 78=164 Ind. Cas. 964.

——**S. 27—Police custody—Person suspected and** treated as accused though not in police custody—Statements by such person, leading to discovery.

Where a person had not been formally arrested but had been suspected from the beginning and had apparently been treated as an accused person and much restraint on his movements was not imposed as he could hardly have absconded:

Held, that he was in Police custody and that the statements given by him in consequence of which the recoveries were made could be proved under S. 27. A.I.R. 1934 Lah. 150 (2)=15 Lah. 310=36 Cr. L. J. 14=37 P.L.R. 67=152 Ind. Cas. 206.

——**S. 27—Police custody—Police Officer interviewing accused who takes him to place where cocaine was concealed.**

Where a Police Officer, who arrested the accused on finding cocaine in his possession, had interviewed the accused and was with him for a considerable time and walked with him to the places where the accused pointed out the spot where the cocaine might be found:

Held, that under these circumstances, the accused was in police custody at the moment when he made the statement as to the spot where cocaine could be found and that the statement was admissible under S. 27. A.I.R. 1933 Cal. 148=34 Cr. L. J. 675=144 Ind. Cas. 74.

——**S. 27—Police custody.**—Person stating that he has done certain acts which amount to an offence—Such statement made to a Police Officer:

Held, that the person submits to the custody of the Officer within the meaning of S. 46 (1), Criminal P. C., and is then in the custody of the Police Officer within the meaning of S. 27, Evidence Act. A.I.R. 1933 Pat. 149=14 P.L.T. 82=34 Cr. L. J. 349=12 Pat. 241=142 Ind. Cas. 474 (S.B.).

[Overrules A.I.R. (Vol. 15) 1928 Pat. 491=111 Ind. Cas. 118.].

——**S. 27—Police Custody—Statement by person in custody leading to discovery.**

Section 27 is not a mere proviso to S. 26, but controls Ss. 24, 25, and 26 and a statement made by an accused person to the Police Officer is not admissible in evidence, if the accused was not in custody at the time, although the statement may lead to the discovery of a fact. A.I.R. 1932 Cal. 297=36 C. W.N. 373=59 Cal. 1040=33 Cr. L. J. 546=138 Ind. Cas. 116.

——**S. 27—Police Custody—Police surveillance, effect of.**

The expression 'Police custody' in S. 27 does not necessarily mean formal arrest; it also includes some form of Police surveillance and

restriction on the movements of the person concerned, by the Police. A.I.R. 1932 Lah. 609=33 Cr. L. J. 756=33 P. L. R. 826=139 Ind. Cas. 429.

——S. 27—'Custody',—meanig of.

For the purposes of S. 27, Evidence Act, the word 'custody' does not necessarily mean detention or confinement. Submission to custody by word or action under S. 46 (1), Criminal P. C., may be taken to amount to custody.

The fact of the disappearance of a boy was reported to the Police. No one was then suspected. In the afternoon of the same day, the accused was suspected. He was called by the Police and on being questioned, pointed out a field where the dead body of the boy was lying. A second report was made on the evening, after the recovery of the body and the accused was mentioned in this report as the probable offender:

Held, that at the stage at which the accused made the statement and pointed out the place where the dead body was lying, he was not in any kind of custody and his statement was not admissible under S. 27. A.I.R. 1931 Lah. 278=32 Cr. L. J. 650=32 P. L. R. 347=131 Ind. Cas. 93.

——S. 27—Police custody—Accused not in custody of police Officer when making confession—S. 27 does not apply.

Section 27 refers to the statement of a person accused of any offence and in the custody of a Police Officer. If the accused was not in the custody of a Police Officer at the time when he made the confession S. 27 cannot apply. A.I.R. 1946 Pat. 210=24 Pat. 671=229 Ind. Cas. 557 =48 Cr.L.J. 460.

12. Proof of Confession.

See also Criminal P. C., S. 533.

——S. 27—Proof of Confession—Confessional statements admissible under S. 27—Procedure for recording—Method of proving.

[So far as a confessional statement admissible under S. 27 is concerned, the correct procedure for the Police Officer in recording the same, pointed out.]

The only evidence of any confessional statement attributed to accused in a murder case was contained in the following words of the prosecution witness who was a Police Officer and had recorded the statement, "I questioned accused No. 1. He confessed and I recorded his confession and it was attested." The confessional statement itself was never proved by the Police Officer in the Sessions Court:

Held, that there was no evidence of any confession before the Court on which it could act. A.I.R. 1945 Mad. 202 =58 M. L. W. 85=1945 M.W.N. 102=(1945) 1 M.L.J. 223=46 Cr.L.J. 734 =220 Ind. Cas. 330.

—S. 27—Where the confession of accused leads to the discovery of property, clearest proof of precise circumstances is essential. 1934 M.W.N. 1363.

——S. 27—Proof of Confession—Honorary Magistrate left by Sub-Inspector to summon accused—Confession to Magistrate—Statement of Magistrate, whether admissible.

Where a Police Sub-Inspector, during his investigation of an offence, left an Honorary Magistrate to summon the accused and himself proceeded to the scene of occurrence, and the Honorary Magistrate sent for the accused who confessed his guilt to him:

Held, that the statement made by the Honorary Magistrate as regards the confession was not covered by S. 27, and would be admissible in evidence. A.I.R. 1932 Lah. 261=33 P. L. R. 217= 33 Cr. L. J. 632=138 Ind. Cas. 497.

13. Several accused.

——S. 27—Several accused—Joint statement by several accused leading to discovery of facts—Admissibility of.

If the prosecution are in a position to establish that the statements or action by two accused persons which led to the discovery of certain facts were actually made or took place simultaneously the evidence with regard to the simultaneous statements or simultaneous action would not be entirely shut out by the provisions of S. 27. But there must be clear and satisfying evidence on this point such as will enable the Court to decide and to give a specific direction to the jury whether the evidence is admissible against both of the accused or against either and if so against which. A.I.R. 1946 Cal. 452=48 Cr. L. J. 46=228 Ind. Cas. 24=50 C. W. N. 88.

——S. 27—Several accused—Joint statement—Fact discovered in consequence—Statement, if admissible.

When a fact is discovered in consequence of information received from one of several persons charged with an offence and when others give like information it is imposible to treat the discovery as having been made from the information received from each one of them. Section 27 ought to be construed strictly. In cases where one accused has agreed to point out a place where a fact will be discovered in pursuance of his statement, that section would not cover similar statements of other accused persons in Police custody. A.I.R. 1945 Oudh 235=46 Cr. L. J. 629=219 Ind. Cas. 486.

——S. 27—Several accused—Accused four in number—Their confession leading to discovery—No evidence to show particular statement made by particular accused.

Where the only evidence against the accused persons who were four in number is confession said to have been made by them leading to the discovery of the stolen article, in the absence of evidence showing that a particular accused made the crucial statement and that it was he who discovered the stolen articles, the accused should be given the benefit of doubt and acquitted. A.I.R. 1942 Mad. 532 (1)=1942 M.W.N. 377(2)= 55 M. L. W. 355 =43 Cr. L. J. 772=201 Ind. Cas. 524.

——Ss. 27, 26—Sevaral accused—Three accused charged with murder—Third accused making statement and promising Police to show place were first accused had buried spear—Police taken to spot—After third accused had searched for spear unsuccessfully, first accused taking it out and producing it—Prosecution case that first accused had himself hidden spear in that place.

No doubt it is not necessary that the informant himself should personally recover any property about which he gives information. But when the informant has tried unsuccessfully to

recover such property the effect of his information has become completely exhausted.

Three accused were charged with murder. After their arrest, third accused made a statement at the conclusion of which he promised the Police to take them to the place where the first accused had buried the spear with which he had stabbed the victim. The next day, third accused, accordingly, took the Police to a gedda and, after he had himself unsuccesfully searched for the spear the first accused took it out and produced it. This statement was admitted under S. 27, Evidence Act and accused No. 3 was convicted on this statement alone. According to prosecution case, the first accused had himself hidden the spear in that particular spot:

Held, that no doubt if one of the Police Officers themselves or any third party acting on the information of the third accused had recovered this spear, S. 27 would have been applicable. But, as this spear was recovered not because of any information given by the appellant, though that might have been the proximate cause of the presence of the party at the gedda but by the action of the first accused himself, the statement by third accused did not fall within S. 27 but within S. 26 and was inadmissible in evidence. The accused could not, therefore, be convicted. A.I.R. 1940 Mad. 744=51 M.L.W. 564=41 Cr. L.J. 917=(1940) 1 M.L.J. 758=1940 M.W.N. 542=190 Ind. Cas. 396.

——S. 27—Several accused.

Where joint acts of several persons are sought to be proved in order to ask the Court to draw an inference from such conduct, evidence should be led with some degree of particularity so that it may be possible for the Court to draw the necessary inference from the conduct of each one of the persons concerned in the act. The principle applies not only to evidence relevant under S. 27, Evidence Act but also to that under S. 8, Evidence Act. A.I.R. 1935 Cal. 184=39 C.W.N. 368=36 Cr. L.J. 808=62 Cal. 572=155 Ind. Cas. 687.

——S. 27—Several accused.

Where the Police Officer called the three accused one after the other and all the three said one after the other the same thing and the articles were found as indicated by the accused:

Held, that in the circumstances, the only person who gave the information which can be said to have led to the recovery is the first accused, though in suitable cases it is possible to ascribe to more than one accused the information which leads to discovery under S. 27 of the Evidence Act. ('32) 1932 M.W.N. 113.

——S. 27—Several accused—All jointly pointing out place where articles were buried.

Where several persons are charged of theft and all that the evidence shows is that all the accused went together with the Police Officer and took out the property from the place where it was buried at one and the same time, and there is no evidence to show that before they took out the property, they or any one of them said where it was buried, the stolen property cannot be said to have been discovered in consequence of the information given by them within S. 27, and the fact that all the accused went togther and took out the property has no value against any one of them. A.I.R. 1931 Sind 154=33 Cr. L.J. 106=135 Ind. Cas. 267.

——S. 27—Several accused.

Fact discovered in consequence of information by one accused, other giving same information—Fact cannot be said to be discovered from information given by both. 2 Bom. L.R. 1089; 24 W.R. (Cr.) 36; 11 B.H.C.R. 242, Ref. 32 Bom. L.R. 574=126 Ind. Cas. 876=A.I.R. 1930 Bom. 244.

——S. 27—Several accused—Accused jointly pointing to place of dead body—Evidence is not admissible against any of them unless it can be shown who made discovery.

Where all the accused persons jointly pointed out the place where blood stains were found and subsequently the place where the dead body of a person was discovered buried, such evidence is not admissible at all against any of the accused unless it can be shown who made the discovery first. 116 Ind. Cas. 619=30 P.L.R. 397=30 Cr. L.J. 639=1929 Cr. C. 214=13 A.I.Cr.R. 60=A.I.R. 1929 Lah. 665.

——S. 27—Several accused—Fact discovered from information of several accused—Fact will be deemed to have been discovered from information of the first.

Where a fact is discovered in consequence of information received from one of several persons charged with an offence and when others give like information the fact should not be treated as discovered from the information of them all, but from the information of the first: 24 W.R. 36, Cr. and 7 P.R. 1916, Foll. 101 Ind. Cas. 488=28 P.L.R. 187=8 A.I.Cr.R. 94=28 Cr. L.J. 456=A.I.R. 1927 Lah. 739.

14. Statement.

——S. 27—Statement—Whether statements by accused to another person in presence of police were made to police or other person is a question of fact.

Where an accused person makes a statement to another person in the presence of the police the question whether that statement was made to the other person or to the police is a question of fact and not of law. A.I.R. 1946 Cal. 452=48 Cr. L.J. 46=228 Ind. Cas. 24=50 C.W.N. 88.

——Ss. 27 and 8—Statement of accused, when pointing out buried property—Admissibility.

A statement of the accused while pointing out buried property that he had concealed the property, though admissible under S. 27, is not admissible under S. 8. A.I.R. 1945 Bom. 292=47 Bom. L.R. 63=47 Cr. L.J. 51=221 Ind. Cas. 86.

——S. 27—Statement—As a result of information given by accused co-accused found by police—Statement to police as to whereabouts of co-accused is admissible under S. 27 against accused.

Where as a result of information given by the accused another co-accused is found by the police the statement by the accused to the police as to the whereabouts of the co-accused is admissible under S. 27, as evidence against the accused. A.I.R. 1946 Sind 43=I.L.R. (1945) Kar. 419=47 Cr. L.J. 548.

——S. 27—Statement — Confession attested by persons present — Whether satisfies S. 27—Exception to statements to which S. 162, Criminal P.C., relates.

A record of a confession made by the accused would satisfy the provisions of S. 27, Evidence

Act even though it is attested by persons who were present there. Such a confessional statement is one of the exceptions to the statements to which S. 162, Criminal P.C., relates. A.I.R. 1943 Mad. 710=56 L.W. 479 (1)=(1943) 2 M.L.J. 293=1943 M.W.N. 713=45 Cr. L.J. 171=I.L.R. (1944) Mad. 224=210 Ind. Cas. 18.

——S. 27—Statement—Confession during investigation in another case—Relevancy of.

A confession, though made during the course of investigation in another case, is relevant evidence. A.I.R. 1943 Mad. 661=56 L.W. 519= (1943) 2 M.L.J. 283=1943 M.W.N. 577=45 Cr. L.J. 124= 209 Ind. Cas. 272.

——S. 27—Statement—Accused under arrest for one offence confessing another offence—Article discovered as result of such confessson.

Where a person arrested in connection with criminal breach of trust in respect of a cycle that he had taken on hire and then sold, confesses that he had also sold another cycle and as a result of that confession, the cycle is discovered, the confession is admissible under S. 27, Evidence Act. A.I.R. 1943 Mad. 89=55 L. W. 677=(1942) 2 M. L. J 549=44 Cr. L.J. 304=I.L.R. (1943) Mad. 456=1942 M.W.N. 750=204 Ind. Cas. 555.

——S. 27— Mode of recording statement — Admissibility in part.

Statements under S. 27, Evidence Act, should be recorded in the first person, that is to say, as far as possible in the actual words of the accused; they should not be paraphrased. The Judge should admit those parts which he considers admissible but leave some record for the consideration of the Appellate Court of any other words which the prosecution claimed should be received in evidence. A. I. R. 1941 Mad. 290=42 Cr. L. J. 407=1940 M.W.N. 163=193 Ind. Cas. 347.

——S. 27—Statement of accused to Police—Doubtful version.

Where it is doubtful whether the accused said to the Sub-Inspector of Police that he would show the place where the deceased had been murdered or that he would show the place where he murdered the deceased, it must be taken that he stated that he would show the place where the deceased was murdered. A.I.R. 1939 Nag. 295=I.L.R. (1941) Nag. 506=40 Cr. L. J. 937=1939 N.L.J. 442=184 Ind. Cas. 274.

——S. 27—Duty of police in recording statement of accused—Statement leading to discovery.

The duty of the Police, if they desire to record a statement of the accused is to record it as given and to leave it to the Court to decide what evidence is admisible.

It is the first statement of the accused to whomsoever made, that leads to the discovery of the fact, if a fact is discovered. A.I.R. 1940 Mad. 710=1940 M.W.N. 86=I.L.R. (1940) Mad. 254= 42 L. W. 981=42 Cr. L. J. 582=194 Ind. Cas. 527.

——S. 27—Statement—Accused, after commmitting murder, lodging report to Police—First information report containing confessional matter.

Where the accused after committing murder, goes to the Police Station and lodges the first information of the crime, and the report contains statements in the nature of confessions and statements having no connection with the actual narrative of the crime, the statements in the nature of confession cannot be admitted but they are not excluded for the purposes of S. 27, Evidence Act. A.I.R. 1941 Nag. 86=1940 N. L. J. 623= I. L. R. (1940) Nag. 679=42 Cr. L. J. 390=193 Ind. Cas. 6.

——S. 27—Statement—Statement by accused that he buried body of person murdered at place pointed out by him is admissible only for S. 201, I. P. C.

A statement made by the accused to the police that he had buried the body of the murdered person at the place pointed out by him is clearly admissible in evidence under S. 27 only for the purposes of S. 201, I. P. C., but not for convicting him of murder. A.I.R. 1929 Lah. 344. 121 Ind. Cas. 728 =31 Cr.L.J. 293=13 A. I. Cr. R. 382=A.I.R. 1930 Lah. 530.

——S. 27—Statement of accused before police that he buried an article in a place—Police taken to that place and article delivered—Admissibility of statement.

The accused person stated to the police that he had buried an article at a particular place, took the police to that place and delivered the article to them.

Held, that the statement of the accused to the police was admissible under S. 27 of the Evidence Act. 112 Ind. Cas. 55=10 Lah. L. J. 531=11 A. I. Cr. R. 292=29 Cr. L. J. 967.

——S. 27—Statements can be made by gesture.

Statements can be made by other means than by words. They can be made by mere gesture. 94 Ind. Cas. 706=27 Cr. L. J. 658=A.I.R. 1926 Rang. 112.

——S. 27—Statement.

If the recoveries were made in consequence of the information supplied by the accused, the statements made by them are admissible under S. 27 of the Indian Evidence Act. A.I.R. 1923 Lah. 434.

——Ss. 27 and 25—Statement to police—Discovery—Admissibility of document.

The accused charged with the death of his wife presented himself at a Police Station and made a report, a record of which was entered in the police register. A police officer proceeded to the house of the accused and discovered in a room a corpse of a woman. Held, that under S. 27 of the Evidence Act the police officer was entitled to prove that the accused came to him at the time and place stated and said "I have killed my wife; her corpse is lying in my house," and in consequence of this statement the woman's corpse was discovered as indicated, but thereafter the defence were entitled to require the production of the whole record and to insist upon the proof of it. 16 A.L.J. 478=19 Cr. L. J. 935=47 Ind. Cas. 659.

——S. 27—Statement.

Accused's statement in presence of police is relevant in so far as it relates to material facts discovered in consequence. 26 M.L.J. 352, Foll. 69 Ind.Cas. 377=14 M.L.W. 418=A .I. R. 1921 Mad. 679.

——S. 27—Statement after discovery—Pointing out property—Value of.

A statement by accused not leading to discovery of property but made after discovery and production of the property is irrelevant. The production or the pointing out may indicate that the accused was in possession or that he had innocent knowledge

that the articles had been left there by some one else. 5 S.L.R. 257=13 Cr.L.J. 529=15 Ind. Cas. 801.

——S. 27—Statement—Information given by accused—Discovery.

Where there is immediate connection between discovery and statement made to a police officer, the latter is admissible in evidence. 98 P.L.R. 1918 =20 Cr.L.J. 305=50 Ind. Cas. 481.

——Ss. 27 and 25—Statement to Police—Pointing out stolen things—Admissibility.

The accused made certain admissions as to their guilt and said that the stolen articles were in a particular place and going along with the police took out the things out of the place. Held, these statements amounted to a confession and therefore inadmissible in evidence under S. 25 of the Evidence Act. S. 27 of the Act has no application to the case, the articles having been pointed out by the accused themselves and they could not therefore be said to have been discovered in consequence of the information given by them. 7 Cr.L.R. 175.

——S. 27—Statement of accused as to place of concealment—Independent discovery by Police —Statement as to conduct.

A statement made by the accused to the police officer after the discovery was made, as to the place where the stolen property was concealed, is admissible in evidence under S. 27 of the Evidence Act; but the reception of the statement as to the pointing out by the accused of the place of concealment, though not illegal, is improper. (1909) 11 C. L. J. 182=5 Ind. Cas. 769.

15. Miscellaneous.

——S. 27—Miscellaneous—Admissions—Admissibility in evidence under S. 27.

It is legitimate to record evidence that an accused person said "I will point out certain property", if such statement leads to a discovery; but it is not legitimate to record as an evidence that an accused said, "I will point out certain property which I obtained as my share of the booty in the dacoity." 52 P.L.R. 1918=9 P.W.R. 1918 Cr.=19 C.L.J. 439=44 Ind. Cas. 967.

——S. 27—Miscellaneous—"Confession"—What is—Statement purporting to convey impression created in mind as to commission of act—Effect of.

A confession, in order to be admissible under the evidence Act, must either in terms, admit the offence, or at any rate substantially all the facts which constitute the offence. A statement which purports to convey what appears to be an impression created in the mind of the accused regarding the occurrence is not a confession as it cannot amount to a categorical admission of the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession, e.g., admission that accused was the owner of the knife which caused the death and was in recent possession of it would not be enough. A.I.R. 1939 P. C. 47, ref. 16 Cut. L.T. 141=A.I.R. 1950 Orissa 202=51 Cr.L.J. 1493.

——S. 27—Miscellaneous—Confession, what is —Statement by accused of his having been in company of dacoits, if confession.

No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate, substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession. In evidence Act, it would not be consistent with the natural use of language to construe confession as a statement by an accused 'suggesting the inference that he committed the crime.' A.I.R. 1942 Pat. 156=23 P.L.T. 475=43 Cr.L.J. 615=200 Ind. Cas. 208.

——S. 28—Confession made while in immediate vicinity of police.

A confession by an accused in police detention as a suspect made in the immediate vicinity of the police, to a Zaildar could not be proved unless made to a magistrate though the accused may not have been handicapped, as, to all intents and purposes he was in police custody. 32 P.W.R. 1916 Cr.=17 Cr.L.J. 226=153 P.L.R. 1916=26 P.R. 1916 Cr.=34 Ind. Cas. 642.

——S. 28—Confession to Magistrate soon after inducement by person in authority.

Confessions to the Magistrate made soon after inducements held out by certain Zamindars sent by the Police, are inadmissible as there is nothing to show that the impression caused by the inducement held out by the Zamindars had been removed so as to make the confession admissible under S. 28. 4 S.L.R. 209=12 Cr.L. J. 119=9 Ind. Cas. 718.

——S. 29.—Confessions rendered admissible under —If validates them. (1950) 1 M.L. J. 659=A.I.R. 1950 Mad. 579.

——S. 29.

The maker of statement not warned by the Magistrate as required under S. 164, Criminal P.C.:

Held, that the defect is not fatal in view of S. 29. A.I.R. 1941 All. 145=1941 A.W.R. 65= I.L.R. (1941) All. 280=1941 A.L.J. 86=1941 O.W.N. 337=42 Cr.L.J. 485=193 Ind. Cas. 873.

——S. 29—Irregularity—Curability.

Statement made before Magistrate by accused in Police custody—Statement recorded on reverse of application for remand—Procedure not followed—Defect can be cured under S. 533, Criminal P. C. —The statements are admissible in evidence. A.I.R. 1934 Rang. 78=35 Cr.L. J. 823=148 Ind. Cas. 1002.

——S. 29—Admissibility.

Statement of the accused is not inadmissible in evidence merely because the prescribed caution has not been administered. A.I.R. 1932 Mad. 431=62 M.L. J. 559=35 L.W. 542=1932 M.W.N. 449=33 Cr.L. J. 526=55 Mad. 711=137 Ind. Cas. 863.

——S. 29—Confession—Subsequent contradiction—Effect of.

A confession is admissible though in a subsequent statement the accused says that some of the statement contained in it are untrue. 9 C.L. J. 55=10 Cr.L. J. 325=3 Ind. Cas. 625.

——S. 30

Synopsis.

See also:

(1) Evidence Act, Ss. 10, 27—Co-accused.
(2) Evidence Act, S. 114—Accomplice, and S. 133.

1. Admissibility
2. Approvers confession
   See also Evidence Act. S. 114, 133
3. Corroboration
4. Essentials for admissibility
5. Evidentiary value
6. Joint trial
7. Retracted confession
8. Scope and applicability
9. Self-exculpatory confession

1. Admissibility.

—S. 30—Admissibility—Confession is admissible against co-accused whether maker ascribes to himself major or minor part in crime.

In order that a confession by an accused may be admissible against a co-accused under S. 30, it is not necessary that the confession should implicate the maker substantially to the same extent as it implicates the co-accused against whom it is sought to be used.

A confession is admissible under S. 30 against a co-accused whether the confessing accused ascribes to himself a major or minor part in the crime. Whether it has any value or not is another matter. A.I.R. 1946 Cal. 156=I.L.R. (1944) 2 Cal. 312.

——S. 30—Admissibility—Accused tried under S. 302, Penal Code—One confessing to offence under S. 201, Penal Code—Confession, if can be used against co-accused.

Where more than one persons are tried for murder under S. 302, Penal Code, and one of them confesses to an offence under S. 201, Penal Code, the confession cannot be used in evidence against the other co-accused.

The word 'confession' in S. 30 cannot be reasonably interpreted to mean a confession of any offence for which the persons are being tried but only the very offence for which they are being tried, the offence always including abetments and attempts. A.I.R. 1946 Mad. 124=58 L.W. 625=1945 M.W.N. 722 (2)=1945-2 M.L.J. 479.

——S. 30—Admissibility—Confession by co-accused, if can be made basis of conviction.

The very existence of S. 30, Evidence Act, postulates that the confession of the co-accused may be used in cases where the evidence afforded—and some such evidence there must be—lacks the requisite volume and certainty to insure conviction. A.I.R. 1941 Nag. 145=42 Cr.L.J. 363=1941 N.L.J. 345=I.L.R. (1941) Nag. 169=193 Ind. Cas. 265.

——S. 30—Admissibility.

—Two accused charged with murder—One making confession for first time at preliminary inquiry in dock and in presence of other:

Held, that the confession could be taken into consideration against the other co-accused. A.I.R. 1939 Mad. 737=1939 M.W.N. 611=(1939) 2 M.L.J. 202=40 Cr.L.J. 913=50 L.W. 920=184 Ind.Cas. 302.

—S. 30—Admissibility—Confession if substantive evidence against co-accused.

The confession may be taken into consideration against a co-accused under S. 30 of the Evidence Act. It may not stand on the same level as substantive evidence but it may be used to supplement the substantive evidence. A.I.R. 1939 Nag. 295=40 Cr. L.J. 937=1939 N.L.J. 442=I.L.R. (1941) Nag. 506=184 Ind. Cas. 274.

—S. 30—Admissibility.

A confession by one conspirator made to a Magistrate in Court implicating other conspirators is admissible in evidence, under S. 30 but statements made by a conspirator to the Police are not admissible in evidence if they are incriminating. A.I.R. 1939 Sind 185=40 Cr.L.J. 882=I.L.R. (1939) Kar. 449=184 Ind. Cas. 145.

—S. 30—Admissibility—Trial of co-accused for offence other than that for which he is jointly tried with other accused—Confession in joint trial by other accused.

There is nothing in S. 30, which suggests that a confession is not admissible in evidence against a person who is being tried jointly for the same offence with a man who has made the confession if the confession minimises the guilt of him who makes it and exaggerates the guilt of the other. The Section says that the confession must affect them both. It does not say that it must affect them both equally. But the uncorroborated evidence of such a confession against one who has not made it, is of very little value. A.I.R. 1938 All. 91=1937 A.L.J. 1253=39 Cr.L.J. 364=1937 A.W.R. 1099=173 Ind. Cas. 838.

——Ss. 30, 10—Admissibility—Confession of one of the accused who is dead and never brought to trial.

Confession made by one of the accused who is dead and never brought to the trial is not admissible under S. 30, Evidence Act, as the confession of the co-accused. Nor, if it is admitted, can it be admitted under S. 10, because S. 10 applies to acts done in furtherance of a conspiracy or which bear some relation to the conspiracy and cannot be said to apply to a confession made after the conspiracy and the acts done in pursuance thereof were at an end. A.I.R. 1938 Sind 94=39 Cr.L.J. 545=175 Ind. Cas. 99.

——S. 30—Admissibility—Death of confessing accused during trial—Value of confession.

J tried along with L—Trial going on for about a year—J dying six months before delivery of judgment—His confession put on record before his death:

Held, that even if the confession of J was admissible against L, it could not be used as substantive evidence. Such a confession could only be used for purposes of corroborating the other evidence which was on record. A.I.R. 1937 Cal. 39=41 C.W.N. 183=38 Cr. L. J. 339=167 Ind. Cas. 162.

——S. 30—Admissibility—Warrant case—Accused pleading guilty.

In warrant cases, it is discretionary with the Magistrate to defer conviction of the accused who pleads guilty and use his confession against the other co-accused under S. 30. A. I. R. 1937 Nag. 17=38 Cr.L.J. 237=I.L.R. (1937) Nag. 315=166 Ind. Cas. 582 (F.B.).

—S. 30—Admissibility.

Voluntary confessions may be received in evidence against the accused making them and may furthermore be taken into consideration against their co-accused. A.I.R. 1935 Rang. 491=37 Cr.L.J. 280=160 Ind. Cas. 292.

—S. 30—Admissibility.

Where a confession is made by an accused person voluntarily, it is admissible in evidence against the accused and may be taken into consideration as against his co-accused. A.I.R. 1934 Rang. 30=35 Cr.L.J. 863=148 Ind. Cas. 1064.

——S. 30—Admissibility—Police presence.

Statement of the accused at the Police Station implicating his co-accused is not admissible in evidence. A.I.R. 1933 Lah. 167=34 P.L.R. 259=34 Cr.L.J. 1175 (2)=146 Ind. Cas. 27.

——S. 30—Admissibility of confession.

Confession of co-accused during trial implicating the other accused in a warrant case is admissible. 111 Ind. Cas. 387=29 Cr.L.J. 835=11 A.I.Cr.R. 185= A.I.R. 1928 Lah. 880.

——S. 30—Admissibility—Cr.P. Code, S. 162.

Statement by a person, before he is charged for any offence by police is only an admission and is admissible in evidence against him but not against co-accused: A.I.R. 1927 Cal. 17, **Rel. on.** 111 Ind. Cas. 721=9 P.L.T. 449=29 Cr.L.J. 913=11 A.I.Cr.R. 143=A.I.R. 1928 Pat. 473.

——S. 30—Admissibility.

Obiter.—The statement made by an accused in Court implicating himself as well as his co-accused can be taken into account in considering the guilt of the latter. 100 Ind. Cas. 113=31 C.W.N. 239=28 Cr.L.J. 241=A.I.R. 1927 Cal. 265.

——S. 30—Admissibility.

A confession of a co-accused implicating himself and others is admissible in evidence against all the accused under S. 10 and can also be taken into consideration against them under the provisions of S. 30. 106 Ind. Cas. 721=1 L.C. 339=2 Luck. 631=8 A.I.Cr.R. 449 =A.I.R. 1927 Oudh 369.

——S. 30—Admissibility.

Confession of accused who is convicted on his plea of 'guilty' should not be admitted against others. 93 Ind. Cas. 241=24 A.L.J. 318=27 Cr.L.J. 449=7 L.R.A.Cr. 55=A.I.R. 1926 All. 318.

——S. 30—Admissibility.

Co-accused induced to make confession—Confession cannot be relied on. 92 Ind. Cas. 461=7 L.L.J. 631= 27 Cr.L.J. 285.

——S. 30—Admissibility—Plea of guilty recorded after framing of charge by Magistrate—Confession is admissible against co-accused.

Theree men were sent up for trial before a Magistrate and proceedings taken against them all. When questioned, one of them said that he was guilty and subsequently pleaded guilty after the charge had been framed.

Held, that his confession could be taken into account against the other accused. The trial could not be said to have commenced only after the recording of the plea of guilty. 38 Mad. 302 and 43 Mad. 511 **(F.B.), Foll.** 95 Ind. Cas. 63=6 Lah. 176=27 Cr.L.J. 735=A.I.R. 1925 Lah. 435.

——S. 30—Admissibility.

A statement by one co-accused that another was implicated in the offence is inadmissible in evidence against the other. 86 Ind. Cas. 347=7 L.L.J. 51=26 Cr.L.J. 763=A.I.R. 1925 Lah. 371.

——S. 30—Admissibility.

Statements of co-accused can be taken into consideration and used as evidence not only against the person making them but also against the person tried jointly with the confessing accused of the same offence. 39 All. 484, **Foll.** 75 Ind. Cas. 701=25 Cr.L.J. 13=A.I.R. 1924 Nag. 27.

——S. 30—Admissibility.

A confession by each of co-accused implicating self and co-accused as regards robbery but throwing entire burden for murder on the other is admissible as regards former but indimissible as regards the latter. 85 Ind. Cas. 836=26 Cr.L.J. 612=A.I.R. 1923 Lah. 293.

——S. 30—Admissibility.

Statement one accused is admissible against co-accused only if section applies. 65 Ind. Cas. 849=20 A.L.J. 178=23 Cr.L.J. 193=A.I.R. 1922 All. 24.

——S. 30—Admissibility.

Case under Cr.P. Code, S. 110—Confession made by co-accused when he was co-accused in another case cannot be used. 22 C.W.N. 408, **Foll.** 61 Ind. Cas. 793=33 C.L.J. 70=25 C.W.N. 239=22 Cr.L.J. 441= A.I.R. 1921 Cal. 557.

——S. 30—Admissibility—Accused charged with murder—Confession by one implicating him only under Penal Code, S. 328—Confession is admissible against co-accused.

Where the accused are under trial for murder, a confession by one of them which implicates him only to the extent of an offence under Penal Code, S. 328, is admissible in evidence against the co-accused.

Per Oldfield and Odgers, JJ.—Contra Ramesam, J—Persons under trial for a major offence should also be deemed to be charged with and tried for any minor offence or offences, constituted by the particular ingredients of the major offence which may be proved; and it can make no difference that the conviction of one accused of a minor offence takes place only in appeal, when the course of the proceedings has been the same against them both. **(Case-Law discussed.)** 72 Ind. Cas. 497=14 M.L.W. 474=A.I.R. 1921 Mad. 490.

—S. 30—Admissibility—Confessions made outside British India.

If confessions made before Magistrates outside British India are proved against the persons who made them they may be taken into consideration against others who are being tried jointly for the same offence. 69 Ind. Cas. 257=17 N.L.R. 113=A.I.R. 1921 Nag. 39.

——S. 30—Confession, admissibility—Statement of accused after arrest—Not amounting to confession—Admissibility.

The statement of an accused made after arrest and not amounting to a confession is not admissible in evidence against a co-accused either under S. 10 or S. 33, but only against himself. The admission does not however affect the conviction when no stress was laid on such statement by the Lower Courts. 38 Cal. 169 Foll. 46 Cal. 710=21 Cr. L. J. 5=30 C.L.J. 255 =54 Ind. Cas. 53.

——S. 30—Admissibility—Confession—Joint trial.

During the joint trial of several persons, one of them made a statement confessing his guilt and implicating some of the other accused, **Held,** that the confessing accused was tried jointly with the other accused and the confession could be considered along with other evidence against all the accused. 37 All. 247 =13 A.L.J. 337=16 Cr. L. J. 327=28 Ind. Cas. 663.

——S. 30—Admissibility—Confession—Trial of a number of accused before the magistrate—Plea of guilty by some after implicating all—Joint trial—Admissibility of confession by accused pleading guilty.

Where in a trial of several persons when the prosecution evidence was concluded and the accused were asked to enter upon their defence two of the accused pleaded guilty and in doing so implicated the others and all of them were tried together, the statement of the two can be admissible for convicting the others. 38 Mad. 302=14 M.L.T. 453=15 Cr.L.J. 13=22 Ind. Cas. 157.

——S. 30—Admissibility—Confession—Co accused—Admissibility of confession—Mode of proof.

Where an accused person after he is arrested makes a confession implicating the other accused and the confession is sought to be used against them, it is incumbent on the prosecution to disclose the name of the officer who made the arrest and produce him or any other person who could speak to the circumstances under which the confession was made so as to enable the defence to ascertain by cross-examination what inducements were offered to the accused to make it and what generally were the circumstances that attended the confession. 36 M. 501=17 C. W.N. 110=14 M.L.T. 263=25 M.L.J. 518=11 A.L. J. 881=18 C.L.J. 365=(1913) M.W.N. 806=14 Cr. L.J. 577=15 Bom. L.R. 910=40 I.A. 193=21 Ind. Cas. 369 (P.C.).

——S. 30—Confession, admissibility.

A statement of an accused must amount to a confession before it can be considered against his co-accused under S. 30 of the Act. (1912) M.W.N. 207= 35 Mad. 247=13 Cr. L J. 305=22 M. L. J. 490=11 M.L.T. 1 Supp.=14 Ind. Cas. 849.

——S. 30—Admissibility—Plea of guilty.

A confession made by accused pleading guilty is not admissible in evidence against the other accused. 15 P.R. (Cr.) 1911=54 P.W.R. (Cr.) 1911=12 Cr.L. J. 605=12 Ind. Cas. 981.

——S. 30—Admissibility — Plea of guilty — Co-accused pleading guilty—If plea can be used against the other accused.

The plea of guilty of one co-accused who is removed from the dock while the other alone is tried, cannot be taken into consideration against that other. 38 Cal. 446=16 C.W.N. 49=12 Cr.L. J. 479=12 Ind. Cas. 87.

——S. 30—Confession, admissibility—Discharged accused, if a competent witness.

Evidence of co-accused, prosecution against whom is validly and effectively withdrawn even in absence of a formal order of discharge under S. 494 (a) Cr.P.C., is admissible. 7 A.L.J. 86=11 Cr.L.J. 21=5 Ind. Cas. 21.

——S. 30—Confession, admissibility—Applicability of section—Strict construction—Confession.

S. 30 must be strictly construed; it does not countenance the construction of a statement into a confession by a process of inferential reasoning. To make statements giving rise to an inference of guilt and to confess a crime are quite different. It is only under S. 30 of the Act that the confession of two or more persons, jointly tried for the same offence, can be taken into consideration as against the rest. It must be a confession to be so admissible, that is, it must affect both the person confessing and the other accused. 11 Bom. L.R. 633=10 Cr.L.J. 369=3 Ind. Cas. 742.

——Ss. 30 and 24—Confession, admissibility.

A confession to be admissible in evidence under S. 30 must be relevant under S. 24 of the Evidence Act. K as a witness in N's trial made a statement implicating himself and V. K. was then added as a co-accused. It was held that K's statement was relevant under S. 30 as it was a confession made by a co-accused, K. being a co-accused when his statement was used. 9 P.R. 1911 Cr.=166 P.L.R. 1911=22 P.W.R. 1911 Cr.=12 Cr.L.J. 267=10 Ind. Cas. 340.

——S. 30—Admissibility—Confession.

When the deposition of one of the witnesses was read over to him in the presence of the pleader of the accused, his deposition is admissible in evidence in the case of perjury against that witness. 36 Cal. 808=9 C.L.J. 690=13 C.W.N. 912=10 Cr.L.J. 150= 8 Ind. Cas. 697.

2. Approver's Confession.

See also:

Evidence Act, S. 114—Accomplice and S. 133.

——S. 30—Confession of co-accused — Corroboration of approver's evidence. (1949) 2 M.L.J. 428=62 L. W. 614=1949 M.W.N. 642.

——S. 30—Retracted confession — Admissibility against co-accused—Corroboration—Evidence of approver—If subject corroboration.

It has been the well settled practice of the Courts in India not to convict on the Evidence of an approver, unless it has been corroborated in material particulars. Similarly it would be unsafe to take into consideration the retracted confessions of a co-accused against the other accused unless it is corroborated by reliable evidence in material particulars. An approver's evidence has always been regarded as tainted evidence and one piece of tainted evidence should not be taken as corroborated by another piece of tainted evidence. 25 Pat. 347=228 Ind. Cas. 567=A.I.R. 1947 Pat. 90=48 Cr.L J. 242=27 P.L.T. 298.

——S. 30—Approver's evidence—Retracted confession is admissible against co-accused—Corroboration by retracted confession of co-accused—Whether enough.

It has been the well settled practice of Indian Courts not to convict on approver's evidence, unless it be corroborated in material particulars. It would also be unsafe to take into consideration the retracted confession of a co-accused, against other accused persons unless it was corroborated by reliable evidence in material particulars. An approver's evidence has always been regarded as tainted (**ab initio**) and one piece of tainted evidence should not be taken as corroborated by another piece of tainted evidence. 25 Pat. 347=27 P.L.T. 298=48 Cr.L.J. 242=228 Ind. Cas. 567=A.I.R. 1947 Pat. 90.

——S. 30—Co-accused and approver.

Per **Mohammad Noor J.**—The evidence of an accomplice is, as a matter of law, sufficient for a conviction. The Courts are by law allowed but not compelled to presume him unworthy of credence unless he is corroborated. If, in spite of warning, a jury believes him without corroboration, the High Court cannot interfere. If the framers of the Evidence Act intended to attach to the confession of an accused against a co-accused the same value as the evidence of an approver, they would have said so. The confession of an accused can only be considered against his co-accused. Even this would not have been permissible, but for S. 30, Evidence Act. The Act itself gives it a position inferior to the evidence of an approver. A.I.R. 1939 Pat. 35=19 P.L.T. 801=18 Pat. 82= 39 Cr.L.J. 997=178 Ind. Cas. 130.

——Ss. 30, 114, Illus. (b)—Statement of approver—Whether can form the basis of a conviction.

The statement of an approver by itself should not be considered to be sufficient for the conviction of an accused person until and unless it has been corroborated by some extrinsic evidence. At the same time, the statement of a co-accused can only be considered when judging the case against any person. Beyond this, the confession of a co-accused has no value, and no conviction can be based on a piece of evidence which is only to be taken into consideration. Such evidence has very little value and though it may come in as a link in the chain, it cannot form the basis of a conviction. A.I.R. 1934 Pesh. 11=35 Cr. L. J. 719=148 Ind. Cas. 8.

164 Cr. P.C.

——S. 30—Approver's confession — Testimony rejected against principal accused—Corroboration against some accused.

Where it was argued that even though the approver's story as to the part played by the principal accused in the case and as to the origin and motive of the crime be rejected in its entirety, yet it should be accepted against the other accused to the extent to which it is corroborated by independent testimony:

Held, that the argument could not be accepted. A.I.R. 1933 Lah. 871=34 P.L.R. 1010=35 Cr. L. J. 137=146 Ind. Cas. 665.

——S. 30—Approver's confession—Corrobortion required.

The confession of a co-accused is, by itself, of too weak a character to found a conviction of the other co-accused on it alone. The confession of an accused is upon a lower footing than the testimony of an accomplice, and the confesssion of a co-accused standing by itself is legally insufficient for the conviction of another co-accused.

The tainted testimony of an approver connot ordinarily be deemend to have received the corroboration which human experience and conduct require from the confessional statement of a co-accused so as to comply with the rule laid down in S. 114 (**b**), Evidence Act, and justify the conviction of the other co-accused against whom there is no other evidence except the testimony of the approver and the incriminating statement of a confessing accused. But where against all the accused, there is, besides the sworn testimony of the approver, evidence of respectable and independent witnesses, to corroborate the evidence of the approver, conviction cannot be said to be illegal. A.I.R. 1933 Oudh 355=10 O.W.N. 688=35 Cr. L. J. 273=9 Luck. 22=146 Ind. Cas. 1064.

——S. 30—Approver and co-accused retracting statements—Court's duty.

In India, there is no rule of evidence which prevents an approver's evidence from being corroborated by the confession of a person who is being tried jointly with the accused for the same offence, implicating both himself and the accused. This principle applies even where both the approver and the confessor subsequently retract their statements. In such cases, however, the Court should scrutinize the corroboration with very great care. A. I. R. 1933 Rang. 57=11 Rang. 4=34 Cr. L. J. 286=142 Ind. Cas. 87.

——S. 30—Approver's Confession—Sufficiency of, to base conviction.

An approver's statement or the retracted confession of an accused cannot be made the basis of conviction unless they are corroborated sufficiently against the accused. A.I.R. 1932 Oudh 317=9 O.W.N. 3=33 Cr. L. J. 920=7 Luck. 511=139 Ind. Cas. 751.

——S. 30—Approver's confession—It is unsafe to base conviction on the uncorroborated statement of approver.

It is not safe to base a conviction upon the evidence of such an approver who obviously is deeply interested in putting responsibility for the offence upon shoulders other than his own, unless there is some independent evidence to corroborate his story in material particulars. The mere fact that the approver produced a spear and a dang from a field and he stated that the spear was used by the accused is not corroboration of the approver's story; so also the fact that the accused was stained with human blood, does not corroborate the approver's story. 99 Ind. Cas. 929=8 L. L. J. 610=28 P.L.R. 39=28 Cr. L. J. 193=7 A. I. Cr. R. 173=A.I.R. 1927 Lah. 78.

——S. 30—Approver's confession.

A statement should not be accepted as that of an approver without any test as to his complicity in the crime. Such a statement does not amount to evidence against the accused. 74 Ind. Cas. 543=24 Cr. L. J. 799=A.I.R. 1924 Oudh 188.

——S. 30—Approver's confession—It cannot be accepted unless he himself took part in the crime and unless the evidence is corroborated.

Before the evidence of an accomplice can be accepted it is necessary to be satisfied that the accomplice himself took part in the crime to the extent that he says and that he is in a position to give true evidence as to what occurred. It is also of course necessary that the accomplice's evidence should be corroborated to prove that it was the accused person and no one else who committed the crime. 73 Ind. Cas. 262=6 N.L. J. 144 =24 Cr.L. J. 566=A.I.R. 1923 Nag. 248.

——S. 30—Approver's confession cannot be used against accused.

The confession of an approver cannot be used under S. 30 because he is not jointly tried along with the accused in the case. 2 P.L.T. 125=A.I.R. 1921 Pat. 499.

——S. 30—Confession—What is.

Where in a Dhatura poison case one of the co-accused stated that his co-accused brought milk and mixed some powder in it, but he did not know what that powder was and that his co-accused gave the milk to the deceased to drink,

Held, that the statement is not a confession. 99 Ind. Cas. 1009=27=P.L.R. 441=28 Cr.L.J. 209.

——S. 30—Approver's confession.

A statement by an accused that he and his co-accused struck the deceased in exercise of their right of private defence is in no sense a confession and cannot be taken into consideration against the co-accused. 85 Ind. Cas. 371=6 L.L.J. 434=26 Cr.L.J. 531=A.I.R. 1925 Lah. 532.

——S. 30—Approver's confession.

Confession by a person under enquiry under S. 476, Cr. P. Code, is a confession. 87 Ind. Cas. 593=26 Bom. L. R. 614=26 Cr.L.J. 993=A.I.R. 1924 Bom. 445.

3. Corroboration.

——S. 30—Corroboration—Co-accused's statement—Necessity.

Corroboration of the confessing accused's statement on particulars affecting a co-accused is necessary before acting upon his testimony against the co-accused—Where there is no corroboration and the only evidence is that of the confession of the co-accused in which he persists to the last, the accused cannot be convicted 51 Cr.L.J. 730=A.I.R. 1950 Kut. 28.

——S. 30—Uncorroborated confession of co-accused—If can be basis of conviction.

It is against the consistent practice of the Courts in this country to convict an accused simply on an uncorroborated confession of a co-accused, which cannot be checked in any way. A.I.R. 1949 Assam 60=51 Cr.L. J. 135.

——Ss. 30 and 133—Corroboration—Confession of co-accused—Value of—Conviction on accomplice evidence supported by such confession—Legality.

A confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in S. 3 of the

Evidence Act. It can be used only in support of other evidence and cannot be made the foundation of a conviction.

Although a conviction founded upon the evidence of an accomplice supported only by the confession of a co-accused is justified in law under S. 133 of the Evidence Act, and although the coincidence of a number of confessions of co-accused all implicating a particular accused, given independently, and without an opportunity of previous concert, might be entitled to great weight, Court should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused. I.L.R. (1944) M. 308 and 35 C.W.N. 1270, ref. to. 76 I.A. 147=28 Pat. 592=30 P.L.T. 378 =84 C.L. J. 146=1949 M.W.N. 444=1949 A.L. J. 283 =51 P.L R. 311=A.I.R. 1949 P.C. 257=62 L. W. 664 =50 Cr.L.J. 872=1949 A.W.R. 412=51 Bom. L.R. 955 =53 C W.N. 609=1949 2 M.L. J. 194 (P.C.).

——S. 30—Corroboration—Confession of co-accused how far evidence against accused—Corroboration, necessity of.

It is a rule at least of prudence if not of law, that the confession of a co-accused uncorroborated by any other evidence is not alone sufficient to support conviction. A.I.R. 1939 Pat. 35=19 P. L. T. 801=18 Pat. 82=39 Cr. L. J. 997=178 Ind. Cas. 130

——S. 30—Corroboration, if essential.

Under S. 30, the confession of an accused person may be taken into consideration as against the co-accused, but this is not tantamount to saying that such confession is to take the place of proof. On the other hand, it must be remembered that the confession of a co-accused is even worse in value than the sworn testimony of an accomplice and, if it is necessary that the latter testimony should be corroborated independently both as to the crime and as to the criminal, it is still more necessary that the confession of a co-accused should be so corroborated, and when that confession is retracted, it has no value at all as against the co-accused. A.I.R. 1934 Cal. 853=62 Cal. 312=39 C.W.N. 27=36 Cr.L. J. 485=154 Ind. Cas. 273.

——S. 30—Corroboration—Recovery of ordinary cloths with no special marks of identification —Ornament which can be identified recovered —Corroboration, if sufficient.

The recovery of ordinary cloths which do not have any special marks capable of definite identification does not afford sufficient corroboration to the testimony of the approver and the accused should not be convicted on such meagre corroboration. But the recovery of an ornament which can be identified is sufficient corroboration A.I.R. 1934 Lah. 525=35 P.L.R. 436=36 Cr.L.J. 702=155 Ind. Cas. 305.

——S. 30— Corroboration — Examination of approver held last.

Where the approver was examined after all the witnesses who were supposed to corroborate his statement had been examined:

Held, that the assesors could not have appreciated the corroborative evidence when it was given and the Court and the Counsel could not have been in a position to question the witnessess properly. The opinion of the assessors, therefore, lost much of its value. A.I.R. 1934 Lah. 171=36 Cr.L.J. 491= 154 Ind. Cas. 224.

——S. 30—Corroboration.

Where it is sought to corroborate the confession of an accused person, the corroboration must be corrboration implicating the accused in the offence with which he is charged. A.I.R. 1933 Cal. 665=34 Cr. L.J. 918=37 C.W.N. 1180=145 Ind. Cas. 236 (S.B.).

——S. 30—Necessity of corroboration.

The confession of a co-accused stands even on a lower footing than that of the evidence of an accomplice, as it is not a statement on oath and cannot be tested by cross-examination and it cannot therefore, be accepted without meterial corroboration connecting the accused with the crime. A.I.R. 1933 Lah. 956=35 Cr. L.J. 288=35 P. L. R. 115= 146 Ind. Cas. 1061.

——S. 30—Corroboration.

Before the confession made by an accused can be taken into consideration, there must be tolerably clear and reliable evidence tending to prove the crime. The Court is not bound to take the confession into consideration against the accused, but it may do so if the substantive evidence is reliable enough to indicate the commission of the crime. When there is no such evidence, to take into consideration the confession of a co-accused is tantamount to basing the conviction entirely on the confession which is repugnant to the principles of law. A.I.R. 1933 Nag. 249=16 N.L.J. 129=34 Cr.L.J. 1141=147 Ind. Cas. 17 (2).

——S. 30—Corroboration.

Although a confession by a co-accused when considered under the provisions of S. 30 should be treated in the same way as any other evidence in the case, but such evidence being derived from a tainted source is open to grave suspicions; further it is not subjected to cross-examination, and for that reason also it should not be regarded as evidence of any value against another accused who is tried jointly for the same offence unless it is supported by some material corroboration upon which reliance can be placed. A.I.R. 1933 Rang. 134=34 Cr. L.J. 835=144 Ind. Cas. 829.

——S. 30—Corroboration.

Confession of co-accused cannot be used to corroborate evidence of approver. A.I.R. 1921 Nag. 39, Rel. on. 120 Ind. Cas. 721=31 Cr. L.J. 153= A.I.R.. 1930 Nag. 97.

——S. 30—Corroboration.

Confession implicating a co-accused requires corroboration if the co-accused is to be convicted on it. 123 Ind. Cas. 393=31 Cr.L.J. 492=1930 Cr.C. 767=A.I.R. 1930 Pat. 385.

——S. 30—Corroboration.

Confession of one co-accused is to be accepted against another with caution unless corroborated by independent evidence—Confession of one co-accused cannot be said to be corroborated by confession of another co-accused. A.I.R. 1921 Pat. 337; 43 Bom. 739, Rel. on. 120 Ind. Cas. 350=31 Bom. L.R. 565=A.I.R. 1929 Bom. 327.

——S. 30—Corroboration:—To say that circumstances corroborative of co-accused's confession should be such as would themselves support conviction is to render S. 30 superfluous — What corroborative evidence is necessary to support conviction must depend on circumstances of each case. 4 Cal. 483; Not appr. Foll.; A.I.R. 1924 Mad. 805, Not appr. 119 Ind. Cas. 474=1929 M.W. N. 272=2 M. Cr. C.. 96=30 M. L. W. 403=1929 Cr. C. 9 =30 Cr. L. J. 1071= A.I.R. 1929 Mad. 498.

——S. 30—Corroboration.

The mere fact that the statement of the co-accused was used as corroboration of another part of the finding about guilt is not a ground for setting aside the conviction. 110 Ind. Cas. 803=29 Cr.L.J. 771=11 A. I. Cr. R. 43=10 P.L.T. 429=A.I.R. 1929 Pat. 64.

——S. 30.—Corroboration — Existence of a motive for the offence is not sufficient—Person charged must be indubitably identified with the act committed.

The existence of general hostility, general enmity and a desire, however strong, or a motive, however effective to procure the death of another person may by a piece of circumstantial evidence, but is not corroboration of a sworn statement of participation in a particular crime. Corroboration must point indubitably to the identification of the person charged with the particular act with which the direct evidence connects him. 95 Ind. Cas. 74=48 All. 409=24 A. L. J. 410=7 L. R. A. Cr. 105=27 Cr.L.J. 746=A.I.R. 1926 All. 377.

——S. 30—Corroboration should be inconsistent with honest dealings.

Where there is no evidence at all against the alleged receiver of stolen property a statement made by the thief in his own defence at the close of the case for the prosecution cannot be taken into account against the receiver under S. 30. Judges should use some discrimination when they are dealing with ambiguous evidence which may have an honest or a dishonest interpretation. In such a case there is no corroboration unless the conduct ot the accused, or the admission of the accused, goes to the full length of something inconsistent with honest dealing. 76 Ind. Cas. 1025 25=Cr.L.J. 305=21 A.L.J. 179=45 All. 323=4 L.R. A. Cr. 57=A.I.R. 1923 All. 322.

——S. 30—Corroboration.

Per Kanhaiya Lal, J. C. and Lyle, A. J. C.—Where there is a reasonable doubt whether the accused gave the information which led to a discovery, it would be unsafe to rely on his confession. If the dead body in a murder case was discovered in consequence of the confession, the corroboration would be material but if the evidence produced about the time when the dead body was discovered is discrepant it is difficult to say whether the discovery was made before the confession or afterwards.

Per Ashworth, A. J. C.—Where an accused person has pointed out the whereabouts of the body of a man who has undoubtedly been murdered and has made a confession which not only is uncontradicted by any of the facts proved in the case but indeed has received corroboration in respect of many points, then the confession should be held to be true as implicating the person making it unless he can make out a strong case to the contrary. It is not necessary that the confession of an accused should receive direct corroboration as to the fact that the accused was concerned in the offence. It is sufficient that there was such corroboration of the confession as to indicate that the accused had such knowledge of the circumstances of the offence as would suggest his taking part in it. 68 Ind. Cas. 17=9 O. L. J. 190=23 Cr. L. J. 481= A.I.R. 1922 Oudh 202.

——S. 30—Corroboration.

The confession of a co-accused should be corroborated in material particulars. 72 Ind. Cas. 497 =14 M. L. W. 474=A.I.R. 1921 Mad. 490.

——S. 30—Corroboration—Confession—Necessity.

Per (Scott, C. J. and Heaton, J.) The rule is that a man is not to be convicted solely on the confessions of co-accused and it follows that he must not be convicted on such confessions together with evidence of the ordinary kind which is trivial or unimportant. Where however there is, apart from the confessions; a body of evidence and circumstances enough to support a conviction, if the evidence is accepted as free from untruth or exaggeration or serious mistake or distortion, the Court can take the confessions into consideration and consider together the evidence, the circumstances and the confessions. The material should not be divided into parts. Where the confession of a co-accused is corroborated, it matters not whether on proving the case at the trial, the confession precedes the other evidence or vice versa. There is no rule as to what would constitute sufficient independent corroboration in a particular case. The evidence which is supposed to afford independent corroboration must be in itself reliable; otherwise it will not be independent corroboration. The value of the confessions of an accused, against a co-accused when those confessions are retracted at the trial, is very low. 43 Bom. 739=21 Bom. L.R. 448=20 Cr. L. J. 497=51 Ind. Cas. 65.

——Ss. 30, 114, Illus. (b) and 133—Confession, corroboration.

On a proper consideration of S. 114 illus. (b) where there are more than one accused person there must be corroboration against each of them showing his connection with the offence, if the accomplice's evidence is to be acted upon. 17 Cr. L. J. 156=19 P.W.R. 1916 Cr.=33 Ind. Cas. 636.

——S. 30—Confessions by co-accused corroboration—Conviction corroboration necessary.

A conviction based entirely on statements contained in confessions of co-accused persons, is not sustainable. 4 Bur. L.T. 189=12 Cr. L. J. 465=11 Ind. Cas. 1001.

——S. 30— Confession — Corroboration — Co-accused—Weight due to.

The confession of a co-accused can be taken into consideration but the Court requires corroboration before acting upon such a confession. Where the corroboration consisted of statements of witnesses which though giving rise to suspicion were consistent with the innocence of the accused, Held, that the corroboration fell far short of what is required to support a conviction. 42 Cal. 789= 19 C.W.N. 584=21 C. L. J. 492=16 Cr. L.J. 321= 28 Ind. Cas. 657.

——S. 30—Confession by a co-accused—Corroboration—Joint trial—Effect.

A confession duly made by one of the several accused under trial jointly for the same offence can be taken into consideration under S. 30 of the Evidence Act, but the value of such a confession is very small and is not legally sufficient corroboration of the testimony of an approver either as to the corpus delicti or the identity of the person affected. 13 O.C. 243=11 Cr. L. J. 554=7 Ind. Cas. 1012.

——S. 30—Penal Code, S. 122-A—Conspiracy—Confession of co-accused, if evidence of conspiracy—Evidence Act, Ss. 10, 30—Corroboration by independent testimony necessary against co-accused—Evidence by itself against the prisoner confessing.

S. 10 of the Evidence Act is intended to make evidence of communications between different conspirators while the conspiracy is going on with reference to the carrying out of the conspiracy. Though under the law of England as to evidence in cases of conspiracy that section is not intended to make evidence of the confession of a co-accused, and put it on the same footing as a communication passing between conspirators, or between conspirators and other persons with refrence to the conspiracy, such confession can be looked at under S. 30 of the Evidence Act. But its value is discounted by the fact that it cannot be tested by the by cross examination. No higher volue can be put upon it than upon the statement corroborated by independent testimony implicating the accused persons in the design with which they are charged. But with regard to the prisoner himself, his confession, his statements in verification thereof and his deposition given as approver before the committing Magistrate are all evidence against him. (1910) 15 C.W.N. 25=38 Cal. 169=8 Ind. Cas. 770.

——Ss. 30, 114, Ill. (b) — "May take into consideration" — Confession of co-accused — Necessity for corroboration—Misdirection to the Jury—Accomplice and co-accused—Corroboration necessary in both cases·

The confession of a co-accused requires corroboration before it is to be acted on; and a direction by a Judge to a jury, if he does not draw the attention of the jury to the necessity for corroboration in the consideration of a confession, is a misdirection, 7 M. H. C. R. app. 1 M. 163, 4 C. 43 ref. to. (1909) 8 M.L.T. 116=33 M. 46=1 Ind. Cas. 867.

See for other cases under S. 111 ill. (b) and S. 133.

——S. 30—Corroboration — Confession, admissibility—Confession at previous trial.

Confessions made by accomplices at previous trials for docoity cannot be considered under S. 30. It cannot be treated as good evidence against the accused unless it is corroborated **aliunde** by independent evidence in material particulars and especially in respect of the identity of the accused. 18 P.L.R. 1910=11 Cr. L.J. 364=6 Ind. Cas. 492.

——S. 30—Co-accused—Corroboration.

The confession of an accomplice is not sufficient to convict an accused man unless there is corroborative evidence, and it is no corroboration to show that the two accused must have acted together in a matter unconnected with the charge against them. An accused person confessed to having committed breaches of trust and implicated his co-accused on a charge of abetment of the same. There was no corroborative evidence but a document was found in the house of the latter which could not have come there without the two accused having acted in concert, but it was totally unconnected with the breach of trust. **Held**, that there was no corroborative evidence to justify a conviction of the latter. (1900) 5 C.W.N. 296.

——S. 30—Corroboration, need for—Co-accused whether punishable on such confession solely.

A person accused of abetment cannot be convicted of it solely on the confession of the accused implicating him in the offence. **See** S. 133. (1900) 5 C.W.N. 294.

4. Essentials for admissibility.

——S. 30—Essentials for Admissibility—Confession of co-accused—Admissibility—Condition.

The words "affecting himself and some other of such persons" in S. 30 of the Evidence Act suggest that before the confession made by one person can be taken into consideration as against other persons, who are being tried jointly with him for the same offence, it must affect the maker as well as others. If the statement does not affect the maker thereof or only ascribes to him a part not sufficient by itself to justify his conviction for the offence for which he is being jointly tried with others, it will not be a confession of the nature contemplated by the section. A.I.R. 1949 All. 132=50 Cr. L. J. 144.

——S. 30—Admissibility of confession of co-accused—Conditions.

All that is necessary for a confession to be admissible against a co-accused is that the maker should inculpate himself in all the offences in which he implicates the other co-accused, and it is not necessary that he should ascribe to himself as major a part in the commission of the crime as he ascribes to the other co-accused. The explanation to S. 30 of the Evidence Act makes it clear that an attempt to commit the offence and an abetment of the offence are included in the term "offence". So, even if the maker of the confession implicates himself only in an attempt to commit, or, in the abetment of, the offence, or a minor part in the commission of the offence, the admissibility of the confession against the other accused is not affected. But where the confession implicates the maker in one out of the several offences and implicates the other co-accused in the other offences as well, it cannot be said that the confession "affects himself and some other of such persons" within the meaning of S. 30, because **ex hypothesis** the confession does not affect himself, and some other persons with respect to some of the offences. 1949 A. L. J. 60 followed. 1950 A.W.R. 238=1956 A. L. J. 140=I.L.R. 1950 All. 1132.

——S. 30—Essentials for admissibility stated.

Section 30, contemplates that the statement of one accused admissible against his co-accused must be made in the same trial when both accused are charged with the same offence and it must be a confession which affects himself as well as his co-accused. A.I.R. 1937 Sind. 218=38 Cr.L.J. 965=170 Ind. Cas. 746.

——S. 30—Essentials for admissibility.

When the statement is self-incriminatory and also implicates a co-accused, the self-implication is the guarantee for the truth of the accusation against the co-accused and may be taken to be a substitute for the sanction of oath. 120 Ind. Cas. 257=31 Cr. L. J. 26=1930 Cr.C. 45=A.I.R. 1930 All. 29.

——S. 30—Essentials for admissibility.

Before S. 30 of the Evidence Act can be applied it must be proved that a confession has been made by one of the persons who are being tried jointly for the same offence and that the confession affects the person making it as well as some other persons so jointly being tried. The section is new to the Indian Evidence Act as contrasted with the English Law and must be construed strictly. When once there is no such confession as affects the person making it any statement made by one accused cannot be treated as evidence against the co-accused or be taken as affording corroboration of the evidence of the approver. 1929 M.W.N. 698.

——S. 30—Essentials for admissibility.

Statement, for using it against the co-accused must be a confession in respect of an offence with which all are charged. 2 All. 444, **Rel. on**. 109 Ind. Cas. 351=29 Cr.L.J. 527=32 C.W.N. 731=47 C.L.J. 526=10 A.I.Cr.R. 219=A.I.R. 1928 Cal. 416.

——S. 30 — Essentials for admissibility — Statement must not be self-exculpating.

Section 30 contemplates a statement, which, taken by itself, is sufficient to justify the conviction of the person making it for the offence for which he is being jointly tried with the other person or persons against whom it is tendered. 2 All. 444, **Foll**. 89 Ind. Cas. 516=23 N.L.R. 62=26 Cr.L.J. 1380=A.I.R. 1926 Nag. 119.

——S. 30—Essentials for admissibility—Statement must inculpate the maker himself more than or at least equally with the co-accused.

The test to determine whether any statement by a co-accused amounts to a confession under S. 30 is to see whether his statement proposed to be used in evidence against another is sufficient by itself to justify his conviction for the offence for which he is jointly tried with the other person against whom it is tendered. The statement of one prisoner cannot be taken as evidence against another prisoner under S. 30 unless the parties are admittedly in **pari delicto**, that is, unless a confessing prisoner implicates himself to the full as much as his co-prisoner whom he is criminating. The **ratio decidendi** of the cases bearing on this point is that statements which inculpate the maker more than, or equally with, others, alone can afford any satisfactory guarantee of their truth. This necessarily means less weight must be attached to statements which implicate the maker in a lesser degree than others. Where the principal blame is laid on others the statement is self-serving according to the ideas of the person making it and is entirely excluded from consideration. There is absolutely no guarantee whatever as to its truth where the statement entirely exonerates the maker. Such a statement cannot be held admissible as against the co-accused. 90 Ind. Cas. 385=21 N. L.R. 88=26 Cr.L.J. 1537=A.I.R. 1926 Nag. 117.

——S. 30—Essentials for admissibility.

Confession to be used against co-accused must be confession of guilt of maker. 94 Ind. Cas. 258=1926 P.H.C.C. 167=27 Cr.L.J. 594=A.I.R. 1926 Pat. 440.

——S. 30—Essentials for admissibility.

A confession should justify the conviction of the confessor and only then it is admissible against the confessor's co-accused. 22 Cr. L. J. 260, Foll. 95 Ind. Cas. 63=6 Lah. 176=26 Cr.L. J. 735=A.I.R. 1925 Lah. 435.

——S. 30—Essentials for admissibility.

Confession to be admissible must equally incriminate the maker with the co-accused againt whom it is to be used. 81 Ind. Cas. 891=25 Cr.L. J. 1067=A.I.R. 1925 Nag. 78.

——S.30—Essentials for admissibility—Confession of co-accused must implicate the maker to the same extent as the other accused.

The statement of an accomplice is taken into consideration when he himself admits his own guilt to the same extent to which he implicates others. His confession may be taken into consideration against such other persons as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some extent takes the place of the sanction of an oath and so affords some guarantee that the whole statement is a true one. The word 'confession' in S. 30 cannot be construed as including a mere inculpatory admission of guilt. A confession unsupported by other testimony is evidence of the weakest kind against a co-accused. 7 All. 646, Foll. 77 Ind. Cas. 439=25 Cr.L. J. 391=A.I.R. 1925 Oudh 295.

——S. 30—Essentials for admissibility.

Only a confession implicating the maker and not exculpating him is admissible as against the other co-accused. 81 Ind. Cas. 249=25 Cr.L. J. 761=A.I.R. 1925 Sind 116.

——S. 30—Essentials for admissibility.

Merely because a confession is not complete and detailed up to the hilt it does not become inadmissible against a co-accused. 84 Ind. Cas. 548=5 L.R.A.Cr. 101=26 Cr.L. J. 324=A.I.R. 1924 All. 511.

——S. 30—Essentials for admissibility—Confession of co-accused need not completely implicate himself—Substantial implication is sufficient.

No general rule can be laid down as to the admissibility of confession against co-accused and each case must be decided on its own facts. All that is required is that the confession should substantially implicate its maker in regard to the crime with which he and his co-accused are charged. It is not necessary that there should be an admission of actual guilt. It is sufficient if the admission establishes constructive guilt. 75 Ind. Cas. 705=4 P.L.T. 505=25 Cr.L. J. 17=A.I.R. 1924 Pat. 347.

——S. 30—Essentials for admissibility—Confession—Admission—Distinction between.

S. 30 of the Indian Evidence Act 1872, must be strictly construed. It makes a clear distinction between an admission and a confession. It is only under that section that the confession of one of two or more accused, jointly tried for the same offence, can be taken into consideration as against the rest. It must be a confession to be so admissible, that is, it must affect both the person confessing and the other accused. The word "confession", as used in the Act, must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt. The terms of the section do not countenance the construction of the statement into a confession by a process of inferential reasoning. It is one thing to make statements giving rise to an inference of guilt and another thing to confess a crime. (1909) 11 Bom. L.R. 633=3 Ind. Cas. 742.

5. Evidentiary value.

——S. 30—Evidentiary Value—Confession—Weight to be attached to—Judge to warn jury in murder trial. 224 Ind. Cas. 156=1946 P.C. (Rul.) 170=47 Cr. L. J. 575=1946 O.A. (P.C.) 80=1946 A.W.R. (P.C.) 80.

——S. 30—Evidentiary Value—Confession—Antecedent circumstances — Reference to—Value. I.L.R. (1946) All. 111=1946 A.L.W. 383=222 Ind. Cas. 538=1946 A.L.J. 77=47 Cr.L.J. 311=A.I.R. 1946 All. 15.

——S. 30—Evidentiary value—Approver—Findings based on other evidence equally strong—Consideration of approver's evidence, if necessary.

Where the accused does not in any way challenge the findings of the Court with regard to the search for and recovery of a revolver and its connection with the accused and with the crime and there has has been no serious miscarriage of justice, there being amply sufficient evidence in the findings, it is unnecessary to go into consideration of the approver's evidence which has

been challenged. A.I.R. 1946 P.C. 12=47 Cr.L. J. 174=221 Ind. Cas. 215 (P.C.).

——S. 30—Confession of co-accused—Value.

The confession of a co-accused cannot be regarded as substantive evidence against the accused. At the most, it may be taken into consideratiion if there is other independent and reliable evidence to connect them with the crime. A.I.R. 1945 Bom. 292=47 Bom. L.R. 63=47 Cr.L. J. 51=221 Ind. Cas. 86.

——S. 30—Evidentiary value.

The confession of a co-accused is not a substantive piece of evidence and can, at the most, be considered along with other evidence. A.I.R. 1944 Bom. 338=46 Bom. L.R. 589.

——S. 30—Evidentiary value—Confession of co-accused—If can be taken into account in considering whether approver's evidence should be relied on.

A conviction should not be based merely on the confession of a co-accused. The words 'take into consideration' in S. 30, Evi. Act, do not mean that the confession is to have the force of sworn evidence. But such a confession is, nevertheless, evidence in the sense that it is a matter which, the Court before whom it is made may take into consideration in order to determine whether the issue of guilt is proved or not. Such a confession is merely to be an element in the consideration of all the facts of the case; while allowing it to be so considered, it does not do away with the necessity of other evidence. Section 30 entitles the Court to take into consideration the confession of the co-accused in deciding whether it is safe to rely on the approver's evidence. A.I.R. 1944 Mad. 117=56 L.W. 737=(1943) 2 M.L.J. 634=1943 M.W.N. 793=45 Cr.L. J. 373=I.L.R. (1944) Mad. 308=211 Ind. Cas. 367.

——S. 30—Evidentiary value.

If there is substantial evidence against the accused and there remains some lingering doubt, the confession of the co-accused may be taken into account to set that little doubt at rest. A.I.R. 1942 Mad. 444=43 Cr.L. J. 750=55 L.W. 263=(1942) 1 M.L. J. 517=1942 M.W.N. 443=201 Ind. Cas. 461.

——S. 30—Evidentiary value—Confession by accused that he killed deceased because other accused promised to give him certain amount—Whether evidence against other accused.

A confession by an accused to a prosecution witness that he killed the deceased because the other accused had promised to give him a certain amount, is admissible under S. 30, but it would naturally require the strongest independent evidence if any reliance can be placed upon it at all. But it cannot be treated as against the other accused. A.I.R. 1941 Mad. 306=1940 M.W.N. 1238=52 L.W. 898=42 Cr.L. J. 424=193 Ind. Cas. 465.

——S. 30 — Evidentiary value — Confession by accused implicating co-accused—If can be used as positive evidence.

The confessions of an accused implicating the co-accused are of less evidentiary value than the testimony of an accomplice because the man in the dock cannot be cross-examined. They can only be taken into consideration under S. 30, Evi. Act, along with such other evidence as there may be. Such confessions may help the Court to decide whether the other evidence is or is not credible. It cannot, however, supply the place of positive evidence regarding the commission of the crime. A.I.R. 1941 Mad. 267=1940 M.W.N. 767=52 L.W. 258=42 Cr.L. J. 396=193 Ind. Cas. 14.

——S. 30—Evidentiary value—Substantive evidence not sufficient to establish guilt against accused.

When the substantive evidence is not sufficient to establish a **prima facie** guilt against the accused, it is not permissible to use the confession of a co-accused under S. 30, Evi. Act, as if it were itself substantive evidence, which it is not. If there is relevant evidence bearing on the accused's complicity in a particular crime, the confession of a co-accused may be taken into consideration to lend assurance to it. It can in no case be used to fill up the gap in the prosecution evidence. A.I.R. 1940 Nag. 230=1940 N.L. J. 210=188 Ind. Cas. 146.

——S. 30—Evidentiary value.

Though S. 30 lays down that the confession of a co-accused can be taken into consideration, it must always be remembered that where it has never been subjected to the test of cross-examination, at the most it can be only corroborative evidence. A.I.R. 1939 Lah. 429=41 P.L.R. 333=40 Cr.L. J. 897=184 Ind. Cas. 219.

——S. 30—Evidentiary value.

Value of confession of a co-accused is not high but if it receives confirmation it should be treated as substantially true. 41 P.L.R. 424=I.L.R. (1939) Lah. 67 (D.B.).

——S. 30—Evidentiary value.

The confession of a co-accused cannot be the main evidence in a case. It is the weakest possible kind of evidence, which can only be taken into consideration against the co-accused by reason of the provisions of S. 30, Evidence Act. It is not given upon oath and it is not tested by cross-examination. A statement in such a confession cannot alone be held sufficient to justify a finding of guilty of so grave an offence as that under S. 396, which is punishable with death. A.I.R. 1939 Rang. 402=41 Cr.L. J. 129=1940 Rang. L.R. 104=185 Ind. Cas. 205.

——S. 30—Evidentiary value.

Confession made by accused is not evidence against other accused. Such confession can only be taken into consideration against other accused but that does not mean that the confession can take the place of evidence so far as the other accused are concerned. A.I.R. 1938 Mad. 675=1938 M.W.N. 577=48 L.W. 139=39 Cr.L. J. 894=177 Ind. Cas. 494.

——S. 30—Evidentiary value—Approver's evidence and confession of co-accused—Distinction—Tainted evidence.

The exact meaning of "tainted evidence" is not quite clear, whether it means that the person giving the evidence is tainted morally, or whether it means merely that he is a person on whose word reliance cannot be placed. As regards an approver, there is the fear that he is giving evidence in order to save his skin and therefore, he is liable to make statements which are not true, if he thinks they will be for his benefit. But as regards the confession of a co-accused, this cannot be called tainted evidence for, the same reason. A person making a confession does so deliberately and after having been warned solemnly by the Magistrate of the consequences of making a confession and knowing that he may be convicted thereon, if he still persists in his purpose and makes a confession, the statements that he makes cannot be considered to be tainted statements unless it be that they are tainted because he is an immoral person who has committed a criminal offence. But all immoral persons are not necessarily and always liars. It cannot be argued that because the confession is admissible, therefore, it must be believed. In each case

it has to be considered whether the confession is a true one, whether there are any circumstances which suggest that it is false, or that some of the statements made therein are false. A.I.R. 1938 Rang. 92=39 Cr.L. J. 481 =1938 Rang. L.R. 30=174 Ind. Cas. 947.

——S. 30—Evidentiary value—Court can only treat confession as lending assurance to other evidence against a co-accused.

All that S. 30 provides is that the Court may take the confession of a co-accused into consideration against the other co-accused, that is to say, that the Court can only treat a confession as lending assurance to other evidence against a co-accused. A.I.R. 1938 Rang. 92= 1938 Rang. L. R. 30=39 Cr. L. J. 481=174 Ind. Cas. 947.

——S. 30—Evidentiary value.

It is a fallacy to say that the confession of a co-accused can be dealt with on the same basis as the evidence of an accomplice. Accomplice's testimony stands on a higher footing than confession of a co-accused. The confession of a co-accused is only a relevant fact which the Court has to consider. It is not strictly evidence against a co-accused and a conviction based solely on the confession of a co-accused is bad in law. A.I.R. 1937 Bom. 31=38 Bom. L.R. 1122= 166 Ind. Cas. 569.

——S. 30—Evidentiary value—Conviction on confession of co-accused.

A conviction on the confession of a co-accused alone is bad in law. A.I.R. 1937 Cal. 433=38 Cr.L. J. 852= 170 Ind. Cas. 201.

——S. 30—Evidentiary value—Weight of—Extra-judicial confession against co-accused — Only corroboration—Testimony of eye witness—Confession whether to be acted upon.

The weight of an extra-judicial confession against a co-accused is not very great and can only be taken into account if it was adequately corroborated. Where the only corroboration in the case is the evidence of eye-witnesses which cannot be implicitly relied upon in view of the possibility of a genuine mistake on their part, the confession cannot be acted upon. 157 Ind. Cas. 1054=37 P.L.R. 345=36 Cr.L. J. 1305.

——S. 30—Evidentiary value.

It would be far too dangerous to consider that a confession of a co-accused amounts to evidence against a person. It is not so stated under S. 30, and it has long been settled law that a conviction cannot be based on the confession of a co-accused. A.I.R. 1935 Lah. 230=35 Cr.L. J. 1180=150 Ind. Cas. 1056.

——S. 30—Evidentiary value—Co-accused against whom charge is withdrawn—Evidence, value of.

A co-accused against whom the charge has been unconditionally withdrawn is a more reliable witness than an accomplice who is examined under conditional pardon. A.I.R. 1933 Cal. 148=34 Cr.L J. 675=144 Ind. Cas. 74.

——S. 30—Evidentiary value.

Per **Reilly, J.**—Section 30 of the Evidence Act, is a very exceptional, indeed an extraordinary provision, by which something which is not evidence may be used against an accused person at his trial. Such a provision must be used with the greatest caution and with care to make sure that it is not stretched one line beyond its necessary intention.

Under S. 30, the confession of an accused cannot take the place of evidence against a co-accused; it cannot add to or supplement evidence otherwise insufficient but where there is evidence against the co-accused, sufficient, if believed, to support his conviction, then the kind of confession described in S. 30 may be thrown into the scale as an additional reason for believing that evidence. A.I.R. 1931 Mad. 177=59 M.L.J. 471 =1930 M.W.N. 858=32 L.W. 527=32 Cr.L.J. 448= 54 Mad. 75=129 Ind. Cas. 645.

——S. 30—Evidentiary value.

Under S. 30, the confession of a co-accused, if proved can be treated as evidence against an accused person. The weight that is to be attached to it as evidence against the accused, however, is a different matter, and depends upon the circumstances of the particular case. Such evidence is derived from a tainted source, as is the evidence of an approver and it is therefore, open to grave suspicion; further, it is not subjected to cross-examination, and for that reason also, it should not be regarded as evidence of any value against another accused who is tried jointly for the same offence unless it supported by some material corroboration upon which reliance can be placed. It is not desirable to lay any hard and fast rule as to what should be the form or nature of such corroboration. A. I. R. 1931 Rang. 235=33 Cr.L.J. 205=135 Ind. Cas. 849 (S.B.).

——S. 30—Evidentiary value.

Statement of accused taken after close of prosecution case under S. 342, Criminal P. C., implicating co-accused—It is admissible against co-accused—But no weight can be attached to it if co-accused implicated by it was not given opportunity to cross-examine accused nor was he asked any questions to explain allegations made against him and statement was not made on oath. 4 Cal. 483; A.I.R. 1923 All. 322; 38 Mad. 302; 17 All. 524 and 23 All. 53, **Cons.**, 6 Bom. 124, **Rel. on.** 32 Bom. L. R. 747=A.I.R. 1930 Bom. 354=54 Bom. 531=127 Ind. Cas. 105.

——S. 30—Evidentiary value.

In the absence of any corroboration connecting an accused with the commission of offences the confession of a co-accused cannot be taken into consideration agaist him. 119 Ind. Cas. 325=30 P.L.R. 646=30 Cr. L. J. 1046=11 Lah. 106=A.I.R. 1930 Lah. 257.

——S. 30—Evidentiary value.

The self-inculpatory confession of an accused implicating his co-accused is fact upon which alone the conviction of his co-accused cannot be legally based. Nor can such a confession even if it be corroborated by other evidence which is insufficient by itself to sustain the conviction of the non-confessing co-accused form a legal basis for his conviction.

Per **Full Bench.**—But if there is any other relevant matter implicating the co-accused the Judge is permitted by S. 30 to consider confession along with the said matter and as a result of such consideration to convict the accused. Per **Subhedar, A.J.C.**) Such confession can be legitimately used to corroborate other evidence and even to supplement the same in those exceptional cases in which without such aid the other evidence falls short by very narrow margin of that standard of proof which is requisite for a conviction.

Where the other evidence was to the effect that the accused were seen going on the night of the murder towards the place where the deceased lived and that there was general enmity between the accused and the deceased the evidence is insufficient to justify convic tion of the non-confessing co-accused. 24 W.R. 42 Cr. and 9C. P.L.R. 35 Cr., **Apper.** A.I.R. 1926 All. 377, **Rel. on ; other case law discussed**. A.I.R. 1930 Nag. 242 (F. B.)=26 N.L.R. 229=125 Ind. Cas. 673.

——S. 30—Evidentiary value.

The statement of a co-accused is admissible in evidence but according to the usual practice and as a rule of prudence it is unsafe to accept the tainted testimony of an a accomplice so long as it is not corroborated in material particulars. The difficulty enhances where the said accomplice does not adhere to his statement. 121 Ind. Cas. 103=11 L.R A.Cr. 1=13 A.I.Cr.R. 52=1929 Cr C. 656=31 Cr. L. J. 206=A.I.R. 1929 All 928.

——S. 30—Evidentiary value.

Although a confession of one co-accused may be taken into consideration against another under the provisions of S. 30, it would be unsafe, if not illegal, to rely on it without further corroboration in material particulars. 115 Ind. Cas. 1=30 Cr. L. J. 385=A.I.R. 1929 Lah. 338.

——S. 30—Evidentiary value.

Where there is nothing against an accused person but a confession made by a co-accused from the dock at the trial, a conviction cannot be supported. 118 Ind. Cas. 512=1929 M.W.N. 391= 2 M.Cr.C. 76=30 Cr.L.J. 932=A.I.R. 1929 Mad. 285.

——S. 30—Evidentiary value.

An accused person cannot be convicted solely on such a confession made by a co-accused implicating him. 9 C.P.L.R. 35 Cr. and 37 Cr; 24 W.R. (Cr.) 42; 38 Cal. 559, **Rel. on.** 109 Ind. Cas. 801=11 N.L.J. 104= 29 Cr.L. J. 609=10 A.I.Cr.R. 340=A.I.R. 1928 Nag. 213.

——S. 30—Evidentiary value—Conviction based solely on confession of co-accused is bad.

Under S. 30 the Court may take into consideration, a confession made by an accused person as against the co-accused, but the Court can only treat a confession as lending assurance to other evidence against a co-accused and a conviction based on the confession of a co-accused alone would be bad in law. 38 Cal. 559, **Foll.** 101 Ind. Cas. 881=28 Cr.L.J. 497=8 P.L.T. 566=8 A.I.Cr.R. 151=A.I.R. 1927 Pat. 257.

——S. 30—Evidentiary value.

Confession by itself cannot be treated as sufficient evidence upon which a conviction can be based of the co-accused. 75 Ind. Cas. 753=27 O.C. 40=25 Cr.L.J. 49=A.I.R. 1925 Oudh 1.

—— S. 30—Evidentiary value.

A confession is only evidence against the person who makes it. A convication of an accused based solely on the confession of another accused cannot stand and there must be independent evidence entirely outside if the confession can be used. 81 Ind. Cas. 817=20 M.L.W. 202=25 Cr.L.J. 1041=A.I.R. 1924 Mad. 805.

——S. 30—Evidentiary value.

Confessing co-accused's evidence is practically that of an approver, and must be treated as such especially where the confession was not free from inducement. 10 O L.J. 280=A.I.R. 1924 Oudh 65.

——S. 30—Evidentiary value—Confession of accused can be considered against co-accused but cannot be taken as corroboration of accomplice witnesses.

The confession made by a person can be taken into consideration as against persons who are being tried along with him, such a statement however is always regarded as tainted and cannot be used to corroborate the testimony of the accomplice witnesses. Where the accused made his statement at the end of the prosecution case when the whole of the evidence had been freshly detailed in his presence, it can be rightly used as evidence against himself.

The evidence of one approver cannot be said to corroborate another except where both have, at the earliest opportunity and before there has been any chance of collaboration deposed to the same acts as having been committed by particular accused person. As a matter of prudence unanimity as to the incident deposed to or a sufficient number of them by two approvers should have been insisted on before their uncorroborated testimony was deemed sufficient to warrant a conviction thereon. It is doubtful if assessors, even the most intelligent, pay much attention to the aforesaid **maxim** and their opinion cannot be taken as a substitute for untainted evidence where a prudent person would require it. 68 Ind. Cas. 113=3 Lah. 144=4 L.L.J. 91=9 P.W.R. 1922 Cr.=23 Cr.L.J. 513=A.I.R. 1922 Lah. 1.

——S. 30—Evidentiary value—Conviction based on it alone, is invalid.

Prideaux and Kotval, A.J.Cs.—(Hallifax, A.J.C., Contra)—A confession of an accused not being declared "relevant" by the Evidence Act as against a co-accused cannot be treated as "substantive" evidence and a judgment cannot be based upon it so far as he is concerned. A Court may under S. 30 of the Evidence Act "take it into consideration" with or supplementarily to relevant facts which may form the basis of a judgment (**case-law discussed**). A confession made by a co-accused must be regarded with suspicion. 65 Ind. Cas. 561=23 Cr.L.J. 129=A.I.R. 1922 Nag. 146 (F.B.).

——S. 30—Evidentiary value.

The confession of one co-accused cannot be said to be corroborated by the confession of another accused as against an accused person who has not confessed at all; but the confession of one co-accused may furnish the corroboration of the confession of another accused as against the latter and **vice versa.** 38 B. 156. 60 Ind. Cas. 786=22 Cr.L J. 290.

——S. 30—Evidentiary value.

Whether the confession of an accused can be used against his co-accused should be determined on seeing whether the accused can be convicted on that confession of the crime with which he and the co-accused were charged. 60 Ind. Cas. 660=22 Cr.L.J. 260 (Lah).

——S. 30—Evidentiary value.

The confession of a co-accused cannot **per se** sustain a conviction and to do so, it must be corroborated **aliunde** by independent evidence in some material circumstance. 59 Ind. Cas. 913=22 Cr.L.J. 161=3 U.P.L.R. (Lah.) 24=11 P.W.R. 1921 Cr.

——S. 30—Evidentiary value.

A confession of an accused is not made on oath and its evidentiary value is very low. The statement of even an accomplice has a higher and more probative value than the confession of a co-accused.

The court can only treat a confession under S. 30 as lending assurance to the other evidence against the co-accused and a conviction on the confession of a co-accused alone would be bad in law. By S. 30 the Legislature has conferred upon the Court to take into consideration such confession. The corrobarative evidence must be cogent and it must be corroborative of the **corpus delicti.** 83 Ind. Cas. 889=26 Cr.L.J. 185=16 S.L.R. 197=A.I.R. 1921 Sind 57.

——S. 30—Confession, evidentiary value—Weight due to.

The confession of an accused should not carry the same weight as the evidence of the same person if he were examined as a witness. The Court must after the most careful consideration, decide whether the degree of proof prescribed by S. 3 of the Evidence Act

has been reached or not. U.B.R. 1 (1913) 170=14 Cr.L.J. 566=21 Ind. Cas. 166.

——S. 30—Confession, evidentiary value of.

The confession of a co-accused is inferior in value to that evidence of an accomplice made upon oath and subject to cross-examination and a conviction cannot be based upon such a confession. 5 M.L.T. 355=9 Cr.L.J. 308=1 Ind. Cas. 547.

——S. 30—Confession—Probative value.

A confession is not evidence against the co-accused, but it can lend assurance to other evidence. (1909) 14 C.W.N. 1114=37 Cal. 467=7 Ind. Cas. 359.

——S. 30—Confession, evidentiary value—Probative value of a co-accused's evidence.

The true effect of S. 30 is that the Court can only treat a confession as lending assurance to other evidence againt a co-accused. A conviction on the confession of a co-accused alone would be bad in law. A retracted confession should not be relied upon. 38 Cal. 559=15 C.W.N. 593=12 Cr.L.J. 286=10 Ind. Cas. 582.

——S. 30—Evidentiary value—Confession—Co-accused.

The accusation made by an accomplice in a confession may be considered against a co-accused if that statement is put in evidence against him, but its evidential value would be of the slightest use. (1901) 5 C.W.N. 670=28 C. 689.

6. Joint trial.

——S 30—Joint trial, meaning of—Proceedings under, S. 117, Cr. P. Code.

Persons against whom proceedings are being jointly taken under S. 107 Cr. P. Code in one and the same enquiry cannot be said to be on their joint trial for the same offence within S. 30 of the Evidence Act. 41 All. 231=17 A.L.J. 147=1 U.P.L.R. (H. C.) 89=20Cr.L.J. 206=49 Ind. Cas. 654.

——S. 30—Joint trial—Meaning of — Guilty—Refusal to examine witnesses.

Where one of the accused pleaded guilty and was examined at the end of the prosecution case, and declined to call any witnesses, the trial was a joint trial, so that his confession could be taken into consideration against the other accused. U.B.R. 1 (1913) 170=14 Cr.L.J. 566 =21 Ind. Cas. 166.

——S. 30—Joint trial, meaning of—Confession by persons jointly tried for the same offence—Penal Code, S. 457.

A conviction under S. 456, I.P.C. based on the confession of a co-accused who was being tried along with the prisoner under S. 411 I. P. C. is unsound and must be set aside. U.B.R. (1912) 1. 158=14 Cr. L. J. 376=20 Ind. Cas. 136.

——S. 30—Joint trial, meaning of—Confession of co-accused—Admissibility—Proceedings under S. 110, Cr. P. Code.

A confession by an accused implicating himself and two others in a charge of dacoity is inadmissible against the others in a proceeding under S. 110 of the Cr. P. Code. 22 C.W.N. 408=20 Cr. L. J. 201=49 Ind. Cas. 649.

7. Retracted confession.

——S. 30—Retracted confession of co-accused—Admissibility against other accused and use of—Corroboration necessary—Nature of—Use against maker—Distinction.

It is generally accepted as a rule of prudence that a retracted confession of a co-accused should not be taken into account against other accused and the accused who does not make it, unless it is corroborated in material particulars, both as to the factum of the crime and as to identity. But where the retracted confession is to be considered against the accused who makes it, it is not necessarily corroboration in the above full sense that is required. It may be corroboration by circumstances which satisfy the Court that when the accused confessed, though the confession was retracted, the confession is true and voluntary and may be made the basis of conviction of the accused who makes it. I.L.R. (1945) Kar. 419=224 Ind. Cas. 83=47 Cr.L.J. 548= A.I.R. 1946 Sind 43.

——S. 30—Retracted confession of co-accused—Value of.

The retracted confession of an accused can have very little weight as evidence against a co-accused; being untested by cross-examination, it necessarily has even less value than the evidence of another accomplice which is not corroboration of the evidence of an approver. 230 Ind. Cas. 431=48 Cr.L.J. 651.

——S. 30—Retracted confession—Use against co-accused—Direction to jury.

It amounts to misdirection to direct the jury that the value of a retracted confession against the co-accused is practically nil and that they should not convict him unless it is corroborated by independent evidence on material particulars. The proper direction would be that unless tbe other evidence against the co-accused will stand on its own legs and justify a conviction, the retracted confession should not be in any way used to support a conviction. Similarly, the direction that if the jury believed such a retracted confession to be true they may convict the maker thereof on that confession alone even though it is not corroborated in material particulars would amount to a misdirection in the absence of the usual caution that it is unwise to convict unless it is corroborated in material particulars. A.I.R. 1946 Cal. 139=49 C.W.N. 719=223 Ind. Cas. 621=47 Cr. L. J. 536.

——S. 30 — Retracted confession — Weight of, against co-accused—Corroboration, nature of.

As against the accused who made it, a retracted confession can properly form the basis of conviction, if it is believed to be true and voluntary. As against the co-accused, prudence requires the Court not to rely on such a confession without independent corroborative evidence in two essentials. The corroboration should not only confirm the general story of the event of the crime but must also connect the accused with the crime. A.I.R. 1946 Sind 43=I.L.R. (1945) Kar. 419=224 Ind. Cas. 83=47 Cr. L. J. 548.

——S. 30 — Retracted confession — Conviction, when can be based on retracted confession.

A conviction can be based on a retracted confession without corroboration, if the reasons given by the accused for withdrawing the confession are palpably false. A.I.R. 1944 Mad. 117=56 L.W. 737=45 Cr. L. J. 373=(1943) 2 M. L. J. 634=1943 M.W.N. 793 =I.L.R. (1944) Mad. 308=211 Ind. Cas. 367 (F.B.).

——S. 30 — Retracted confession — Standard of corroboration.

As against the co-accused, a retracted confession may be taken into consideration subject, however, to the rule which is now firmly established that it cannot form the basis of a conviction without substantial and independent corroboration both as to the crime and the criminal. Futher, a higher standard of corroboration in regard to a retracted confession must be demanded than in the case of the testimony of an

approver because the testimony of an approver can be tested by cross-examination whereas the confession of an accused cannot be subjected to such a test.

The account of the murder given by the accused in his confession that he alone with other accused committed the murder was corroborated by the medical evidence and by the finding of the bodies. His **pagri** was found to be blood-stained on arrest and he himself gave information leading to the recovery of a spear and a sword. These weapons were not proved to be stained with human blood but they were discovered buried in a field:

Held, that the fact that the accused did give information leading to the discovery of a buried sword which was, in fact, a **kirpan**, a weapon which there was no need to bury unless it was used for some guilty purpose, was in the particular circumstances, material corroboration. A.I.R. 1942 Lah. 271=44 P.L.R. 448=44 Cr. L. J. 77=203 Ind. Cas. 488.

——S. 30—Retracted confession.

As a rule of prudence it is unsafe to rely upon a retracted confession made by an accused unless it is corroborated in material particulars so as to satisfy the Court that the confession may be acted upon, and a retracted confession is very slight evidence indeed against the co-accused who are named as participants in the crime. A.I.R. 1942 Pat. 90=43 Cr. L. J. 36=23 P.L.T. 387 =196 Ind. Cas. 597.

——S. 30—Retracted confession.

A retracted confession may be valuable evidence against the accused making the confession but it is of very little value against a co-accused. A.I.R. 1938 Lah. 252=40 P.L.R. 58=39 Cr. L. J. 491=174 Ind. Cas. 849 (1).

——S. 30—Retracted confession—Confession of exculpatory nature.

A confession of an exculpatory nature made by an accused and subsequently retracted cannot be used against a co-accused. A.I.R. 1938 Pat. 352=39 Cr. L. J. 725=176 Ind. Cas. 530.

——S. 30—Retracted confession—Corroboration.

A retracted confession by a co-accused is admissible in evidence but the rule of prudence is to seek corroboration before the conviction of a co-accused is based thereon; as to what the nature of the corroboration should be will depend upon the facts of each particular case. A.I.R. 1938 Pat. 108=16 Pat. 612=19 P.L.T. 104=39 Cr. L. J. 325=173 Ind. Cas. 507.

——S. 30—Retracted confession—Value of—Considerable circumstantial evidence connecting accused—Use of confession of co-accused to remove doubts still remaining.

Obviously, a retracted confession has little evidentiary value against a co-accused when compared with the evidence of an accomplice given on oath, which can be tested by cross examination; but when, there is considerable circumstantial evidence connecting the accused with the murder, the Court is entitled to use the confession of a co-accused to remove any doubts that might still linger in its mind whether, in spite of the fact that the accused has been identified, that he was seen both before and after the offence under suspicious circumstances, yet, by some chance he may not have taken part in the murder. A.I.R. 1937 Mad. 755=39 Cr. L. J. 390=1937 M. W. N. 537=I. L. R. (1938) Mad. 348=46 L.W. 144=173 Ind. Cas. 1001.

——S. 30—Retracted confession.

When a confession is retracted, it becomes very unsafe to use the contents of that confession against any co-accused. On the other hand, a Judge sitting alone, after due consideration and taking into consideration all extraneous facts such as the statements made by the Police Officers who were originally in charge of the persons confessing, the statement of the Magistrate who took down the confession and the general tone of the confession itself together with the probabilities to be attached to the explanatory statement retracting the confession, can accept the confession as being a true and proper account of the necessary happenings to support the prosecution case before the Court. A.I.R. 1936 Cal. 316=63 C. L. J. 232= 37 Cr. L. J. 775=63 C. 1053=163 Ind. Cas. 41.

——S. 30—Retracted confession—Value of, as against co-accused.

Section 30 is an exception to the general rule of English law and the rule which prevailed in India before the passing of the Evidence Act, 1872, that the confession of an accused person was only evidence against himself and could not be used against others. The weakness of the guarantee afforded by self-implication, and the dangerous and expceptional character of the evidence require that this section (S. 30) should be construed very strictly; and where the guarantee afforded by self-implication is rendered nugatory by the confessing accused himself retracting his confession and denying the truth of the statements made therein, then little or no reliance can be placed upon such a retracted confession so far as co-accused are concerned. A.I.R. 1936 Oudh 156=37 Cr. L. J. 163=1936 O.W. N. 64=11 Luck. 662=159 Ind. Cas. 875.

——S. 30—Retracted confession.

Per **Rupchand, A.J.C.**—A confession, merely because it has been retracted, does not become inadmissible in evidence against a co-accused, although its evidentiary value is thereby considerably diminished. But before a statement made by an accused person is treated as evidence against a co-accused, it must amount to a confession of the very crime with which he and the co-accused are charged, and, for that purpose, where the sole evidence in the case is the confession, the Court is bound to take into consideration the confession as a whole, and not only a part of it. 156 Ind. Cas. 972=36 Cr. L. J. 1037.

——S. 30—Retracted confession—Confession fourteen days after arrest and retracted before trial—Conviction of co-accused on it.

Confession made 14 days after arrest by the Police and retracted at the earliest opportunity before the trial Magistrate has no evidentiary value as against the co-accused. A. I. R. 1934 Lah. 718=36 Cr. L. J. 300 (2)=37 P.L.R. 132=153 Ind. Cas. 139.

——S. 30—Retracted confession—Duty of Court.

The incriminating statement of a co-accused is no more than the tainted testimony of an accomplice. The statement is without the safeguard of either oath or cross-examination. When an accused person does not implicate himself as fully and substantially as he does his co-accused, the statement cannot be used as evidence against the co-accused. The case for the rejection of the confession as against the co-accused would be much stronger where the confession has been eventually retracted. Value of retracted confession against co-accused is exceedingly weak and unless it is materially corroborated, no conviction should be based on it. In considering this question, the first question which prudence would require a Court to consider is whether the confession made by an accused person bears the stamp of truth.

Where a confession has been made by an accused person after he has been given an opportunity to

think over his position, the Court may be justified in drawing the presumption that it was made voluntarily. But this fact does not relieve it from its duty of carefully considering the nature of the confession made and the value to be attached to it. The Court, in such cases, should very carefully scrutinize the confession and then decide for itself whether it is one which appears to be reliable and trustworthy. A.I.R. 1934 Oudh 418=35 Cr. L. J. 1290=11 O.W.N. 1012=10 Luck. 150=151 Ind. Cas. 298.

——S. 30—Retracted confession—Law relating to.

A confession which has been retracted must be viewed with suspicion. But if it is considered to have been a voluntary confession and substantially true, it can be admitted into evidence and used against its maker. If it is considered to be such a confession as substantially implicates its maker in regard to the crime with which he and the co-accused are charged, it can be used also against the co-accused. But even then it can carry no weight, except where it is substantially corroborated by good evidence from other sources. A.I.R. 1934 Pat. 586=36 Cr. L. J. 12=15 P.L.T. 711=152 Ind. Cas. 275.

——S. 30—Retracted confession—Corroboration, necessity of.

The effect of the retraction of a confession is not to cancel the confession but it puts the Court on inquiry as to its value, its voluntary character and the probability of its being true and although as a matter of law, corroboration is not necessary for a retracted confession, as a general rule, retracted confession requires corroboration of some kind. The amount of corroboration which the Court will look for depends on the circumstances of the particular case and sometimes very slight corroboration will suffice. A.I.R. 1933 Bom. 230=35 Bom. L. R. 371=34 Cr. L. J. 896=145 Ind. Cas. 133.

——S. 30—Retracted confession.

A confession, though it is retracted is admissible against the parties making it. A.I.R. 1933 Nag. 249=16 N. L. J. 129=34 Cr. L. J. 1141=146 Ind. Cas. 17 (2).

——S. 30—Retracted confession—Value of, against other accused.

The retracted confession made by a co-accused is not legally sufficient to justify the conviction of other accused jointly tried with him, unless it is sufficiently corroborated by other evidence.

Where the Magistrate who recorded a confession as well as the Sessions Judge who tried the accused both believed the confession to be voluntary and true and nothing was urged in appeal to make the Court doubt the veracity or the voluntary nature of the confession made by the accused:

Held, that there was no reason to reject the confession of the accused as against the accused making it even though it were retracted. A.I.R. 1933 Oudh 263=10 O. W. N. 405=34 Cr. L. J. 595=143 Ind. Cas. 555.

——S. 30—Retracted confession.

A retracted confession should carry practically no weight as against a person other than the maker. The very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath.

Where the confessing accused retracted their confessions and when pardon was offered to two of them with a view to their giving evidence as accomplices, they refused to accept such pardons and the Sessions Judge came to the conclusion that none of the confessing accused would accept pardons even if offered to them:

Held, that this fact weakened the value as evidence of these confessions against the appellants (non-confessing accused) as it showed that none of the confessing accused was prepared to give evidence on oath denouncing the appellants as having taken part in the dacoity, even though thereby they themselves would obtain a pardon. A.I.R. 1933 Rang. 320=35 Cr. L. J. 39=146 Ind. Cas. 303 (2).

——S. 30—Retracted confession—Necessity of corroboration.

The retracted confession of an accused person is admissible against a co-accused but is practically of no value unless there be independent corroboration. The corroboration must connect the accused with the commission of the offence and the tainted evidence of an approver is not sufficient corroboration. A.I.R. 1932 Lah. 298=33 Cr. L.J. 251=33 P.L.R. 602=136 Ind. Cas. 27.

——S. 30—Retracted confession — Sufficiency for conviction.

A conviction cannot be safely based on the retracted confession of a co-accused. 137 Ind. Cas. 290=9 O.W.N. 243=33 Cr. L.J. 514 (2).

——S. 30—Retracted confession—Value of.

A retracted confession is evidence and there is no provision in S. 30, by which a confession is to be received in one way against one person and in another way against another. The use to be made by the Court of a confession, whether retracted or not, is a matter of procedure rather than law, the business of the Court being to make up its mind in accordance with the dictates of common sense, whether it is safe to believe the confession or not.

The mere fact that the confessions were retracted will not raise an inference that they were obtained by improper inducement, threat or promise. A.I.R. 1931 Lah. 196=32 Cr. L. J. 579=130 Ind. Cas. 641.

——S. 30—Retracted confession—Value of.

Where a confession which does not contain statements of any value in evidence except an admission of the guilt of the accused has been subsequently retracted, it is not sufficient in itself to justify the conviction of the person making it, and if the Sessions Judge and the assessors hold that it is untrue, the Appellate Court cannot say that the Judge and the assessors were wrong. A.I.R. 1931 Oudh 83=8 O.W.N. 31=32 Cr. L.J. 630=6 Luck. 582=131 Ind. Cas. 72.

——S. 30—Retracted confessions.

In cases where the sole evidence against the accused is that of a retracted confession such confession if it is relied on must be relied on as a whole and not only in part. 121 Ind. Cas. 550=1930 Cr. C. 84=31 Cr. L.J. 300=A.I.R. 1930 All. 192.

——S. 30—Retracted confession—Value of.

A retracted confession is sufficient evidence for convicting the person who made it if the Court believes it to be true. As regards the person making it such a confession may even without any corroborative evidence form the basis of conviction. As regards his co-accused corroborative evidence is necessary. 20 All. 133; 29 All. 434; A.I.R. 1925 All. 627 and A.I.R. 1927 Oudh 17, Rel. on. 7 O.W.N. 805=1930 Cr. C. 952=A.I.R. 1930 Oudh 412.

——S. 30—Retracted confession—When material for conviction of co-accused.

The retracted confession alone of an accused is not sufficient to justify the conviction of a co-accused, but where such confession stands unrebutted, and there is nothing to show that the accused had any reason for naming other men falsely, and his story fits in exactly with the facts known or proved and is corroborated sufficiently by material evidence against the co-accused, the confession is admissible, and may be a strong piece of evidence against the co-accused. 127 Ind. Cas. 247=7 O.W.N. 527=A.I.R. 1930 Oudh 353.

——S. 30—There is no distinction between retracted and unretracted confession.

The Evidence Act makes no distinction whatever between a retracted or unretracted confession. Both are equally admissible and may be taken into consideration against the accused though it may be that less weight would be attached to a retracted confession. 115 Ind. Cas. 359=32 C.W.N. 1004=30 Cr. L.J. 475=A.I.R. 1929 Cal. 14.

——S. 30—Retracted confession.

Retracted confession must be corroborated by independent evidence in material details. 116 Ind. Cas. 621=30 P.L.R. 377=30 Cr. L.J. 640=1929 Cr. C. 167=13 A.I Cr. R. 49=A. I. R. 1929 Lah. 597.

——S. 30—Retracted confession.

Confession retracted though to be regarded with suspicion is admissible—If corroborated in material particulars or otherwise truthful it can be used even against co-accused. 117 Ind. Cas. 43=8 Pat. 262=10 P.L.T. 228=30 Cr. L. J. 716=A.I.R. 1929 Pat. 212.

——S. 30—Retracted confession.

Retracted confession of co-accused is not sufficient for conviction. 30 P. R. 1914, Cr., Ref. 107 Ind. Cas. 614=29 Cr. L. J. 267=9 A.I. Cr. R. 527=A.I.R. 1928 Lah. 329.

——S. 30—Retracted confession.

The rule is now firmly established that ordinarily, it is improper to use the retracted confession of an accused person against his co-accused and that, generally speaking it is not safe to convict the maker of such a confession without corroboration in material particulars. 104 Ind. Cas. 630=28 P. L. R. 583=9 A. I. Cr. R. 56=28 Cr. L. J. 854=A. I. R. 1927 Lah. 765.

——S. 30—Retracted confession.

Retracted confessions although they are nevertheless evidence against the person making them cannot be used as against the co-accused without substantial corroboration. 101 Ind. Cas. 881=28 Cr. L. J. 497=8 P.L.T. 566=8 A. I. Cr. R. 151=A.I.R. 1927 Pat. 257.

——S. 30—Retracted confession.

As a matter of practice the Courts decline to convict accused persons on retracted confessions unless these confessions receive material corroboration, but this is a rule of prudence; not a rule of law. 101 Ind. Cas. 881=28 Cr. L. J. 497=8 P. L. T. 566 =8 A. I. Cr. R. 151 =A. I. R. 1927 Pat. 257.

——S. 30—Retracted confession.

It is not safe to base conviction on the retracted uncorroborated confession of a co-accused and mere identification of an accused person by a confessing accused, who admittedly knew him, is absolutely no corroboration of the statement of the confessing accused. Also the mere fact that the accused were not found at their house and that they were absconding is no corroboration of such a confession. 95 Ind. Cas. 938=7 L. R. A. Cr. 143=27 Cr. L. J. 858= A.I.R. 1926. All. 603.

——S. 30—Retracted confession.

The confession of an accused person, whether retracted or not, can be taken into consideration as against his co-accused. But an accused person cannot be convicted solely on the confession or confessions of his co-accused unsupported by other evidence: 3 U. B. R. 3, Foll. 95 Ind. Cas. 71=4 Rang. 45=27 Cr. L. J. 743=A.I.R.. 1926 Rang. 127.

——S. 30—Retracted confession.

A retracted confession is not inadmissible in evidence and a Judge does right in letting it in and leaving it to the jury to decide the value to be attached to it as against the maker. 69 Ind. Cas. 145=49 Cal. 573=35 C. L. J. 279=23 Cr. L. J. 657=26 C. W. N. 680=A.I.R. 1922 Cal. 107.

——S. 30—Retracted Confession.

Accused made a confesion which he subsequently retracted. In the confession he carefully avoided saying that he took any actual hand in the murder. He stated however that he was one of the original conspirators and that he was present and saw the murder being committed without attempting to interfere,

Held, this confession cannot be taken into account against the co-accused as the person making confession did not intend to implicate himself though he actually did so. 68 Ind. Cas. 401=4 Lah. L.J. 41=23 Cr. L.J. 561=A.I.R. 1922 Lah. 119.

——S. 30—Retracted confession—Murder—Conviction.

It is unsafe to base the conviction of an accused for murder on his retracted confession unless it is corroborated by trustworthy evidence in all meterial particulars. 2 P.W.R. 1917, Cr.=75 P.L.R. 1917 =18 Cr. L.J. 779=41 Ind. Cas. 155.

——Ss. 30 and 114 (b)—Retracted confession of co-accused—Conviction.

The confession of a co-accused is not the same thing as the testimony of an accomplice. It may be taken into consideration as lending support to other evidence. But in the absence of other evidence, conviction based upon it is improper. The weight to be given to a retracted confession depends upon the circumstances under which it is made and on the intrinsic value of the confession. 3 U.B.R. (1917) 3=18 Cr. L.J. 774=11 Bur. L.T. 140=41 Ind. Cas. 150.

——S. 30—Retracted confession—Corroboration.

As against a co-accused a confession which has been retracted at the first opportunity should not be relied upon, unless corroborated by independent testimony. 32 P.W.R. 1916 Cr.=17 Cr.L.J. 226=26 P.R. 1916 Cr.=153 P.L.R. 1916=34 Ind. Cas. 642.

——S. 30—Retracted confession—Co-accused—Evidence against.

Where in a charge of murder, one of the two accused makes a confession implicating the other accused also but retracts it later on, independent

evidence should be forthcoming in regard to each accused implicated. Where there is no real corroboration of the retracted confession, the accused are entitled to the benefit of the doubt and must be acquitted. 22 P.W.R. 1915 Cr.=163 P.L.R. 1915=16 Cr. L. J. 469=29 Ind. Cas. 101.

——S. 30—Retracted confession—Value of—Corroboration, necessity of.

A retracted confession of a co-accused is admissible under S. 30 of the Evidence Act and can be taken into consideration against him, but a conviction cannot be based on it unless corroborated in material particulars by other evidence. 5 P.L.R. 1915=3 P.W.R. 1915 (Cr.)=16 Cr.L.J. 157=27 Ind. Cas. 221.

——Ss. 30 and 114—Retracted confession—Confession by co-accused—Value of retracted confession.

The confession referred to in S. 30 cannot be restricted to an unretracted confession and there is nothing to prevent a Court from convicting after considering the confession but the rules of practice of the High Courts in India are to be observed when exercising the discretion. A conviction founded solely on the confessions of co-accused cannot be sustained. S. 114 of the Evidence Act applies to the testimony of an accomplice on oath but not to a confession and a judge sitting with assessors ought never to convict solely on confession but where sitting with jury he could either ask the accused to withdraw the confession or direct them to acquit unless corroborated in material particulars by independent evidence. 38 Bom. 156=15 Bom. L.R. 975=14 Cr.L.J. 625=21 Ind. Cas. 673.

——Ss. 30, 114, and 133—Retracted confession of accomplice—Value of.

There is nothing in law to prevent the conviction of an accused on the uncorroborated and retracted confession of an accomplice, if it be believed against him. 6 Bur. L.T. 47=14 Cr.L.J. 179=19 Ind. Cas. 179.

——Ss. 30 and 24—Retracted confession.

Extra judicial confession by boys cajoled or frightened but retracted before the committing magistrate, does not prove a case against persons jointly accused with the boys. 14 P.R. (Cr.) 1911 =42 P.W.R. 1911 (Cr.)=12 Cr.L.J. 597=12 Ind. Cas. 973.

——S. 30— Retracted confession of a co-accused.

A retracted confession of a co-accused under S. 30 should not be considered as supplying sufficient evidence for the conviction of the other co-accused. 5 P. R. 1911 Cr.=91 P. L. R. 1911=27 P. W. R. 1911 Cr. = 12 Cr. L. J. 276=10 Ind. Cas. 857.

8. Scope and applicability.

——S. 30—Applicability — Conditions— "Same offence" —Meaning.

S. 30 of the Evidence Act requires that the persons concerned must be tried jointly for the same offence, which expression means an offence coming under the same legal definition, that is, under the same section of the law.

Where two accused are charged under Ss. 302 and 457, I. P. Code and the third under Ss. 460 and 411, I.P. Code and the latter is convicted under S. 411, I. P. Code only, S. 30 of the Evidence Act would not apply to a confession made by the third accused and it could not be taken into consideration to determine the guilt of the other two accused. 51 Cr. L. J. 1004 A.I.R. 1950 H. P. 35.

——S. 30—Scope and applicability—Confession—Use against co-accused—Principles regulating—Joint trial for major and minor offences.

The words "affecting himself and some other of such persons" in S. 30 of the Evidence Act suggest that before the confession made by one person can be taken into consideration as against other persons, who are being tried jointly with him for the same offence, it must affect the maker as well as others. If the statement does not affect the maker thereof or only ascribes to him a part not sufficient by itself to justify his conviction for the offence for which he is being jointly tried with others, it will not be a confession of the nature comtemplated by S. 30.

Where more persons than one are being tried jointly for offences, one of which is major and the other is minor offence, and those offences are inter-connected, if the person making the confession does not incriminate himself so far as the major offence is concerned, if cannot be said that the confession affects him as well as others. 1932 A.L. J. 162, Approved: 1937 A.W.R. 1099, Not approved. I.L.R. (1949) A. 658=1949 A.W.R. 13=1949 A.L.J. 60=A.I.R. 1949 All. 291=50 Cr.L.J. 498.

S. 30—Scope — "Same offence" — Meaning—Joint trial of two persons, one under S. 457/380 and another under S. 411, I. P. Code—Confession by one—Admissibility against the other.

The words "same offence" in S. 30, Evidence Act, mean "identical offence", and cannot mean "offence of the same kind" as under S. 234, Cr. P. Code. Where two persons are jointly tried one for an offence under S. 457/380, I. P. Code, and another under S. 411, I. P. Code, a confession made by one of them cannot be taken into consideration against the other who has been inmplicated in the confession of the former. 49 Cr. L. J. 207=A.I.R. 1948 Sind 65.

——S. 30—Scope—Confession to be taken as a whole—Limits to rule. I.L.R. (1946) All. 111=1946 A.L.W. 383=222 Ind. Cas. 538=1946 A.L. J. 77=47 Cr.L. J. 311=A.I.R. 1946 All. 15.

——S. 30—Scope—Confession ascribing to maker minor part in crime — Admissibility against co-accused. 225 Ind. Cas. 153=47 Cr.L. J. 695=A.I.R. 1946 Cal. 156.

——S. 30—Scope and applicability.

Confession if can be of any offence—Several accused tried for a major offence—Confession of one of a minor offence—Admissibility against other co-accused. I.L.R. (1946) Mad. 593=224 Ind. Cas. 74=A.I.R. 1946 Mad. 124.

——S. 30—Scope—"Take into consideration"—Meaning of—Accomplice cannot corroborate to another accomplice.

It is an accepted rule that one accomplice cannot corroborate to another accomplice. The words "take into consideration" in S. 30 do not mean that the confession is to have the force of sworn testimony. But such a confession is evidence in the sense that it is a matter which the Court, before which it is made, may take into consideration in order to determine whether the issue of guilt is proved or not. The wording of S. 30, however, shows that such a

confession is merely to be an element in the consideration of all the facts of the case; while allowing it to be so considered, it does not do away with the necessity of other evidence. A.I.R. 1946 Mad. 271=59 M.L.W. 22=(1946) 1 M.L.J. 42=1946 M.W.N. 49=I.L.R. (1946) Mad. 389 (D.B.).

——S. 30—Scope—Confession must be of offence for which accused are jointly tried.

The confession, as mentioned in S. 30, must be a confession of the offence for which the accused persons have been tried and not of some other offence. Where they are tried for murder, but one of the accused confesses only to an offence under S. 201, Penal Code, the confession cannot be taken into consideration against the other accused. A.I.R. 1939 Nag. 309=40 Cr.L.J. 934=1939 N.L.J. 469=184 Ind. Cas. 258.

——S. 30—Scope—Confession need not claim for maker the leading part in crime.

No doubt S. 30 requires that the confession should be one affecting its maker but the law does not go so far as to require that the confession should claim for its maker the leading part in the crime. A.I.R. 1939 Pat. 35=39 Cr.L.J. 997=19 P.L.T. 801=18 Pat. 82=178 Ind. Cas. 130.

——S. 30—Scope—If restricts confession to one recorded before Magistrate.

There is nothing in S. 30, which restricts the confession to one recorded before a magistrate. On the other hand, Illus. A to S. 30 suggests that the section contemplates "the taking into consideration" of a confession to an ordinary witness. It follows, therefore, that all such confessions, when the accused are being tried jointly for the same offence, when made by one of them affecting himself and another or others of the accused, may be taken into consideration as against the other or others under S. 30. A.I.R. 1937 Mad. 618=1937 M.W.N. 442=46 L.W. 152=(1937) 2 M.L.J. 60=38 Cr.L.J. 1027=I.L.R. (1937) Mad. 695=171 Ind. Cas. 245 (F.B.).

——S. 30—Scope—Implication of co-accused in confession made at close of prosecution—Whether can be considered as 'proved'.

If a confession is made before the Court itself, it "is a matter before it" and the Court must believe it to exist. It must, therefore, be said to be "proved." A fact can be proved not only by "evidence" as defined in S. 3, Evidence Act, but also by "other matters before the Court." A confession recorded by the Court itself would not be 'evidence'; but would be a "matter before" the Court. Hence the language of S. 30 does not justify a distinction between a confession made by an accused person before the trial and in the course of the trial. A confession made before the Court even at the close of the case for the prosecution, can therefore, be said to be a confession "proved" within the meaning of S. 30, Evidence Act. This being so, it could legally be taken into consideration, that is to say, used as evidence. This evidence will be of the weakest kind and the value to be attached to such evidence is a matter for determination in each particular case. A.I.R. 1936 Lah. 337=16 Lah. 651=37 P.L.R. 806=37 Cr.L.J. 508=161 Ind. Cas. 898.

——S. 30—Scope and applicability—Accused and co-accused not tried for same offence.

One of the conditions requisite to the successful application of S. 30 is that the accused must be tried jointly for the same offence. Then when a confession made by one of the co-accused affecting himself and another co-accused is proved, the Court may take such confession into consideration against the co-accused as well as against the accused who made it. But where the co-accused is not tried for the same offence, his statement should not be taken into account against the accused.

As the statement of a co-accused ranks lower than the evidence of an accomplice because it is not made on oath nor is it tested by cross-examination, corroborative evidence is always necessary. A.I.R. 1936 Sind 236=30 S.L.R. 319=38 Cr.L.J. 124=166 Ind. Cas. 37.

——S. 30—Scope—Must be strictly followed.

Before any statement made by one of the accused persons tried jointly with the others can be taken into consideration against such others, it must fulfil two conditions: (a) It must be a confession of guilt affecting himself equally with the others; and (b) it must be proved against those persons who are jointly tried with him. Section 30, Evidence Act introduces a departure from the ordinary rule relating to the admissibility of evidence and must be strictly construed. A.I.R. 1935 Lah. 35=37 Cr.L.J. 75=159 Ind. Cas. 381.

——S. 30—Scope—"Proved" meaning of.

"Proved" in S. 30, means proved before the prosecution case comes to an end, either proved in the course of the prosecution case or proved in some proceeding previous to the trial. A.I.R. 1935 Lah. 35=37 Cr.L.J. 75=159 Ind. Cas 381.

——S. 30—Scope—'Offence' if includes abetment and attempt—Applicability of S. 30 to proceedings under Criminal P. C., S. 110.

The explanation to S. 30 shows that the word "offence" is used in a wider sense than the technical definition as the explanation states that "offence" as used in this section includes the abetment or attempt to commit the offence. Section 30 applies to a case where there is a proceeding under S. 110, Criminal P.C., against a number of persons, one of whom has made a confession implicating other persons whose conduct is also the subject of an enquiry. Further, as the procedure to be followed under S. 110 is, by virtue of S. 117, that for a warrant case, the procedure under S. 30 applies. A.I.R. 1934 All. 927=1934 A.L.J. 1170=36 Cr.L.J. 198=4 A.W.R. 42=57 All. 312=152 Ind. Cas. 881.

——S. 30—Scope.

Section 30 applies only to statement of co-accused made before and proved at the trial. A.I.R. 1933 Oudh 86=9 O.W.N. 1136=34 Cr.L.J. 124=8 Luck. 286=141 Ind. Cas. 192.

——S. 30—Scope—Confession to be taken as a whole.

Where there is no other evidence to show affirmatively that any portion of the exculpating element in a confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. A.I.R. 1932 Lah. 438=33 P.L.R. 511=34 Cr.L.J. 94=141 Ind. Cas. 40.

——S. 30—Scope—Confession after close of prosecution case, whether admissible against co-accused—'Proved', meaning of.

A confession made by an accused person after the close of the prosecution case when questions are put to him under S. 342, Criminal P. C., cannot be

taken into consideration by the Court under S. 30, Evi. Act, against a co-accused.

In S. 30, 'proved' must mean proved before the case for the prosecution comes to an end, either proved in the course of the prosecution case or proved in some proceeding previous to the trial. A.I.R. 1931 Mad. 820=54 Mad. 788=1931 M.W.N. 886=34 L.W. 162=61 M. L. J. 358=32 Cr.L.J. 1099=134 Ind. Cas. 63.

——S. 30—Scope—A and B charged with murder confession by A that B committed murder and A assisted in concealing body.

The word 'confession' in S. 30, means confession of the offence for which the accused persons are being tried. It cannot reasonably be interpreted to mean a confession of any offence; nor even of any minor offence included in the offence for which the accused persons are being tried, nor of any offence connected with that offence, nor of any other offence which may be disclosed by the evidence.

Where **A** and **B** were accused of murder and **A** made a statement before a Magistrate that he did not take any part in the murder but was compelled by **B** by a threat to assist **B** in disposing of the body:

Held, that the statement could not be taken into consideration against **B** under S. 30, as it was not a confession of the offence of murder for which **A** and **B** were being tried. A.I.R. 1931 Mad. 177=59 M. L. J. 471=1930 M.W.N. 858=32 L. W. 527=32 Cr.L.J. 448=54 Mad. 75=129 Ind. Cas. 645.

——S. 30—Scope and interpretation.

Per **Macnair, A.J.C.**—When S. 30 lays down that the judge may consider a fact in certain circumstances it plainly declares that fact to be relevant in those circumstances. A.I.R. 1930 Nag. 242 (F.B.)=26 N.L.R. 229=125 Ind. Cas. 673.

——S. 30—Scope.

Per **Full Bench.**—Court has discretion to exclude a confession by an accused altogether from consideration against the co-accused if it is so disposed. Per **Macnair, A. J. C.**—The use of the word "may" does not show that every confession is of very small value against a co-accused. It cannot be said that the word "may" gives the Court right to exclude the confession from consideration if it is so disposed. The Judge is given a discretion but the discretion must be exercised in a judicial manner; if the confession would help in arriving at a decision that the accused is guilty he must do so. A.I.R. 1930 Nag. 242 (F. B.)=26 N.L. R. 229=125 Ind. Cas. 673.

——S. 30—Scope and interpretation—"Same offence"—Meaning.

The expression "same offence" in S. 30 means the identical offence and does not mean an offence of the same kind. The legislature did not intend the section to cover different offences in the same transaction by different persons. The illustration to S. 30 makes the meaning of the section quite clear. 115 Ind. Cas. 359=32 C.W.N. 1004=30 Cr.L.J. 475=A.I.R. 1929 Cal. 14.

——S. 30—Scope.

Section 30 does not refer to statements made at the trial but the statements made before and proved at the trial; 33 Mad. 302, **Diss. from**; 45 All. 323 and 4 Cal. 483, **Appr.** 118 Ind. Cas. 512=2 M.Cr.C. 76=30 Cr.L.J. 932=A.I.R. 1929 Mad. 285.

——S. 30—Scope—"May take into consideration."

The expression 'may take into consideration' points to the necessity of there being other evidence on record to which this statement can lend assurance. 109 Ind. Cas. 801=11 N.L.J. 104=29 Cr.L.J. 609=10 A.I.Cr.R. 340=A.I.R. 1928 Nag. 213.

——S. 30—Scope and meaning of—'Affect'

The word "affect" is a very wide one and S. 30 is not limited to a case where the confessing accused directly implicates another accused as well as himself but also covers a case where the confession indirectly affects a co-accused. 97 Ind. Cas. 660=50 Bom. 683=28 Bom. L.R. 1013=27 Cr.L J. 1140=A.I.R. 1926 Bom. 513.

——S. 30—Scope.

To use therefore a statement made in the dock by one accused against the other in a joint trial, offends against at least two of the fundamental principles of criminal law. What is contemplated by Section 30 is formal proof by the prosecution of a confession previously made. When you prove a confession made by a person, you tender evidence at the trial that on some previous occasion he did in fact make a confession, and that is the only thing which was ever contemplated by the section. 76 Ind. Cas. 1025=25 Cr.L.J. 305=21 A.L.J. 179=45 All. 323=A.I.R. 1923 All. 322.

9. Self-exculpatory confession.

——S. 30—Self-exculpatory confession.

Where a co-accused produced a pistol and by way of explanation, stated that it had been given to him by another accused in the same case and the former did not admit that he had any hand in the dacoity for which both of them were tried:

Held, that such a self-exculpatory statement of the co-accused could not be taken into consideration against another accused under S. 30. A.I.R. 1945 Bom. 484=47 Bom. L.R. 648=47 Cr.L.J. 252=222 Ind. Cas. 143.

——S. 30—Self-exculpatory confession— Admission of co-accused.

Where the only evidence against the accused is the admission of the co-accused that he had committed the offence at the instigation of the accused, his conviction cannot be sustained. A.I.R. 1943 Mad. 278=56 L.W. 74=(1943) 1 M.L.J. 154=1943 M.W.N. 62=44 Cr.L.J. 482=206 Ind. Cas. 25.

——S. 30—Self-exculpatory confession.

Confession implicating several other people not mentioned in first information report or arrested or tried:

Held, that the confession was worthless as against all other persons except the maker thereof.

Held, further that absence from the confession of the names of the persons mentioned in the first information report was strong evidence that the confession was, at any rate, not secured by pressure from the Police. A.I.R. 1942 All. 47=43 Cr. L. J. 380=1941 A.W.R. 358=I.L.R. (1941) All. 912=198 Ind.Cas. 452.

——S. 30—Self-exculpatory confession.

A confession of a co-accused is admissible against another accused only if it equally implicates the confessor with his colleague in crime. Where the confessing accused implicates himself as having concealed a dead body but implicates his co-accused not only for concealment but also for the murder, the confession will not be admissible against the co-accused so far as the murder is concerned. A.I.R. 1937 Lah. 127=17 Lah. 547=38 P.L.R. 1018=38 Cr.L. J. 472=167 Ind. Cas. 861.

——S. 30—Self-exculpatory confession.

The confession of an accused which is only a confession about taking part in the disposal of the dead body, so far as the maker of the confession is concerned; and does not implicate the maker of the confession in anything which preceded the death, cannot be made use of against a co-accused who is charged with murder. A.I.R. 1937 Mad. 321=45 L. W. 93=1937 M.W.N. 178=38 Cr.L.J. 753=(1937) 1 M.L.J. 750=169 Ind. Cas. 372.

——S. 30—Self-exculpatory confession—Safeguards to be followed in admitting confession.

The confessor who seeks to implicate a number of other people whilst carefully safeguarding himself, never really does anything at all, but is always on the spot through compulsion, and all that it is useful for is to testify to various happenings which involve other people. Such confessions should be treated with great caution. A.I.R. 1936 Cal. 407=37 Cr.L.J. 1149=165 Ind. Cas. 438.

——S. 30—Self-exculpatory confession.

A confession by each of the co-accused throwing entire burden on the other is inadmissible against the latter. A.I.R. 1935 Lah. 35=37 Cr.L.J. 75=159 Ind. Cas. 381.

——S. 30—Self-exculpatory confession—Corroboration.

Where an accused makes a confession trying to exonerate himself but implicating other co-accused, such a confession must be regarded with suspicion at least so far as concerns the other two persons implicated by the confessor and should not be relied upon without sufficient corroboration. A.I.R. 1935 Rang. 512=37 Cr.L.J. 246=160 Ind. Cas. 210.

——S. 30—Confession of an exculpatory nature—Recording of confession four months after arrest—Conviction, if can be based on so-called confession.

The most important evidence against the accused **A** and **B** in a murder case was the so-called confession of **A**. It was on exculpatory statement. The confession which was recorded four months after arrest, was retracted subsequently:

Held, that the confession could not be considered as against **B** because it was retracted and there was doubt about its genuineness, first as it was an exculpatory statement rather than a confession, and secondly, as the so-called confession was not recorded until four months after **A** was produced.

Held, also, that as regards **A**, the so-called confession was exculpatory as regards any major offence and was of a nature that might possibly be made by an innocent person under comparatively light pressure and was not recorded until four months after his arrest and very grave doubts existed as to its genuineness. 157 Ind. Cas. 229=36 Cr.L.J. 1146.

——S. 30—Self-exculpatory—Statement clearing himself at the expense of the other—Conviction of the other based on such statement.

Where the statement before the Court of a person who was being tried jointly with accused was a statement deprecating his own guilt, being a statement seeking to clear himself at the expense of the accused:

Held, that the statement could not be taken into consideration under S. 30, Evidence Act, or any other provision of the law as against the accused and hence the conviction based mainly on the statement of a co-accused recorded under S. 342, Criminal P. C., could not stand. A.I.R. 1934 Cal. 724=36 Cr.L.J. 194=152 Ind. Cas. 924.

——S. 30—Self-exculpatory confession.

Statement of accused at Police Station implicating his co-accused is not admissible in evidence. A.I.R. 1933 Lah. 167=34 P.L.R. 259=34 Cr.L.J. 1175 (2)=146 Ind. Cas. 27.

—Ss. 30, 133—Self-exculpatory confession—Motive whether corroboration—Evidence not implicating oneself fully—Admissibility.

The existence of hostility as a motive for criminal act is no more than a piece of circumstantial evidence and falls short of proving the participation of the accused in the offence, which is sought to be fastened upon him.

When an accused person, in his statement or confession, imputes the commission of the offence to his co-accused, but does not implicate himself as fully and substantially as he does his co-accused, the said statement cannot be used as evidence against the co-accused. A.I.R. 1932 All. 228=33 Cr.L.J. 201=1932 A.L.J. 162=54 All. 350=135 Ind. Cas. 838.

——S. 30—Self-exculpatory confession.

Where a number of persons were jointly tried for theft and one of them denied that he was guilty of the offence but stated that the theft was committed by another accused who brought to him certain pieces of cloth as his share which he refused to take:

Held, that the statement could not be treated as a confession of an offence and no part of it could be used against the other accused. A.I.R. 1931 Sind 154=33 Cr.L.J. 106=135 Ind. Cas. 267.

——S. 30—Self-exculpatory confessions.

The statement of the accused in her confession admitting her guilt on implicating the co-accused is a self-exculpatory statement and is inadmissible in evidence against the co-accused. 7 O.W.N. 980=A.I.R. 1930 Oudh 502=128 Ind. Cas. 282.

——S. 30—Self-exculpatory confession.

Confession exculpating author from alleged offence is not confession and should not be relied upon for convicting co-accused. A.I.R. 1930 All. 746=1930 A.L.J. 1105=128 Ind. Cas. 593.

——S. 30—Self-exculpatory confession.

Self-exculpatory statement of accused should not be taken into consideration against his co-accused. 120 Ind. Cas. 340=53 Bom. 479=31 Bom. L.R. 545=1929 Cr.C. 114=31 Cr. L. J. 65=A.I.R. 1929 Bom. 296.

——S. 30—Self-exculpatory confession.

Where a self-exculpatory statement is volunteered by a co-accused it is inadmissible in evidence. 120 Ind. Cas. 210=31 Cr.L.J. 15=13 A.I.Cr.R. 157=1929 Cr.C. 673=A.I.R. 1929 Nag. 350.

——S. 30—Self-exculpatory confessions.

A confession made by one of the co-accused who does not implicate himself to the same extent as he implicates the other co-accused is of very little value atleast as against the other co-accused. 116 Ind. Cas. 770=8 Pat. 289=10 P.L.T. 549=30 Cr. L.J. 675=1929 Cr.C. 62=13 A.I.Cr.R. 143=A.I.R. 1929 Pat. 275.

——S. 30—Self-exculpatory confession.

Statements implicating co-accused but not incriminating maker are not admissible in evidence. 120 Ind. Cas. 81=1929 Cr.C. 678=30 Cr.L.J. 1121 A.I.R. 1929 Sind 250.

——S. 30—Self-exculpatory confession.

A confession, intended to be exculpatory as regards the person confessing, is inadmissible against a co-accused though it is admissible against the confessor. **Case-law considered**. 91 Ind. Cas. 1002=9 N.L.J. 80=27 Cr.L.J. 186=A.I.R. 1926 Nag. 229.

——S. 30—Self-exculpatory confession — Statements by accused—Admissibility against maker co-accused.

A statement by an accused person which suggests an inference of guilt may amount to a confession though the person making the statement may directly repudiate his participation in the crime. Such a statement may be taken into consideration against the person making the statement, but it may be unsafe to use it against a co-accused. Where, it appears that the person making the statement was, at all events, an accessory present at the commission of the crime, the statement can be used against the co-accused, if sufficient corroboration is forthcoming. 6. O.L.J. 426=20 Cr.L.J. 787=53 Ind. Cas. 691.

——S. 30 — Self-exculpatory confession of co-accused—Retracted confession—Corroboration.

A retracted confession of a co-accused, which is not self-implicating in the same degree as it implicates the co-accused is not safe to rely upon, in the absence of material corroboration. 19 Cr.L.J. 826=(1918) Pat. H.C.C. 175=46 Ind. Cas. 842.

——S. 30 — Self-exculpatory confession—Non-incriminating statement of accused.

An accused's statement which does not incriminate him is not a confession and cannot be used against his co-accused. 16 Cr.L.J. 25=8 Bur. L.T. 35=26 Ind. Cas. 329.

——S. 30—Self-exculpatory statement—Admissibility.

The self-exculpatory statement of the wife, to the effect, that the white substance was administered on the assurance by her paramour that it would bring about good feeling, did not amount to a confession and could not be used against the paramour as criminal conspiracy was not proved. 14 Cr.L.J. 586=18 C.L.J. 590=21 Ind. Cas. 378.

——S. 30—Self-exculpatory statement.

A statement of an accused that under threats of death he was forced to sit outside the door of the house where a murder was being committed to warn the murderers of the approach of any body, and not divulge the secret and to remain a passive agent in the crime and that he took no part in committing the crime, does not amount to a confession of either murder or its abetment, and consequently is inadmissible under S. 30 of the Act against the co-accused. 38 P.W.R. 1910 Cr.=24 P. R. 1910 Cr.=193 P. L. R. 1910=11 Cr.L.J. 604=8 Ind. Cas. 250.

——S. 30—Self exculpatory statement.

Where the evidence on a charge of murder consists of a confession by one accused against another, the accused excepting himself, and the evidence of an approver to the effect that he saw the deceased alive with the accused just before the murder, neither the confession nor the corroboration should be acted upon. (1911) 2 M.W.N. 375=12 Cr.L.J. 562=12 Ind. Cas. 650.

——S. 30—Self-exculpatory statement—Confession of co-accused—Probative force.

Conviction based on the confession of a co-accused not implicating himself to the same extent as the other accused is bad in law. (1910) M.W.N. 754=9 M.L.T. 38=11 Cr.L.J. 701=8 Ind. Cas. 719.

——S. 30—Self-exculpatory statement—Confession of co-accused—Legal evidence—Abetment.

Where some of the accused persons made statements in court denying their participation in the commission of any crime, but incriminating a co-accused, these statements are not confessions and cannot be taken into consideration as against the co-accused under S. 30 of the Evidence Act. A statement made to the Police by an accused person to the effect that if certain other persons were sent for, he would see that some other property was traced out and restored is not legal evidence to prove that the accused has been guilty of abetment of theft. (1904) 2 A.L.J. 53.

——S. 30—Miscellaneous.

Identification by co-accused while on trial is not admissible. 73 Ind. Cas. 62=45 All. 300=21 A.L.J. 143=4 L.R.A.Cr. 13=24 Cr.L.J. 526=A.I.R. 1923 All. 352.

——S. 31— Admission — Not conclusive—Prima facie evidence.

Per **Malik, J.**—An admission is not conclusive evidence against any party. If from the facts it could be shown that the admission was wrong it would fail to have any effect. It is only **prima facie** evidence against the party making the admission and shifts the burden of proof. A.I.R. 1947 All. 281.

——S. 31—Admission—Not conclusive against maker—Open to explanations.

Section 31, Evidence Act, means that an admission, unless it amounts to an estoppel, is not conclusive as against the maker, as it is open to him to prove that it was made under a mistake of law or fact or under threat or inducement. A.I.R. 1939=Rang. 219=40 Cr.L.J. 691=1939 Rang. L.R. 97=182 Ind. Cas. 705.

——S. 31—Admission—Proof of mistake etc,—Permissibility.

Where plaintiff does not show that he has been induced by the compromise to alter his position to his detriment, the defendants can prove that such admission was mistaken or untrue. 1937 O. W. N. 423.

——S. 31—Admission—If conclusive.

An admission made as a result of a promise of a perpetual lease which is in the nature of a bribe cannot be regarded as conclusive against the person making it. A.I.R. 1936 All. 412=1936 A.L.J. 622=58 All. 734=1936 A.W.R. 597=163 Ind. Cas. 283.

——S. 31—Admission, when binding on the maker.

An admission is not conclusive but may be shown to be wrong; but unless the admission is explained, it is binding on the party making it or those who claim through him. ('36) 164 Ind. Cas. 530=62 C.L.J. 430=40 C.W.N. 75.

——S. 31—Admission — Pardanashin lady — If binding on her.

An admission is no doubt a very good piece of evidence and under ordinary circumstances, it would be taken as binding upon a party unless the party who makes the admission can explain it away. But when the admission is made in a document executed by a **pardanashin** lady, it may not necessarily bind her. A.I.R. 1934 Cal. 851=59 C.L.J. 532=153 Ind. Cas. 532.

——S. 31—Admission—Evidentiary value.

An admission is not conclusive but is only a piece of evidence which should be weighed against other evidence. A.I.R. 1932 Lah. 126=32 P.L.R. 248 (2)=134 Ind. Cas. 128.

——S. 31—Admission—Evidentiary value.

An admission made by a party is a very strong proof against him and the fact admitted must be taken to be true unless the person making the admission explains that it was made under circumstances which do not make the admission binding on him. ('31) 134 Ind. Cas. 888=53 C.L.J. 222.

——S. 31—Admission—Evidentiary value—Maker when estopped.

Express admissions of a party to the suit or admissions implied from his conduct are strong evidence against him, but he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his condition. In such a case the party is estopped from disputing their truth as against that person and those claiming under him and that transaction but as to third parties he is not bound. A.I.R. 1931 Oudh 246=8 O.W.N. 306=131 Ind. Cas. 903.

——S. 31—Admission in sale deed—Executant to explain recital.

Where the execution of a sale-deed by the defendant is established, it is for him to show that his admission of receipt of consideration mentioned therein is incorrect. A.I.R. 1930 Lah. 985=129 Ind. Cas. 281.

——S. 31—Admissions—Weight due to.

Express admissions of a party to a suit or admissions implied from his conduct are strong evidence against him but he can prove he was mistaken or that they were false. 29 A. 184 Rel. 23 O.C. 184=58 Ind. Cas. 608.

——S. 31—Admissions — Illiterate people — Not binding.

Where an illiterate person called another his adopted son but did not intend him to be his heir, the statement does not bind him. 193 P.L.R. 1915=140 P.W.R. 1915=32 Ind. Cas. 312.

——S. 31—Explained admissions.

Where admissions are on a somewhat similar footing to a retracted confession, it is difficult to base a conviction on such an admission. 102 Ind. Cas. 492=8 A.I.Cr.R. 196=28 P.L.R. 313=28 Cr.L.J. 556=A.I.R. 1927 Lah. 549.

——S. 31 and Or. 10 C.P.C.—Divorce proceedings—Admission of allegations in petition—When sufficient.

Divorce Act, S. 13—Husband admitting adultery alleged by wife—Admission is sufficient proof even in absence of other evidence, if the court believes it after scrutiny. 9 L.L.J. 315=A.I.R. 1927 Lah. 491.

——S. 31 and Or. 10 R. 1 C. P. C.—Admissions falling under S. 31—Admissions in suit—Later conclusive for purposes of the suit.

S. 31 refers to past admissions—Admissions of party to suit in the course of the suit are conclusive for the purposes of that suit. 49 All. 219=25 A.L.J. 48=97 Ind. Cas. 176=A.I.R. 1926 All. 710.

——S. 31—Admissions by co-defendant—If proof.

Suit for possession against vendor and third party contesting defendant—Admission by vendor in written statement of the sale—No other evidence by plaintiff—No proof of the sale or title of the plaintiff to the property. 101 Ind. Cas. 589=A.I.R. 1927 Lah. 356.

——S. 31—Execution proceedings.

Admissions made in execution proceedings must be held to be binding when the unsuccessful party proceeds to a suit. 103 Ind. Cas. 34=A.I.R. 1927 All. 659.

——S. 31—Effect of admission against third person.

An admission cannot have binding effect on a third person claiming under an independent title. Where a Hindu father made an admission as regards the law applicable.

Held, that it was not binding on the son because he did not claim through the father. 34 C.W.N. 944=130 Ind. Cas. 230=A.I.R. 1931 Cal. 105.

——S. 32.

See also Evidence Act, S. 33.

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1. Account Books

——S. 32 (2)—Account books—Kept in ordinary course of business—Corroboration—If necessary.

The Court is not bound to believe the accounts which are relevant under S. 32 (2) of the evidence Act without corroboration, especially when the witness examined to prove the account books says that he has no personal knowledge of any of the transactions which figure in them. I.L.R. (1946) Nag. 707=226 Ind. Cas. 307=A.I.R. 1947 Nag. 106=1946 N.L.J. 561.

——S. 32 (2)—Ordinary course of business—Old account books of dead persons.

Old account books may be relevant and admissible in evidence under S. 32 (2) read with S. 114, but there is no presumption as to the correctness of the entries therein which may be proved to be false. A.I.R. 1944 Lah. 58=45 P.L.R. 441=212 Ind. Cas. 416.

——Ss. 32 (2), 90—"Ordinary course of business"—Interpretation—Old account books.

Section 32 (2), Evi. Act, deals with the relevancy of entries in books and not to the manner of their proof. The entries in the books of account kept in the ordinary course of business are statements made by persons who made those entries in the ordinary course of business.

That those persons are dead or cannot be found both in the sense as to their identity, (i. e., who they were) and in regard to their whereabouts, (i.e., where they were) or have become incapable of giving evidence may be safely inferred from the dates of those entries. It is not necessary that the names of the persons who made such entries must be known before the expressions "who cannot be found" or "who have become incapable of giving evidence" can be applied to them. This is a clear distinction between 'a person' in S. 32 and 'any particular person' in S. 90, Evi. Act. A person may be said to have been not found when we know who he was and if in spite of search, he was not found or was found to have been dead. But he may equally be said not to have been found if his identity cannot be traced or found and who, therefore on account of the absence of his identity cannot be found. A.I.R. 1944 Lah. 58=45 P.L.R. 441=212 Ind. Cas. 416.

——S. 32 (2) (3)—Account books.

Books of account in which no balances have been struck are admissible under S. 32 (2), Evidence Act, as entries or memoranda, made by persons who are dead in books kept in the ordinary course of business.

A statement made by a person in a sale-deed that she was liable for a particular amount is clearly admissible under S. 32 (3) as a statement made against her pecuniary and proprietary interest. A.I.R. 1934 Nag. 106= 30 N.L.R. 192=148 Ind. Cas. 1033.

——Ss. 32 (2), 34, 90—Account books over 30 years old.

Although S. 90, Evi. Act states that in the case of documents over 30 years old, there is a presumption that they are written by persons by whom they purported to have been written, S. 32 (2) can only be applied in case it is proved that the person who wrote the document in question is dead or otherwise not available as a witness, and hence under S. 34, entries in old account books by themselves are not enough to charge a person with liability. A.I.R. 1932 All. 500= =1932 A.L.J. 493=142 Ind. Cas. 889.

——S. 32—Ordinary course of business—Account books.

Rent suit by land-lord—Account books from the land-lord's **sherista** tendered in evidence and admitted under S. 32 (2)—The fact that they were made in the absence of and without the assent of the tenants and were uncorroborated is not sufficient ground to consider them as of no value. 110 Ind. Cas. 338=47 C. L. J. 457=A.I.R. 1928 Cal. 408.

——S. 32 (2)—Account books—Entries in relevancy.

Where the persons making the entries are dead these entries are relevant under S. 32, sub-Section (2) of the Indian Evidence Act and the entries which are so relevant are in law sufficient evidence in themselves, and do not as in the case of entries admissible only under S. 34, require corroboration. 63 Ind. Cas. 946= 4 Lah. L.J. 36=A.I.R. 1922 Lah. 119.

——S. 32—Account books—Requisite for admitting entries in evidence under the section—Death of person making.

Unless the death of the person making the entries in an account book is proved, S. 32 of the Act does not admit such entries in evidence. 37 Ind. Cas. 877 (Pat.).

——S. 32—Ordinary course of business—Entries through named persons in account book kept by deceased servant.

When a deceased servant kept his master's accounts in the course of business, and entries of payments through named persons are made therein, such entries are, under S. 32 of the Act, admissible in proof of payments only if those named persons are called on to prove the actual payment. 37 Ind. Cas. 877 (Pat.).

——Ss. 32 (2), 34—Ordinary course of business—Entries in account books in course of business—Corroboration.

Entries made in books of account kept in the regular course of business are admissible under S. 34 only when there is other evidence to corroborate them; but under S. 32 (2) they may be admissible without such corroboration when the person who made the entries cannot be found. (1914) M.W.N. 240=1 L.W. 136=22 Ind. Cas. 627.

——S. 32, Cl. (2)—Accounts—Partnership account books—Entries binding on partners 'inter se'.

The partnership books being accessible to all the partners and being kept more or less under the surveillance of them are **prima facie** evidence against each of them and also for any of them against the others. But they are not conclusive evidence if the person complaining of them can by clear evidence show that there is an error in the books. Where there is a question of surcharging and falsifying accounts, the case alleged must be clearly proved by the person impeaching them and if there is any doubt it will be determined against him. (1908) 10 Bom. L.R. 811.

——Ss. 32 (2), 34—Accounts — Entries — Corroboration.

Entries in accounts, relevant only under S. 34 of the Evidence Act, are not by themselves alone sufficient to charge any person with liability without corroboration as required. But where accounts are relevant also under S. 32 (2) of the Act, they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under S. 34, require corroboration. Entries on account may in the same suit be relevant under both the sections, and in that case the necessity for corroboration does not apply. 6 Bom. L.R. 50=28 B. 294.

——S. 32 Cl. (2)—Account sales—How far evidence of foreign sales.

Account sales are **prima facie** evidence of the amount realised in foreign markets by the sale of goods. (The account sales were in this case furnished to the other side before suit and not objected to). 28 C. 209.

2. Assertion of right.

——S. 32 (7)—Assertion of right.

The statements as to the permanent character of tenancy contained in documents evidencing transactions of transfer are also relevant evidence under S. 32 (7), Evidence Act, for proving the permanent tenancy. A I.R. 1941 Cal. 541=I.L.R. (1941) 2 Cal. 44=45 C.W.N. 590=74 C.L.J. 145=197 Ind. Cas. 376.

——Ss. 32 (2), 13—Document by persons who are since dead or cannot be traced—Assertion of right in land.

Documents regarding the land in dispute prepared by persons who are since dead or whose whereabouts cannot be traced are admissible under S. 32 (2), Evidence Act, together with S. 13 as being statements asserting possession over the land in dispute. A.I.R. 1936 Pat. 462=2 B.R. 729=164 Ind. Cas 277.

——S. 32—Assertion of right.

Settlement deed under which pro-note is transferred, if admissible as secondary evidence, may be employed to prove pro-note under S. 32 (7) read with Evidence Act, S. 13 (a). (**Obiter**). 26 Ind Cas. 747, Rel. on, A.I.R. 1930 Mad. 742=123 Ind. Cas. 197.

——**S. 32 (7)—Scope—Assertion of title in a mortgage by the mortgagor—Relevancy on question of ownership.**

S. 32, clause 7 of the Evidence Act, makes the statements made by a deceased person in respect of relevant facts themselves relevant if those statements are contained in a document which relates to any transaction mentioned in S. 13, that is, a transaction in which an assertion is made of a right or title which is relevant question in the suit, those statements being relevant in proof of the facts contained in the statements. So assertion of title as owner in a deed of mortgage is relevant on the question of the mortgagor's ownership under S. 13 and after his death, under S. 32, Cl. 7. 70 Ind. Cas. 389=14 M.L.W. 327=1921 M.W.N. 560=A.I R. 1921 Mad. 383.

3. Bhat's Register.

——**S. 32 (6)—Bhat's register—Statements of family bards.**

In questions of pedigree, the statements of deceased members of the family made **ante litem motam** before there was anything to throw doubt upon them, are evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by showing that they actually made the statements but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognized them. If any member of the family, as a person who presumably would know all about the family, had stated such and such a pedigree, that evidence would be receivable, its weight depending upon other circumstances.

It is the business of a **mirasi** who is a hereditary family bard, to acquaint himself with the details of the family history, whose glories he recounts in song on ceremonial occasions, and the fact that he must speak from hearsay does not render his evidence valueless. A.I.R. 1931 P.C. 45=53 C.L.J. 213=33 L. W. 434=1931 M.W.N. 373=8 O.W.N. 653=32 P.L.R. 186=60 M.L.J. 583=33 Bom. L.R. 420=12 Lah. 336=58 I.A. 188=130 Ind. Cas. 612 (P.C.).

——**S. 32—Bhat's register—Pedigree—Proof of.**

Entries made by successive generations of bards supply a running account of the different branches of the families of their customers and they afford, if otherwise reliable, evidence of as great value as any family pedigree kept by the family members themselves.

A pedigree may be kept by a member of the family or by another person on his behalf and can be admitted in evidence if it is written by a family Bard for the purpose of keeping a record of the family events for his use and for the use of family. At any rate such a record is a record of the statements as are usually made to and noted by the Bard; it can be admitted in evidence, though the person who made the entries is unknown. The Bahis of Gangabasi priests which contain the relationships of their clients and their ancestors are the records of statements made by persons having special means of knowledge and are admissible in evidence. 83 Ind. Cas. 618=22 A.L.J. 657=5 L.R.A. Civ. 435=46 All. 665=A.I.R. 1924 All. 575.

——**S. 32 (6) (2)—Family pedigree—Proof by the books kept by the family chronicler.**

If the book by a professional person or a person whose business was to keep a book for the advantage of the family, is shown to have been kept in the ordinary course of business, it should be admitted as evidence under Sub-S. 2, S. 32. Even if that were incorrect, still Sub-S. 6 of S. 32 enables a family pedigree to be admitted in evidence so long as the members of the family depend upon a particular person to keep a record of the family events. 67 Ind. Cas. 235=24 Bom. L.R. 289=46 Bom. 753=A.I.R. 1922 Bom. 51.

——**S. 32 (6) (2)—Bhat's Register.**

Family records kept by **Bhats** are evidence on question of relationship. 66 Ind. Cas. 894=25C.W.N. 908=A.I.R. 1921 Cal. 42.

——**Ss. 32, 64 and 65—Bhat's Register—Genealogy—Copies of—Bhat's books.**

Copies of entries of genealogies in Bhat's books are not admissible in evidence where the originals are in existence but not produced. The originals are admissible under S. 32 (2) and (5) of the Evidence Act, as it is a recognised duty and pursuit of **a bhat** to keep a geneology of familes where he officiates. 48 Ind. Cas. 375 (Nag.).

4. Boundaries.

——**Ss. 32 (4), 36 — Applicability — Boundaries—Revenue** mahal—**Question of limits of.**

The question of the limits of a particular revenue **mahal** is not a matter of public right or public or general interest so as to be within S. 32 (4), Evi. Act, nor is a map which is not a published map generally offered for public sale or a map made under the authority of Govt. within S. 36. A I.R. 1937 P.C. 69=(1937) 2 M.L.J. 631=18 P.L.T. 257=3 B.R. 368=1937 O.W.N. 396=45 L.W. 580=1937 A.W.R. 459=41 C.W N. 577=1937 R. D. 178=16 Pat. 258=1937 M.W.N. 593=1937 A.L.J. 638=39 Bom. L.R. 731=31 S.L.R. 242=65 C.L.J. 241=167 Ind. Cas. 329 (P.C.).

——**S. 32 (3)—Boundaries—Statement in document of title between third parties — Admissibility—Conditions.**

A statement of boundaries in a document of title between third persons who are dead at the time the statement is sought to be put in evidence, is admissible in evidence under S. 32 (3), Evi. Act only when it is shown first, that at the time the statement was made, it was contrary to the interests of the maker, and secondly, that at the time it is sought to be used, it is statement of a relevant fact. A.I.R. 1935 Pat. 167=16 P.L.T. 199=14 Pat. 461=1 B. R. 455=155 Ind. Cas. 470 (F. B.).

[**Overrules** A.I.R. 1916 Pat. 416=36 Ind. Cas. 610.].

——**Ss. 32, 157—Boundaries.**

Recital in a document relating to adjacent land executed between strangers may be admissible if the executant is called and deposes to the boundary to corroborate him under S. 157, or if he is dead, under S. 32, Evi. Act. A.I.R. 1933 Pat. 636=145 Ind. Cas. 944 (2).

——**S. 32—Boundaries—Recital in documents of third parties.**

The recital in a document between third parties to the effect that the land which formed the boundary of the property dealt with by the document belonged to a particular third person is not admissible against persons not parties to the transaction evidenced by that document to prove the ownership of such neighbouring land. 30 L. W. 422.

——**S. 32—Boundaries.**

Recitals in documents regarding boundaries executed by third parties in favour of the plaintiffs are not admissible in evidence if the executant is not dead and does not come to corroborate them. A.I.R. 1927

Lah. 448, **Foll.**; 109 Ind. Cas. 728=10 L.L.J. 370= A.I.R. 1928 Lah. 428.

——S. 32—Boundaries.

Documents not **inter partes** — Statements as to boundary description—Executant dead—Documents are admissible; 16 C.W.N. 252; 23 Bom. 63; 11 Bom. L.R. 409; 11 A.L.J. 139; 17 C.W.N. 108; 45 Cal. 159 and 22 W.R. 231, Foll.; A.I.R. 1924 Cal. 1067, **Diss. from.** 99 Ind. Cas. 910=44 C.L.J. 587 =A.I.R. 1927 Cal. 234.

——S. 32—Boundaries—Land in dispute—Recitals of.

Executant of document dead—Document is admissible. 23 Bom. 63; 16 C.W.N. 252; 11 A.L.J. 139 and 45 Cal. 159, **Foll.** 99 Ind. Cas. 907=44 C.L.J. 582= A.I.R. 1927 Cal. 230.

——S. 32 — Boundary description — Document between third parties—Admissibility.

A document between strangers to the suit in which mention is made of one of the parties or their predecessors as holding the land lying on the boundaries of the lands belonging to the executants of the document is not admissible in evidence. 86 Ind. Cas. 734=41 C.L.J. 374=A.I.R. 1925 Cal. 1034.

——S. 32 — Boundaries.

A mere description of boundaries in a document between third parties cannot be said to be a statement against the proprietary interest of the person making it. 84 Ind. Cas. 420=28 C.W.N. 1092 =A.I.R. 1924 Cal. 1067.

5. Date of birth.

——S. 32 (5)—Date of birth in application for appointment of guardian—Admissibility—Conditions.

A recital of the date of birth in an application for appointment of a guardian is not by itself admissible in evidence upon mere production of the document but may be rendered admissible under certain circumstances. If the conditions recited in S. 32 (5), Evidence Act, are satisfied, that is, a person who had made this statement had special means of knowledge and he is now dead or cannot be found, such statement in the application will be admissible. A.I.R. 1950 Cal. 533.

——Ss. 32 (5), 35—Date of birth—School registers —Entries in.

The date of birth of a boy attending school for the first time has to be ascertained from his guardian or father and entered in the school register, and the date of the birth in any school that he attends later is merely copied from the transfer certificate of the previous school. The entries regarding the date of birth made in the register of later schools are admissible under S. 35, Evi. Act, as entries made by public servants in a public or official register in the discharge of their official duty. Whether he had any special means of knowledge so as to make the entry relevant under S. 32 (5), Evi. Act, does not affect the admissibility of entry under S. 35, though it may affect its value. Section 35 stands by itself independently of S. 32 (5). A.I.R. 1940 Nag. 217=1940 N.L.J. 150=186 Ind. Cas. 613.

——S. 32 (5)—Date of birth—Age — Depositions regarding age of deponent who is dead— Admissibility of, to prove his age.

Where an entry regarding the age in a deposition, made according to the statement made by a person who is dead, is not in the heading but is actually in the answer to a question by the Court just as is the rest of the statement, and the entries are on plain paper and not on paper with any printed words such as son of, caste, age, etc., and the writing throughout appears to be that of the Presiding Officer himself, there is no reason either to presume that the Presiding Officer instead of taking the obvious and usual course of asking the witness's age should have put down the age merely by guess work. Such documents prove the statements made by its maker as to his age and are admissible in evidence. A.I.R. 1939 Oudh 17 =1938 O. W. N. 1267=178 Ind. Cas. 950.

——S. 32 (5)—Date of birth—Statement regarding age.

A statement made by the plaintiff's father as a witness in a previous proceeding, regarding the age of the plaintiff is admissible in evidence under S. 32 (5), Evidence Act, on the ground that the time of one's birth relates to the commencement of one's relationship by blood and a statement of one's age made by a deceased person having special means of knowledge relates to the existence of such relationship within the meaning of S.32, cl.(5), Evidence Act. Consequently, if a statement as to the exact date of birth is admissible under S. 32, cl. (5), Evidence Act, there is no reason why a statement as to the approximate date of birth should not be so admissible. A.I.R. 1937 Oudh 170 =1936 O. W.N 1167=12 Luck. 606=165 Ind. Cas. 523.

——S. 32 (5) and (2)—Date of birth—Entry in school register.

Entry as to date of birth in a school register based upon statement of deceased father is admissible to prove age. 114 Ind. Cas. 801=5 O. W. N. 1111=A.I.R. 1929 Oudh 113.

——S. 32 (5) and (6)—Ill. (1)—Date of birth —Family book—Entry of birth of child — Admissibility.

In support of his plea of minority, the defendant tendered in evidence at the trial an entry recording the date of the defendant's birth made by his deceased father in a book in which he made similar entries with regard to the other members of the family. **Held,** that under S. 32 (5) of the Evidence Act and ill. (1) to the section the entry was admissible in evidence. Illustrations appended to a statute are of great value in interpreting the meaning of the section. 21 C. W. N. 257 = (1917) M. W. N. 162=19 Bom. L. R. 157=43 I. A 256=39 Ind. Cas. 401 (P.C.).

——S. 32 (5)—Date of Birth — Statement as to date of birth by aunt—Admissibility.

A statement in a guardianship petition made by a person's aunt that he was born on a certain day and that she was his aunt is admissible in evidence as it relates to the existence of relationship. 20 C. 758, 25 M. 183 Foll. 21 C.L.J. 621=28 Ind Cas. 595. Overruling—20 C.L.J. 302=19 C.W.N. 646=27 Ind. Cas. 30.

——S. 32 (6)—Proof of age—Birthday books— Admissibility of—Husband's evidence as to wife's age—Prior affidavit—Admissibilty of.

Where the evidence shows of a practice of making entries of dates of birth in books kept for the purpose of obtaining the opinion of astrologers, the Birth-day books are admissible in evidence to prove the dates of birth if the parol evidence concerning them is accepted. A husband's statement as to his wife's age though hearsay is admissible for what it was worth; and an affidavit

in which he had sworn to the same date previously before the controversy is admissible in evidence. 19 C. W. N. 787=31 Ind. Cas. 637 (P. C.).

——Ss. 32 (5) and 11—Proof of age—Statement by a deceased person as to date of birth—Admissibility.

A statement of a deceased person made in a guardianship application concerning the date of birth of the minor is not admissible in evidence to prove the age of the minor in a subsequent suit as the statement cannot be regarded as one relating to the existence of any relationship by blood, marriage or adoption. Nor can it be covered by S. 11 of the act. 20 C.L.J. 302=27 Ind. Cas. 30.

——S. 32 (5)—Date of birth—Admissibility.

Statements made by deceased persons are admissible to prove date of birth. 20 C. 758; 24 C. 265; 25 M. 183 Foll. 28 M.L J. 669=24 Ind. Cas. 519.

——S. 32 (5) and (6)—Proof of age—Recital in a will—Admission—Register whether admissible.

The recital in a will about the age of another person when that recital is not merely incidental is admissible in evidence as to the age of that person at that time. 38 Mad. 166=13 M.L.T. 385=(1913) M.W.N 355=24 M.L.J. 517=19 Ind. Cas. 452.

——S. 32—Proof of age—Special means of knowledge.

Statement by a person before a public officer as to his son's age is admissible in evidence under S. 32 of the Evidence Act. 25 M. 183; 20 C. 768, Foll. 9 M.L.T. 220=9 Ind. Cas. 324.

——S. 32, Cl. (5)—Statement as to age of a member of a family by another member since deceased—Admissibility.

A statement as to plaintiff's age made by his sister was admissible in evidence after her decease under S. 32 (5) of the Evidence Act, the date of birth being the commencement of a relationship by blood, and so relating to the existence of such relationship. 20 C. 758 foll. 11 M.L.J. 379=25 M. 183.

6. Date of death.

——Ss. 32, 11—Date of death—Statement in petition for probate—Admissible.

A statement in a petition for grant of probate as to date of death of deceased made shortly after death by a person in a position to know the fact is admissible in evidence to prove such date when made in circumstances free from suspicion. Such a statement is admissible, if not under S. 32, then under S. 11, Evi. Act. A.I.R. 1931 Pat. 224=12 P.L.T. 891=131 Ind. Cas. 788.

——S. 32—Date of death—Mention in a mortgage by son of deceased.

The question was as to the date of A's death. A mortgage deed executed by A's son soon after A's death in which A was described as dead is admissible. 72 Ind. Cas. 985=A.I.R. 1923 Cal. 378.

7. Death of executant.

——S. 32 (2)—Death of executant—Chowhuddibandi papers—Admissible.

The Chowhuddibandi papers were furnished by the zamindar not voluntarily, but on Goverment forms at Govt.'s request, and for enabling the latter to have information on important points. They were accordingly filed by the zamindars on 1799, in pursuance of a duty. Such returns had to be made by every zamindar of Bengal:

Held, that the papers were admissible under S. 32, cl. (2), Evi. Act, the persons making the statements contained in them being dead. A.I.R. 1941 Cal. 193=72 C.L.J. 320=44 C.W.N. 935=195 Ind. Cas. 412.

——S. 32—First information report — When admissible—Death of deponent.

The first information report, unless the man making it dies, is not admissible in evidence of any fact which is contained in it. A.I.R. 1938 Rang. 282 (283)=39 Cr. L. J. 771=176 Ind. Cas. 683 (D.B.).

——S. 32—Death of executant.

Where papers about 45 years old proved to have come into the respondent's hands as purchaser are produced in evidence, and where the papers cannot be shown to be in the hand of any one alive.

A Court of fact may in the circumstances of the case presume that the writer was dead at the time they were produced: 16 C. L. J. 24, Rel. on. 114 Ind. Cas. 485=55 Cal. 1216=49 C. L. J. 70= A.I.R. 1929 Cal. 110.

——Ss. 32, 33—Deponent dead — Affidavit— If admissible under.

The affidavit of a person who is dead and who is not subjected to cross-examination is not evidence admissible either under S. 32 or S. 33, Evidence Act. 102 Ind. Cas. 243=38 M. L. T. 275= A.I.R. 1927 Mad. 507=52 M. L. J. 477.

8. Dying declaration.

a. Admissibility
b. Cause of death
c. Evidentiary value
d. Partial acceptance
e. Procedure of taking
f. Proof
g. What is.

8 (a) Admissibility.

——S. 32 (1)—Dying declaration of deceased—Admissibility.

The statement of a person, who subsequently dies, as to the circumstances resulting in his death is admissible under S. 32 (1), Evidence Act. 4 A. I. Cr. D. 54=A.I.R. 1950 T. C. 41=51 Cr. L. J. 988.

——S. 32 (1)—Dying declaration—Admissibility—Person making, surviving and not the Complainant—Use of, for corroboration (S. 157).

When a person who has made a dying declaration does not die but survives, the statement cannot be admissible in evidence as a dying declaration under S. 32, Evidence Act. Nor can it be used or relied upon even for the purpose of corroboration under S. 157, especially when the person making the declaration is not the complainant, 54 Mys. H.C.R. 120.

——S. 32 (1)—Statement in dying declaration of one person as to the death of another—Admissibility

The statement in a dying declaration of one dead person in regard to the death of another is not a relevant fact with respect to the question about the death of the latter and so would not be admissible in evidence with respect to the offence of murder of that person. I.L.R. (1948) All. 122=1947 A.W.R. (H.C.).

401=1947 A.L.J. 627=A.I.R. 1948 A. A. 170=49 Cr L. J. 140.

——S. 32—Dying declaration at identification parade held by Police—Admissibility—Prohibition contained in S. 63 (1), Bombay City Police Act.

Since S. 63 (2), Bom. City Police Act excludes dying declaration from the prohibition contained in sub-s. (1) a statement made by the deceased pointing out the assailant who caused his death, at the identification parade, held by the Police, is admissible as his dying declaration under S. 32 (1), Evi. Act. A.I.R. 1946 Bom. 189=47 Bom. L.R. 992.

——S. 32 (1)—Dying declaration— Admissibility—Conditions.

Dying declaration can be admitted only if it fulfils conditions of S. 32. Dying declarations which are sought to be proved in criminal cases fall under sub-s. (1) of S. 32. A.I.R. 1944 Lah. 377=46 P.L.R. 135.

——S. 32 (1)—Motive for murder—Alleged statements of deceased—Evidence of motive from—Statements held inadmissible.

A motive at the back of the murder was said to be that accused had been on intimate terms with the deceased's sister and that the deceased was attempting to arrange her marriage with another person. The evidence of this motive was derived from the statements said to have been made by the deceased before her death:

Held, that these statements were inadmissible in evidence. A.I.R. 1941 Mad. 359=52 L.W. 942=1940 M.W.N. 1272=(1941) 1 M.L.J. 227=42 Cr.L.J. 664=I.L.R. (1941) Mad. 503=195 Ind. Cas. 76.

——S. 32 (1)—Dying declaration—Admissibility.

Charge of abetment of murder — Statement of deceased made several months before murder about proposal of accused to murder, sought to be proved as corroboration of such evidence—Statement, held inadmissible under S. 32 (1)—Conspiracy to commit murder—Evidence of **A** that accused had approached him to secure men to commit murder a week before murder—Corroboration sought from evidence of **B** who stated that on the morrow of murder, **A** gave out to people that accused had approached him with such object—**Held,** this was no corroboration of statement of approach of accused. A.I.R. 1938 Cal. 125=66 C.L.J. 196=39 Cr.L.J. 395=174 Ind. Cas. 36.

——S. 32—Intention consisting in statements alleged to have been made by deceased to witnesses—If admissible to show motive for murder.

Where, in a case under S. 302, I. P. C., the only evidence regarding the motive of the accused, that the deceased was denying the return of the jewels borrowed by the accused, consists in statements alleged to have been made by the deceased himself to the witnesses, those statements are inadmissible since they are statements made by a deceased person not falling within S. 32, Evidence Act. ('38) 177 Ind. Cas. 808=48 L.W. 615=1938 M.W.N. 868=(1938) 2 M.L.J. 618=39 Cr.L.J. 947.

——S. 32 (1)—Scope—Dying declaration recorded by Second Class Magistrate not empowered under S. 164, Criminal P.C.,—Admissibility of.

Section 32, Evidence Act, provides an exceptien to the general rule that evidence must be given in Court by witnesses.

Under S. 32 (1), Evidence Act, statements, written or verbal, of relevant facts, made by persons who are dead are themselves relevant facts when the statements are made by a person as to the cause of his death and as to the nature and circumstances of the transaction which resulted in his death in cases in which the cause of his death comes into question. Such statements are relevant even if they were recorded by a Magistrate of the Second Class, who was not empowered under S. 164, Criminal P. C., to record statements of witnesses. A.I.R. 1932 Lah. 14=32 Cr.L.J. 1118=33 P.L.R. 8=134 Ind. Cas. 117.

——S. 32—Dying declaration—Admissibility.

Statement by deceased before Third Class Magistrate not competent to record statement under Criminal P.C., S. 164—Statement is yet relevant under S. 32 (1). 120 Ind. Cas. 274=1930 Cr.C. 28=31 Cr.L.J. 79=A.I.R. 1930 Lah. 60.

——S. 32—Admissibility — Statement of woman raped committing suicide later.

The statement of a woman, who was alleged to have been raped and who committed suicide three days later, made immediately, after the incident, is inadmissible in evidence as it was not the cause of her death. 1930 M.W.N. 702=32 Cr.L.J. 751=131 Ind. Cas. 456=1931 Cr.C. 329=A.I.R. 1931 Mad. 233.

——S. 32 — Deceased dying from other causes than the assault — Dying statement of—Admissibility.

Where a person dies in a hospital after being assaulted and hurt, not of the injuries but of a malady independent of such injuries such for example as pneumonia, the dying statement of such person is not admissible in evidence in a trial of his assaulters under S. 324. 7 O.W.N. 466=A.I.R. 1930 Oudh 249.

——S. 32 (1)—Dying declaration—Admissibility.

A dying declaration which contradicts itself in its various parts is inadmissible in evidence. 108 Ind. Cas. 526=10 A.I.Cr.R. 68=29 Cr.L.J. 418.

——S. 32 (1) and (3)—Dying declaration—Admissibility.

Dying declaration of one of the dacoits as to the circumstances of dacoity before a Magistrate is admissible against him, so far his implication in the crime is concerned but is not admissible against other dacoits. 85 Ind. Cas. 643=26 Cr.L.J. 547=5 L.R.A.Cr. 201=A.I.R. 1925 All. 227.

——S. 32 (1)—Report to police showing motive for murder is admissible.

B made a report to the police that he was slapped by a 'pahelwan' of Nagpur because he had refused to deliver the keys of a house. Next day, **B** was murdered by **C**, who was identified as the assailant of **B** on the previous day,

Held, that the report discloses the motive for the murder and is admissible in evidence. 88 Ind. Cas. 353=7 N.L.J. 144=26 Cr.L.J. 1121=A.I.R. 1924 Nag. 115.

——S. 32 (1)—Dying declaration—Admissibility.

Statement by a person as to circumstances of transactions resulting in her death are admissible when cause of her death is in question. 120 Ind. Cas. 81=1929 Cr. C. 678=30 Cr. L. J. 1121=A.I.R. 1929 Sind 250.

——S. 32 (1) (3)—Dying declaration—Admissibility.

A statement by a dying person not about the circumstance of his death, but about a dacoity that was taking place at the time of his death is not admissible under S. 32 (1) in a trial for the dacoity. Nor can those statements be admissible under S. 32 (3) unless they would have exposed him to criminal

prosecution. 7 L.B.R. 33=6 Bur. L.T. 183=14 Cr.L.J. 510=20 Ind. Cas. 990.

——S. 32, Cl. 1—Dying declaration—Complainant remaining alive—Effect of deposition—Corroboration.

Where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as dying declaration under S. 32 of the Evidence Act, but it may be relied on under S. 157 of the Evidence Act, to corroborate the testimony of the complainant when examined in the case. (1902) 4 Bom. L.R. 434.

——S. 32, Cl. (1)—Dying declaration—Admissibility of.

Where the declaration of a person wounded by the accused in committing dacoity was made on the 13th August 1899 and he died on the 20th August 1899, and there was no other evidence to prove that the death was caused or accelerated by the wounds received at the dacoity, or that it was the transaction which resulted in his death, the High Court held that his declaration ought not to have been admitted in evidence. 2 Bom. L.R. 331=25 B. 45.

8. (b) Cause of death.

——S. 32 (1)—Statement relating to cause of death — Admissibility — Proximate relation to actual occurrence—Need for.

Under S. 32 (1), Evidence Act, a statement of the deceased relating to cause of death is admissible only if it is a statement of the circumstances of the transaction which resulted in death. In other words, it must be sufficiently or closely enough connected with the actual transaction. 51 Cr.L.J. 1201=A.I.R. 1950 Cal. 306.

——S. 32 (1)—Dying declaration—Cause of death —Onus on the prosecution.

The onus of establishing circumstances that would bring a statement within any of the exceptions contemplated by S. 32, lies clearly upon that party which wishes to avail itself of the statement. When there is nothing to show that the injury to which a statement related was the cause of the injured person's death, or that the circumstances under which it was received resulted in his death, the statement is not admissible under S. 32 (1). A.I.R. 1943 Cal. 465=45 Cr.L.J. 71=47 C.W.N. 332=I.L.R. (1943) 1 Cal. 423=209 Ind. Cas. 105.

——S. 32 (1) — First information — Informant dead—Admissibility of report—Cause of death.

In a case in which the first informant is alive and is examined, the first information cannot be regarded as substantive evidence; but the position is different in a case when the first informant is dead. In such a case, before the matter comes before the Court, the report is admissible under S. 32 (1), or S. 8, Evidence Act. A.I.R. 1943 Cal. 74=I.L.R. (1942) 2 Cal. 144=44 Cr.L.J. 322=205 Ind. Cas. 92.

——Ss. 32 (1), 35—Dying declaration — Cause of death.

Statement to Village Munsif by wife of murdered describing events resulting in killing of the husband—Wife committing suicide same evening—In trial of accused for murder, statement of wife, held was not admissible either under S. 32 or S. 35. A.I.R. 1942 Mad. 450=1942 M.W.N. 291=(1942) 1 M.L.J. 503=43 Cr.L.J. 810=202 Ind. Cas. 290.

——S. 32 (1) — Murder case — Evidence as to statement of motive — Not statements as to cause of death—Inadmissible.

In a trial for murder, the Judge relied on certain evidence as proving motive on the part of the accused to murder the deceased. That motive was derived from statements made by the deceased to his wife and to his wife's sister to the effect that in relation to a law suit in which the deceased's wife's sister was concerned, the accused had accepted a bribe from the plaintiff in the suit against the wife's sister:

Held, that these statements were wholly inadmissible as they were not statements made by the deceased as to the cause of his death or to circumstances of the transaction which resulted in his death. A.I.R. 1941 Mad. 101 (101)=1940 M.W.N. 937=52 L.W. 495=(1940) 2 M. L. J. 715=42 Cr.L J. 308=I.L.R. (1941) Mad. 81=192 Ind. Cas. 586.

——S. 32 (1)—Dying declaration—Cause of death.

Murder case — Body of deceased found in trunk proved to be bought on behalf of accused—Statement made by deceased to his wife a day previous to date of murder, that he was setting out to place of accused to meet accused's wife—Statement is one as to some of circumstances of transaction resulting in his death and is admissible. A.I.R. 1939 P. C. 47 (50)=1941 Rang. L.R. 789=1939 A.W.R. 35=18 Pat. 234=1939 O.W.N. 282=20 P.L.T. 265=49 L.W. 349=41 Bom. L R. 428=41 P.L.R. 272=(1939) 1 M.L.J. 756=66 I. A. 66=I.L.R. (1939) Kar. (P. C.) 123 Sup.=5 B.R. 449=1939 M.W.N. 185=40 Cr.L.J. 364=43 C.W.N. 473=69 C. L. J. 273=1939 A. L.J. 298=69 C.L.J. 273=6 Cut. L.T. 25=180 Ind. Cas. 1 (P.C.).

——S. 32 (1)—Dying declaration—Cause of death —Admissibility of—Charge need not necessarily be of murder or homicide.

The nature of the proceeding in which the cause of death comes into question need not necessarily be a charge of murder or homicide. It may be a charge of a different nature or it may be a civil action. The only material point is that the cause of death must come into question irrespective of the nature of the proceeding in which it comes into question. Where, therefore, the cause of death of the deceased has come into question, the mere fact that a charge of murder failed and was not brought home to the accused would not make the statement inadmissible for the purposes of other offences which were committed in the course of the same transaction and with which the accused were charged. A.I.R. 1940 Nag. 340=1940 N.L.J. 459=42 Cr.L.J. 17=I.L.R. (1941) Nag. 110=190 Ind. Cas. 849.

——S. 32 (1)—Statement of deceased as to cause of death.

Statement of a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is admissible in cases in which the cause of his death comes into question. ('37) 1937 M.W.N. 333.

——S. 32 (1)—Dying declaration — Cause of death—Admissibility against others concerned in transaction resulting in death.

Statements by a deceased as to the cause of his death are admissible, not only as against the person who actually caused the death of the deponent, but also against other persons concerned in the transaction which resulted in the deponent's death, in cases in which the cause of that person's death comes into question. A.I.R. 1936 Rang. 187=37 Cr.L.J. 621=162 Ind. Cas. 491.

——S. 32 (1)—Statement by dead person as to the cause of his death—Not aware then, that he was dying.

Under S. 32, Evidence Act, a statement made by a person who is dead, as to the cause of his death is admissible in evidence even though he was not

aware that he was dying when he made it. It is, of course, for the Court to consider in each case what value is to be attached to such a statement. A.I.R. 1935 Lah. 94=16 L. 589=36 Cr.L.J. 1335=37 P.L.R. 705=158 Ind. Cas. 336.

——S. 32 (1)—Statement by deceased as to circumstances of robbery made before death—Death caused by injury received in.

In a trial for robbery, in which the deceased received the wound which remotely caused her death, her statement made before death, regarding the circumstances of the robbery, is relevant under S. 32 (1) Evidence Act. A.I.R. 1935 Rang. 418=37 Cr.L.J. 205=159 Ind. Cas. 1032.

——S. 32 (1)—Statements of deceased prior to murder—Motive or conspiracy to commit—If included in their scope.

The transaction resulting in death which is contemplated in S. 32 (1), Evidence Act, cannot mean any fact or series of facts which have no direct relation to death. It cannot include the conspiracy to commit murder which, as defined in S. 120 (a) I.P.C., is only an agreement between two or more persons for the commission of any offence.

In S. 32, the fact of death is the res gestae, the main fact, and only those circumstances, which constitute or accompany this main fact can be regarded as forming part of the transaction. These incidents, therefore, must be intimately connected with the immediate cause of death, viz., the injury which results in death, and such facts as are within the knowledge of the injured person intimately and immediately connected with the injury, are primarily contemplated in the section. Consequently, statements made by the deceased some days prior to the event which resulted in death are excluded by S. 32 (1). So also statements made by the deceased some days prior to the murder, which prove the motive of the offenders to murder him are inadmissible under S. 32 (1), Evidence Act. A.I.R. 1933 Nag. 136=34 Cr.L.J. 505=29 N.L.R. 251=143 Ind. Cas. 17.

——S. 32 (1), 145, 155, 157—First Information Report—Declaration as to cause of death.

First Information Reports do not prove themselves and have to be tendered under one or other of the provisions of the Evidence Act. The usual course is for the prosecution to call the informant and for the First Information Report to be tendered as corroboration under S. 157. But it can also be tendered in a proper case under S. 32 (1) as a declaration as to the cause of the informant's death or as part of the informant's conduct (of the res gestae) under S. 8. Theoretically, the defence can prove the information to impeach the informant's credit under S. 155 or contradict him under S. 145, Evidence Act. A.I.R. 1931 Lah. 103=33 Cr.L.J. 183=135 Ind. Cas. 668.

——S. 32—Dying declaration—Cause of death.

First Information Report is admissible under S. 32(1), Evidence Act, as the statement of a person (since deceased) relating to the circumstances of the transaction which resulted in his death. 123 Ind.Cas. 120=31 P.L.R. 83=31 Cr. L.J. 475=A.I.R. 1930 Lah. 450.

——S. 32(1)—Dying declaration—Cause of death.

A dying declaration as to the cause of death is admissible even when the charge is not one of homicide. 6 W.R. (Cr.) 75, Foll. 106 Ind. Cas. 698=6 Pat. 747=9 A.I.Cr.R. 379=29 Cr.L.J. 106=A.I.R. 1928 Pat. 162.

——S. 32(1)—Dying declaration—Cause of death.

The first information report could also be tendered in a proper case under S. 32 (1) as a declaration as to the cause of the informant's death. 99 Ind. Cas. 227=44 C.L.J. 253=28 Cr.L.J. 99=54 Cal. 237=A.I.R. 1927 Cal. 17.

——S. 32(1)—Dying declaration—Cause of death.

Statement, as to circumstances of transaction resulting in death made before injury was inflicted is admissible. 97 Ind. Cas. 660=50 Bom. 683=28 Bom. L.R. 1013=27 Cr.L.J. 1140=A.I.R. 1926 Bom. 513.

——S. 32 (1)—Dying declaration—Transaction resulting in death—(Suicide owing to ill-treatment by accused, charged under Penal Code, S. 330.)

The accused were charged under S. 330, I.P.C. with having for the purpose of exhorting a confession, caused hurt to one R, who committed suicide owing to the ill-treatment. Held, that ill-treatment was the cause though not the direct cause of the suicide and although the accused were not legally responsible for the suicide, the whole affair, ill-treatment, and subsequent suicide, being one transaction the statement of the deceased was admissible under S. 32 (1) of the Evidence Act: 20 P.R. 1916 (Cr.)=42 P.W.R. 1916 (Cr.)=47 P.L.R. 1917=17 Cr.L.J. 438=35 Ind. Cas. 998.

8 (c). Evidentiary value.

i. Evidentiary value—Basis for conviction.
ii. Evidentiary value--Corroboration necessary.
iii. Evidentiary value—Reliability.

8. (c)(i) Evidentiary value—Basis for Conviction.

——S. 32 (1)—Dying declaration — Evidentiary value—Basis for Conviction.

Where the Court is entirely satisfied with regard to the truth and genuineness of an uncorroborated dying declaration, there is nothing to prevent it from regarding such a dying declaration as sufficient to sustain a conviction. A.I.R. 1945 Nag. 153 =1945 N.L.J. 139=I.L.R. (1945) Nag. 613=47 Cr. L. J. 92=221 Ind. Cas. 144.

——S. 32 (1)—Dying declaration—Sufficient to sustain conviction.

Where the Court is entirely satisfied with regard to the truth and genuineness of an uncorroborated dying declaration, there is nothing to prevent the Court from regarding such a dying declaration as sufficient to sustain a conviction. I.L.R. (1942) Kar. 587.

——S. 32(1)—Dying declaration—Sufficiency of —Murder charge.

A dying declaration which names only one person and where the killing took place under circumstances where there could be no doubt that the dying man identified his assailant, is the very strongest possible form of evidence. Where, however, a large number of people are implicated, it is a very different matter and in such a case, if there is no corroboration of the dying declaration, the evidence is insufficient to prove a charge of murder. A.I.R. 1941 Lah. 368=43 Cr.L.J. 59=43 P.L.R. 598=I.L.R. (1942) Lah. 619=196 Ind. Cas. 700.

——S. 32 (1)—Dying declaration—When can be acted upon, for convicting accused without corroboration.

Although it is improbable that a man who has been stabbed and has been able to recognize his assailant would omit to name the actual assailant and instead give the name of some other person in his dying declaration, yet in cases where the assailant has not been recognized, the Court must not ignore the possible temptation that there may be if one has grounds for suspecting any person, to name that person as having been actually and positively identified. The danger of this kind of wrong identification has to be borne in mind in dealing with what are called dying declarations. There is no absolute rule that a dying declaration should not be acted on for the purpose of convicting an accused person even if uncorroborated, provided, that the Court is fully satisfied that it is true. A.I.R. 1941 Pat. 409=7 B.R. 717=42 Cr.L.J. 527=194 Ind. Cas. 186.

——S. 32 (1)—Conviction, when can be based on uncorroborated dying declaration.

There may not be corroboration of the nature contemplated by S. 157, Evidence Act, or matters provable under S. 158, and the only direct evidence may be a statement by the deceased made admissible by S. 32. It does not, however, necessarily follow that this evidence is insufficient to support a conviction. The evidence of an accomplice is tainted, and S. 114, Evidence Act, (illus. b) says that the Court may presume that he is unworthy of credit unless corroborated, but a dying declaration is on a much higher plane and the Act places no such restriction on its acceptance.

It is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the Court after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. A.I.R. 1940 Mad. 196=51 L.W. 65=(1940) 1 M.L.J. 124=1940 M.W.N. 81=I.L.R. (1940) Mad. 158=41 Cr.L.J. 437=187 Ind. Cas. 280 (F.B.).

——S. 32 (1)—Dying declaration—When sufficient to convict.

It is, of course, a fact that for an accused person to be convicted on a dying deposition alone, the Court must be quite satisfied that the dying deposition bears all the marks of truth, and it must be examined with care, remembering that the statement is an ex parte statement, made as a rule in the absence of the accused without the accused having any chance of cross-examining the person who made it; but, the conviction can be had solely on a dying deposition where the Court is satisfied that the man who made the dying deposition had a good opportunity of recognizing the person who attacked him, and that he was telling the truth when he made his dying deposition. A.I.R. 1938 Rang. 282=39 Cr.L.J. 771=176 Ind. Cas. 683.

——S. 32 (1)—Conviction on dying declaration only.

There are many cases in which it is quite safe to convict on a dying deposition, but these are cases in which there is absolutely no doubt that the deceased had a good opportunity of knowing who the assailant was and could not have been mistaken, and at the same time, there is no possible reason why he should be falsely accusing the alleged assailant. A.I.R. 1936 Rang. 324=37 Cr.L.J. 990=164 Ind. Cas. 139.

——S. 32 (1)—Dying declaration—When sufficient to convict.

A dying declaration alone is sufficient to found a conviction if, after applying the accepted tests, it is held to be true and genuine. It is not necessary that it should be corroborated otherwise. A.I.R. 1935 Pesh. 41=36 Cr.L.J. 800=155 Ind. Cas. 276.

——S. 32 (1)—Conviction merely on dying declaration.

Where, apart from the tainted evidence of certain persons alleged to be eye-witnesses, there was only the dying declaration of the deceased against some of the accused:

Held, that it would not be safe and prudent to base a conviction of these accused merely on the dying declaration. A.I.R. 1934 Oudh 405=35 Cr.L.J. 1113=11 O.W.N. 851=150 Ind. Cas. 819.

——S. 32—Dying declaration—Reliability—Penal Code, XLV of 1860, S. 302.

A trustworthy dying declaration made by a deceased person in full possession of his faculties and proved by clear evidence to be the words spoken by the deceased and corroborated by surrounding circumstances is sufficient to sustain a conviction under S. 302, I.P.C. 4 P.W.R. 1909 Cr. =9 Cr.L.J. 156=1 Ind. Cas. 100.

8 (c) (ii) Evidentiary value—Corroboration, necessary to convict.

——S. 32 (1).—Dying declarations should be corroborated in material pariculars and by independent testimony. A.I.R. 1944 Mad. 290=42 Cr.L.J. 407=1940 M.W.N. 163=193 Ind. Cas. 347.

——S. 32 (1)—Dying declaration—False in one particular—Corroboration by independent testimony—Necessary.

Where there were no actual eye-witnesses to a murder and the deceased made several statements naming his assailants but admitted to his wife that he falsely implicated one of them as he hated him:

Held, that unless there was some reliable independent evidence to support the deceased's statements as against the other accused in material particulars tending to show that they were actually concerned in the attack on him, conviction was not proper. A.I.R. 1934 Rang. 98=35 Cr.L.J. 905=149 Ind. Cas. 33.

——S. 32 (1)—Dying declaration—Corroboration, necessity of.

A dying declaration may be relevant under S. 32 although the person who makes it does not expect to die.

Generally a declaration, relevant under S. 32, but not made by one in immediate expectation of death, and not made in presence of the accused, ought not to be acted upon unless there is some reliable corroboration, and this rule applies with extra force in a case where both the Judge and the assessors do not accept the dying declaration as to one of the accused. A.I.R. 1933 Bom. 479 (2)=35 Bom. L.R. 1021=35 Cr.L.J. 109 (2)=58 B. 31=149 Ind. Cas. 548.

——S. 32 (1)—Dying declaration—Corroborative evidence or motive, absence of—Benefit of doubt.

The deceased did not give out his assailant's name on being asked soon after the infliction of wounds but just before his death, he denounced the accused as his assailant. There was no evidence as to what happened nor any good corroboratory evidence to show that the accused committed the offence, nor was there any motive proved which might have made the accused do the deed:

Held, that the accused was entitled to the benefit of doubt. A.I.R. 1933 Rang. 95=34 Cr.L.J. 747=144 Ind. Cas. 282.

——S. 32 (1)—Dying declaration made several days before death—Weight of—Corroboration, necessary.

When a man who is dead has left a statement throwing light upon the cause of his death, that statement is relevant evidence under S. 32, Evidence Act, but it is not entitled to any peculiar credit. If a man gasps out his story soon after the occurrence, it may be said that there was no time for him to fabricate or for his friends to suggest falsehood. But if a statement is made many days before his death, that statement does not carry much weight and it is incumbent on the Court before it accepts the statements to see how far it is corroborated. A.I.R. 1931 Mad. 180=59 M.L.J. 876=32 L.W. 940=32 Cr.L.J. 357=129 Ind. Cas. 252.

——S. 32 (1)—Dying declaration—Unsafe to convict solely on the basis of.

It is unsafe to convict a person merely on the dying statement when such statement is not recorded in the deceased's own words and contains a note of the substance of what deceased told the police. 1930 Cr.C. 757=A.I.R. 1930 All. 532.

——S. 32 (1)—Dying declaration—Corroboration necessary to convict.

Deceased's statement to doctor made just before death, though admissible, must have independent corroboration to prove murder. 120 Ind. Cas. 474=A.I.R. 1929 Pat. 249.

——S. 32 (1)—Dying declaration—Corroboration—If sufficient to convict.

Finding of few blood spots on apparel of an Indian whether sufficient corroboration of dying declaration for supporting conviction depends on facts of each case. A.I.R. 1938 Pat. 52=16 Pat. 593=19 P.L.T. 86=4 B.R. 281 (2)=39 Cr.L.J. 332=173 Ind. Cas. 499.

8 (c) (iii) Evidentiary value—Reliability.

——S. 32 (1)—Dying declaration—Weight of—Matter suggested to deceased by outsiders—If affects.

When there is serious room for doubt as to whether the contents of the dying statement include matter suggested to the deceased by the outsiders, this is a circumstance which cannot be ignored in estimating the value to be attached to it. A.I.R. 1941 Pat. 409=7 B.R. 717=42 Cr.L.J. 527=194 Ind. Cas. 186.

——S. 32 (1)—Dying declaration—Reliance on—Prosecution attempting to improve and develop evidence at successive stages.

Where the prosecution evidence shows that there are signs of attempt to improve and develop it at successive stages, special caution is needed also in dealing with a dying declaration. A.I.R. 1941 Pat. 409=7 B.R. 717=42 Cr.L.J. 527=194 Ind. Cas. 186.

——S. 32 (1)—Dying declaration—Presumption of truth.

A great deal of sanctity is attached to the dying declaration because it is expected that the person who is on the verge of death, will tell the truth. A.I.R. 1939 Oudh 33=1938 O.W.N. 1103=1938 A.W.R. 108=40 Cr.L.J. 38=178 Ind. Cas. 348.

——S. 32 (1)—Dying declaration—Reliance on.

Undue reliance should not be put on so-called dying declarations made presumably under the shadow and fear of death. A.I.R. 1936 Oudh 405=1936 O.W.N. 691=37 Cr.L.J. 955=12 Luck. 291=164 Ind. Cas. 482.

——S. 32 (1)—Dying declaration—Evidentiary value—Expectation that person making it would live and guard against saying something—If affects.

Where it is appeared that when a person made a dying declaration, he expected that he would live and would, therefore, guard against saying something which would go to establish that he was negligent and so would make him lose his job:

Held, that it was no reason for disbelieving his statement in the declaration regarding other matters. A.I.R. 1935 Cal. 580=39 C.W.N. 188=36 Cr.L.J. 1322=158 Ind. Cas. 176 (S.B.).

——S. 32 (1)—Dying declaration—Weight of—Consideration.

A dying declaration which records the very words of the dying man is most valuable evidence—While a dying declaration parts of which have been supplied to the dying man either by interested parties or by Police Officers has no evidentiary value. A.I.R. 1934 Lah. 805=36 P.L.R. 24=36 Cr.L.J. 427=153 Ind. Cas. 810.

——S. 32 (1)—Dying declaration—Conflict with statement to police.

One can understand a dying man saying nothing or speaking incoherently or omitting details, but to have him stating to Magistrate when he cannot possibly have been led in any way, the name of accused and of his father, the time, the motive and the place must surely throw doubt upon any other account of what happened. Where such an account differs from the statement recorded by Police from dying man, the discrepancy can only be attributed to the leading question put by Police to sick man who can hardly speak for otherwise it is impossible to understand how a dying man should have conceived of on entirely new story. 1931 M.W.N. 132.

——S. 32 (1)—Dying declaration—Evidentiary value—Opportunity for coaching—Effect on reliability.

Where the case for the prosecution depends upon the death-bed statement of a man who was admittedly kept back from hospital in order to be instructed about his statement and it is also shown that his statement regarding witnesses to the occurrence was false, his declaration cannot be relied upon for convicting the accused named by him. 1930 M.W.N. 1211.

——S. 32 (1)—Dying declaration—Evidentiary value—Reliability.— Dying declaration though conflicting with initial report is not wholly unreliable. 71 Ind. Cas. 593=24 Cr.L.J. 177=A.I.R. 1924 Lah. 413.

——S. 32 (1)—Dying declaration—Prompting by third persons—Value of declaration.

Although a dying declaration, if properly recorded is a valuable piece of evidence, but if while the statement is being recorded a third person is present and prompts the deceased to give out names of certain accused, it would be exceedingly unsafe to attach any weight to such a dying statement. 96 Ind. Cas. 215=8 L.L.J. 296=27 P.L.R. 484=27 Cr.L.J. 903=A.I.R. 1926 Lah. 496.

——S. 32 (1) — Dying declaration — Accused already named as assailant—Value of.

No reliance would be placed on the dying declaration when it is made at a time when the deceased must have been well aware of the fact that the accused has been named as his assailant. 99 Ind. Cas. 322=8 L.L.J. 410=27 P.L.R. 632=28 Cr.L.J. 114.

——S. 32 (1)—Dying declaration—Value of—Reliability depends upon circumstances in which declaration was made and nature of its record.

A dying declaration under the Indian Law assumes a character very widely different from what it is under the English Law. A dying declaration is relevant under the Indian Evidence Act, whether the person who made it was or was not at the time when it was made, under expectation of death, and the weight to be attached to it depends not upon the expectation of death which is a guarantee of its truth, but upon the circumstances and surroundings under which it was made and very much also upon the nature of the record that has been made of it. Hence it becomes almost always a question of fact as to whether it should be relied upon or not. 88 Ind. Cas. 1000=29 C.W.N. 738=42 C.L.J. 247=52 Cal. 987=26 Cr.L.J. 1256=A.I.R. 1925 Cal. 876.

——S. 32 (1)—Dying declaration.

Dying declaration of inhabitants of a Punjab is unsafe as basis of conviction. 86 Ind. Cas. 826=26 Cr. L.J. 890=A.I.R. 1925 Lah. 549.

——S. 32—Dying declaration — Evidentiary value.

A dying declaration made after receiving extreme unction should generally be believed to be true and acted upon. (1911) 2 M. W. N. 188=12 Cr. L. J. 528 = 12 Ind. Cas. 296.

——S. 32 (1)—Dying declaration—Death agony —Statements in—Probably true.

Where a victim in agony states what had happened to him, shortly after the occurrence, the story could not have been concocted in all probability. 1 P.W.R. 1910 Cr.=11 Cr.L.J. 171=5 Ind. Cas. 602.

——S. 32—Dying declaration—Unreliable.

A dying declaration if it is inconsistent with the other prosecution evidence, full of material contradiction and discrepancies, is useless. 20 P.W.R. 1909 Cr.= 11 Cr.L.J. 131=4 Ind. Cas. 993.

8. (d) Dying declaration—Partial acceptance.

——S. 32—Dying declaration—Value of—Part of it untrue—Whether must be rejected in toto.

Although a portion of a dying declaration is untrue, it need not necessarily be rejected in toto The Court would decline to believe the rest of it without corroboration. I. L. R. (1946) Nag. 235=224 Ind. Cas. 440=47 Cr. L. J. 625=1946 N. L. J; 241=A.I.R. 1946 Nag. 301.

——S. 32—Dying declaration —Partial acceptance.

When, in the interval between the assault and the time when the statement was made, the victim gathered around him his relatives advising him to tell a false story, dying declaration would have no value. In such a case, any passage in the dying declaration, should not be relied upon as being true. A.I.R. 1944 Sind 137= I.L.R. (1944) Kar. 114=46 Cr. L. J. 19=215 Ind. Cas. 172.

——S. 32(1)—Dying declaration—Partial acceptance by jury—Direction to jury.

Exculpatory statement by deceased with regard to assault committed by him on one of the accused —Evidence showing this part of statement to be false—Rest of statement corroborated — Judge asking jury to consider if in view of this single mis-statement, the entire version of the dying declaration should be disbelieved:

Held: the jury could believe that part of statement which was corroborated. A.IR. 1936 Cal. 793=40 C.W.N. 1377= 38 Cr. L: J. 243=I.L.R. (1937) 1 Cal. 475=166 Ind. Cas. 625.

——S. 32(1)—Something found false in dying declaration—Whole, if to be necessarily disregarded.

Section 32, Evidence Act, makes certain declarations relevant which, under the ordinary law, would be irrelevant as hearsay. Once a declaration falls within S. 32, it becomes relevant evidence and the Court must Judge of the weight of that evidence on exactly the same principles as with other types of evidence. The Court has always to bear in mind that a declaration admissible under S. 32 is not made on oath and is not the subject of cross-examination, and therefore, it is a weaker type of evidence than the evidence given by a witness in the witness-box, and if a Judge thinks that part of a dying declaration is deliberately false, it is very improbable that in practice, he would act upon the other part of the declaration, at any rate without very definite corroboration. Because it transpires that something in a dying declaration is false, the whole dying declaration must not necessarily be disregarded. A.I.R. 1933 Bom. 479 (2)=35 Bom. L. R. 1021=35 Cr. L. J. 109(2) =58 B. 31=146 Ind. Cas. 548.

——S. 32—Dying declaration—No question of acceptance in part.

A dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue, though, to found a criminal conviction on such appraisement of evidence will be very often unsafe. As regards a dying declaration, to accept a portion

and reject the rest is entirely out of the question: there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon. 88 Ind. Cas. 1000=29 C. W.N. 738=42 C..L. J 247=52 Cal. 987 =26 Cr.L.J. 1256=A.I.R. 1925 Cal. 876.

8 (e) Dying declaration—Procedure of taking.

——S. 32(1)—Dying declaration—Recording of.

Every statement intended to be proved as a dying declaration need not have been recorded by a Magistrate Moreover, law does not require such statements to be made necessarily under expectation of death. 193 Ind. Cas. 322.

——S. 32 (1)—Dying declaration — Declaration by signs—How to be recorded.

Where the victim, who is in a serious condition and unable to speak, makes a dying declaration by signs of hands and head, there is the gravest doubt whether in the circumstances, the so-called dying declaration can be admitted into evidence if the person recording it does not describe the signs more particularly than by stating that they were by waving of the hands and movement of the head. He should record the precise nature of the signs, leaving the interpretation to the tribunal. A.I.R. 1938 Pat. 153 =4 B. R. 342=39 Cr. L.J. 384=173 Ind. Cas. 833.

——S. 32 (1)—Dying declaration—Taking of—Duty of Magistrate.

An injured man who is waiting to be operated on should not be subjected to anything like a third degree cross-examination by the Magistrate who records his dying deposition; but the magistrate should not content himself with merely recording the statement made by the injured man; he should ask him such simple questions as may occur to his mind in order that the dying deposition may be an account of some value. A.I.R. 1938 Rang. 282=39 Cr.L.J. 771=176 Ind. Cas. 683.

——S. 32(1)—Dying declaration—Question put to deceased "was it A ?" — Answer by nod — Recording of.

Evidence as to signs made in answer to questions put to the deceased is admissible but statements of witnesses as to what interpretation they put upon the signs are not admissible.

The nod of assent by the deceased to the question "was it A ?" would constitute a verbal statement made by the deceased.

It is, of course, true that evidence of signs of an ambiguous or uncertain character ought not to be admitted at all and that in many cases, the evidence, though admissible, might be of little weight. It is no doubt also true that answers to questions of a leading character may be of little weight. A. I. R. 1937 P.C. 24=38 Cr L. J. 281= 45 L. W. 78=1937 O. W.N. 218=1937 M.W.N. 169=41 C.W.N. 513=1937 A.L. J. 420=1937 A.W. R. 275=39 Bom. L.R. 359=(1937) 1 M.L. J. 600= 166 Ind. Cas. 330 (P.C.).

——S. 32 (1) — Dying declaration — Influence should not be brought to bear on declarant.

The recording of a dying declaration is a grave and solemn proceeding. Unauthorised persons should not be permitted to crowd round when the declaration is being made. It is the duty of the Magistrate to take every possible step to ensure that no influence is brought to bear on the declarant and that he is not prompted in any way in making his statement. A.I.R. 1934 All. 908=36 Cr. L. J. 152=4 A.W.R. 5= 57 All. 267=152 Ind. Cas. 741.

——S. 32 (1)—Dying declaration—When taken.

The necessity of recording a dying declaration arises only when the hopes of life of the man are given up. 129 Ind. Cas. 676=52 C.L.J. 425 (F.B.).

——S. 32—Dying declarations—Form of dying declaration should show distinctly the questions put to the declarant and his answers to them.

Where a statement is not the ipsissima verba of the person making it but is composed of a mixture of questions and answers there are several objections open to its reception in evidence, which it is desirable should not be open in cases in which the person has no opportunity of cross-examination. In the first place the questions may be leading questions and in the condition of a person making a dying declaration there is always a very great danger of leading questions being answered without their force and effect being freely comprehended. In such circumstances the form of the declaration should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining. Magistrate, and how much was the production of the person making the statements. 88 Ind. Cas. 1000=29 C.W.N. 738=42 C.L.J. 247= 52 Cal. 987=26 Cr.L. J. 1256 A.I.R. 1925 Cal, 876.

8 (f) Dying declaration—Proof.

i. Proof—Mode of

ii. Proof—Necessity of

iii. Proof—Miscellaneous.

8. (f) (i) Proof—Mode of.

——S. 32 (1)—Dying declaration—Method of proof.

Where a dying declaration has to be proved by a Magistrate, it is unnecessary for him to repeat the record seriatim in his evidence if he is satisfied that it was correctly recorded; it is sufficient for

him merely to refer to the record and testify its correctness, and that it was made by the person and under the circumstances in question. (Scope of Ss. 32 and 33 narrated).

The proof of the identity of person who made the declaration is essential. To prove the identity of the declarant, it is desirable not to summon the Magistrate for that purpose, but to prove it from the mouth of some one else, preferably some other witness in the case who was present at the time that the declaration was taken. A.I.R. 1941 Rang. 301=1941 Rang. L.R. 258=43 Cr.L.J. 123=197 Ind. Cas. 131.

——S. 32 (1)—Dying declaration—Mode of proof.

The only satisfactory and reliable way of proving the dying declaration is to let the person who recorded it or in whose presence it was recorded directly prove the writing itself. No human being can be expected to remember word for word what he had written long ago and either the witness will have to learn the evidence by heart before he enters the witness-box or no dying declaration could be proved in a satisfactory manner at all. A.I.R. 1938 Pesh. 33=39 Cr.L.J. 744=176 Ind. Cas. 471.

——S. 32 (1)—Dying declaration—"Written statement by person who is dead"—Mode of proof.

The expression "written statements made by a person who is dead" means that the written statements must have been actually made by the deceased person. A person may make a written statement either by writing it out himself or by dictating it to somebody else. Usually a person who is in immediate expectation of death is too feeble to be able to write out his statement himself, but if any written statement is produced in Court purporting to have been made by a person who is dead, it must be shown if that person did not write that statement himself, that he dictated the statement, and that he did not make the statement, in answer to any questions except such a question as "Will you please state what it is your wish to be written down?" and there must be guarantee that the dictation has been taken down correctly. Usually the best way to establish this is to show that the dictated statement was read over to the deceased and admitted by him to be correct. A.I.R. 1936 Rang. 42=37 Cr.L.J. 299=160 Ind. Cas. 597.

——S. 32(1)—Dying declaration—Mode of proof.

Dying declaration certified by its recorder in Court to be correct is admissible in proof of its contents. A.I.R. 1922 Cal. 382, Foll. 92 Ind. Cas. 167=7 Lah. 91=27 Cr. L.J. 215=28 P.L.R. 222=A.I.R. 1926 Lah. 310.

——S. 32—Dying declaration—Proof, Mode of.

Dying declaration can be proved by examining person recording it or person who heard its being made—It must be taken as a whole and portion only cannot be allowed. 50 C.L.J. 584=1930 Cr.C. 196=A.I.R. 1930 Cal. 228.

——S. 32—Dying declaration—Mode of proof.

To prove a dying declaration it is not necessary that the witness while giving evidence, should repeat in his own words what the deceased has said; it is enough if he proves the record of that statement. A.I.R. 1926 Lah. 310, Foll. 123 Ind. Cas. 120=31 Cr.L.J. 475=31 P.L.R. 83=1930 Cr.C. 554=A.I.R. 1930 Lah. 150.

——S. 32 (1)—Dying declaration—Proof of.

Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by a deceased person admissible under S. 32 of the Evidence Act and that statement is not a document made by the Magistrate but the verbal statement made by the deceased person. The only way of proving a dying declaration is by the evidence of some witness who heard it made the witness being at liberty to refresh his memory by referring to the note made by him or read over to him at or about the time the statement is made. 67 Ind. Cas. 577=23 Cr.L.J. 417=6 L.L.J. 115=A.I.R. 1924 Lah. 12.

——S. 32 (1)—Dying declaration—Proof by a witness present is sufficient proof.

Where the dying declaration was recorded in the presence of a witness, was read over to the deceased in the presence of the witness and was admitted by the deceased to be correct,

Held, if the witness, who heard that statement made, swears that the written statement correctly reproduces the words used by the deceased, this is sufficient to prove that the deceased did use the words contained in that statement. 71 Ind. Cas. 685=49 Cal. 358=24 Cr.L.J. 221=A.I.R. 1922 Cal. 382.

——S. 32—Dying declaration how to be proved.

Witnesses should not be allowed to prove dying declaration as if it is a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by a deceased person admissible under S. 32 of the Evidence Act, and that statement is not the document made by the Magistrate, but the verbal statement made by the deceased person. The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over by him at or about the time the statement is made. (1901) 6 C.W.N. 72.

8. (f) (ii) Proof—Necessity of.

——S. 32—Dying declaration—Not taken down in presence of accused—Proof necessary.

The written record of a dying declaration not taken down in the presence of the accused is admissible when it is proved by a witness that the statements contained therein were in his presence recorded by a Magistrate and read over to the accused who admitted their correctness. A.I.R. 1940 Nag. 340=1940 N.L.J. 459=42 Cr.L.J. 17=I.L.R. (1941) Nag. 110=190 Ind. Cas. 849.

——S. 32 (1)—Dying declaration—Written record, when admissible—Proof, if necessary.

The statements made by the deceased regarding the motive of the accused in committing the offence, in the first information report and in the dying declaration, are statements as to the circumstances of the transaction resulting in the death of the deceased, and as such, are admissible under S. 32.

The law is not that the written record cannot be used at all, but that it is not to be used without first examining as a witness the person who heard the statement made.

Where a Sub-Insrector who recorded the first information report is examined as a witness and the written record of the statement is attested by him and also the Magistrate who recorded the dying declaration is examined as a witness and proves the statement recorded by him and also proves that the deceased was on his senses and that he read over the statement to the deceased who admitted it to be correct; this is sufficient attestation and proof of the statement to make it admissible under S. 32. A.I.R. 1938 Pat. 52=16 Pat. 593=19 P.L.T. 86=4 B.R. 281 (2)=39 Cr.L.J. 332=173 Ind. Cas. 499.

——S. 32 (1)—Dying declaration — Proof Necessary—Mode of.

Statements made by a person who is dead must be proved whether they are written statements or verbal statements. If they are verbal statements, the persons who heard the deceased make the verbal statements must be examined on oath as witnesses, and if a person at the time made a record of the deceased's statements, he may refresh his memory by referring thereto or if he has no specific recollection of the statements made, he may, under S. 160, Evidence Act, testify to facts mentioned in the document if he is sure that the facts were correctly recorded by him. In the latter case, the witness must still depose by reference to the document as to what the deceased said. It is not necessary for the witness to read out his statement and for the Magistrate to record what the witness reads out. The witness may be said to testify to the fact mentioned in the document if he produces the document and swears that all that is written therein was actually stated by the deceased. If the document is thus put on record, it does not become, in the strict sense, substantive evidence, but it forms part of the testimony of the witness who recorded it.

If the statement to be proved is a written statement made by a person who is dead, then it must be proved that such statement was so made by the person who is dead. In that case, the written statement itself becomes substantive evidence. What is to be decided is what constitutes a written statement made by a person who is dead. A.I.R. 1936 Rang. 42 (43)=37 Cr.L.J. 299=160 Ind. Cas. 597.

——S. 32 (1)—Dying declaration—Proof necessary.

Under S. 32, Evidence Act, whether the statement made by a dying man and recorded by another is read over to him or not, or whether it is signed by him, makes no difference; the fact that it has been read over and signed by the deponent only makes its evidentiary value stronger.

In the case of a dying declaration, the evidence of the person who recorded it or in his unavoidable absence, some other person who was present and heard it correctly recorded should always be taken to make the written record admissible. A.I.R. 1931 Mad. 430=33 L.W. 348=60 M.L.J. 404=1931 M.W.N. 167=54 Mad. 678=33 Cr.L.J. 115=135 Ind. Cas. 337.

——S. 32 (1)—Dying declaration—Proof, necessity of.

Dying declaration should be proved in manner prescribed by 8 Cal. 211. 88 Ind. Cas. 860=52 Cal. 446=26 Cr.L.J. 1244=A.I.R. 1925 Cal. 821.

——S. 32 (1)—Dying declaration—Proof, if necessary.

Evidence Act makes dying declaration relevant facts as written statements of deceased or written records of verbal statements which a deceased makes and which becomes substantive evidence of the cause of deceased's death. An oral statement of the deceased about the cause of his death may be proved by any who heard it as well as by the person who recorded it. Under S. 32 (1) it is not necessary that the magistrate recording the confession should be called and be asked to refresh his memory by referring to statements of witness under S. 159 of Evidence Act. 16 Cr.L.J. 759=31 Ind. Cas. 359 (Mad).

——S. 32 (1)—Dying declaration—Deponent not signing—Whether statement admissible in evidence—Proof, necessary.

A dying declaration reduced to writing but not signed by the deponent, is not admissible in evidence, but must be proved by the oral testimony of the person who heard it. Notes of Police officer relating to a dying declaration are not admissible in evidence unless signed but the deponent, but in testifying to it, he can refer to them to refresh his memory. 10 N.L.R. 19=15 Cr.L.J. 243=23 Ind. Cas. 195.

——Ss. 32, (1) 33—Dying declaration — Proof of—Necessity.

A statement of a deceased person recorded in the absence of the accused is not admissible under S. 33

of the Evidence Act. Nor is it admissible under S. 32 (1) unless it is proved by the magistrate who recorded it or by some one who heard it made. 6 Bur. L.T. 68=14 Cr.L.J. 396=20 Ind. Cas. 220.

——S. 32 (1)—Dying declaration — Proof, necessity of.

A dying declaration recorded by a Magistrate is not evidence unless proved by the statement of the Magistrate though he is himself the committing Magistrate in the case. A Court cannot go beyond the rule that every statement placed on the record must be properly proved. Dying declarations are not covered by the provisions of Chap. XLI of the Cr. P. Code. 239 P.L.R. 1912=14 Cr.L.J. 131=18 Ind. Cas. 883.

——Ss. 32, 33—Dying declaration—When admissible—Proof necessary.

The dying declaration being the most important piece of evidence must be as exact and full as possible. Where the record of the said declaration spoken to by the witnesses is apparently less than what they said, a retrial must be held. The proper legal mode of proving verbal statements of a deceased is to elicit it from the person who heard him make it. The witness can refresh his memory from the record of the statements written by himself or by another in his presence; otherwise it is not relevant. If it is a deposition in the presence of the accused it would be relevant. A deceased's written statement signed by him after having been satisfied of its accuracy is admissible under S. 32 as his statement in writing. Such a statement would not debar a witness from proving what the deceased said, independently of the writing. It would be desirable to record, what the witness can reproduce from his memory without reference to the writing. 11 M.L.T. 214=(1912) M.W.N. 405=22 M.L.J. 453=13 Cr. L.J. 468=15 Ind. Cas. 308.

——S. 32—Dying declaration—Admissibility of—Cr. P. Code, Chap. 41—Proof of, necessary.

A dying declaration recorded by a Magistrate should be proved before it can be accepted as evidence and the fact that the Magistrate was the Committing Magistrate makes no difference. Dying declarations are not covered by Ch. 41 of the Cr. P. C. to enable them to be admitted without proof. 17 P.R. 1911 Cr.=13 Cr.L.J. 225=48 P.W.R. 1911 Cr.=14 Ind. Cas. 417.

——S. 32, Cl. (1)—Dying declaration, when evidence.

A dying declaration recorded by a Magistrate other than the trying Magistrate and in the absence of the accused is not admissible in evidence unless and until it is proved by the Magistrate who recorded it. (1907) 34 C. 698=11 C.W.N. 666.

——S. 32, Cl. (1)—Dying declaration—Proof necessary—Mode of proof.

The writing recorded by a Police officer, containing the statement made by a murdered man before his death, is no evidence of the statement. Persons who heard the statement must speak to it, but they can refresh their memory with the record. 8 C. 211 foll. (1902) 6 C.W.N. 921.

——S. 32 — Dying declaration — Recorded in language different from that in which it was made—Officer recording not called—Effect of.

A declaration made by a person in expectation of death recorded in the absence of the accused and in a language different from the one in which it is made by an officer who is not examined in the case cannot properly be used in evidence against the accused, and at any rate such a declaration should not be relied upon in convicting the accused. Where a dying declaration is not a continuous statement made by the dying person, but is elicited in answer to one or more questions, the document, to be really of use, should clearly set out the exact questions put and the answers made to them. 6 C.W.N. 72.

8. (f) (iii) Proof—Miscellaneous.

——S. 32 (1) — Dying declaration—Proof of — procedure.

Magistrate called to prove dying declaration which he was not authorised to record—He may be questioned whether deceased was in fit state to make declaration and understood what he said. A.I.R. 1941 Rang. 301=1941 Rang. L. R. 258=43 Cr. L. J. 123=197 Ind. Cas. 131.

—— S. 32 (1)—Dying declaration—Competency and credibility.

Wound penetrating whole liver, going through stomach and ribs:

Held, that the sufferer of injury of this nature is incapable of making declaration after two hours. A.I.R. 1938 Lah. 268=39 Cr. L. J. 508=174 Ind. Cas. 973.

——S. 32 (1)—Dying declaration—Competency of.

Person receiving forty-two gun-shots in chest, liver, stomach, etc.—He would be immediately unconscious and incapable of making dying declaration. A. I. R. 1938 Lah. 262=39 Cr. L. J. 512=174 Ind. Cas. 989.

——S. 32 (1)—Dying declaration—Possibility of speech.

In the case of a wound of the larynx, speech is possible if the wound is above the vocal cords even if it is gaping. But in wounds of the larynx below the vocal cords, and in those of the trachea no speech is possible. A.I.R. 1936 Oudh 405=1936 O.W.N. 691=37 Cr. L. J. 955=12 Luck. 291=164 Ind. Cas. 482.

——S. 32 (1)—Dying declaration—Evidence of—Rejection.

Where, in view of the numerous and very severe injuries received by the deceased on his head, the Court has grave doubts as to his being in a condition to utter even a single word after the injuries had been inflicted on him, the Court should discard the evidence of the dying declaration of the deceased given by the prosecution witnesses. A.I.R. 1933 Oudh 333=10 O.W.N. 557=35 Cr. L. J. 45=8 Luck. 570=146 Ind. Cas. 381.

8 (g) Dying declaration—What is.

——S. 32 (1)—Accused examined in hospital when he was wounded—Accused not charged with any offence—Statement not read over to him—No enquiry under Chap. XIV, Criminal P. C. —No certificate under S.164, Criminal P. C.

The statement of the accused was recorded by a Deputy Magistrate in the hospital even before he was charged with any offence and before an offence under the Explosive Substances Act or under the Penal Code, had been registered against any body; neither was an oath administered nor did the statement purport to be one recorded under S. 164, Criminal P. C., and there was nothing to show on the face of the record of this statement that it was even read over to the doponent before his right thumb mark was affixed to it:

Held, that the statement could not be used as a dying declaration as the defendant did not die and the dying declarations are recorded, not of persons who are accused of crimes but of persons who are themselves the victims of some one else's crime. A.I.R. 1935 Oudh 477=36 Cr. L. J. 1007=1935 O.W.N. 781=11 Luck. 327=156 Ind. Cas. 819.

——S. 32 (1)—Dying declaration—"Any of the circumstances of the transaction resulting in death".

The words 'as to any of the circumstances of the trans ction which resulted in his death' in S. 32, Evidence Act, are wide enough to include oral statements made by a person wounded mortally while pursuing dacoits, during the period commencing from the information given by him to the authorittes until the time he is shot down. The dying declaration made by him and recorded by the Magistrate will also be relevant under S. 32 subject to the rule of law excluding hearsay evidence. A.I.R. 1933 Oudh 53=9 O.W.N. 977=34 Cr.L. J. 101=140 Ind. Cas. 892.

——S. 32 (1)—'Dying declaration'.

Declaration made by a dying person, though he lingered on for some days, is a dying declaration. 113 Ind. Cas. 177=10 L L. J. 463=30 Cr. L. J. 65=11 A. I. Cr. R. 543=A.I.R. 1929 Lah. 64.

——S. 32 (1)—Dying declaration—Statement to a Magistrate containing a complaint.

A statement to Magistrate is admissible under S. 32 (1) as a dying declaration though it contains a complaint. 36 Cal. 659=13 C.W.N. 682=10 Cr. L. J. 186=2 Ind. Cas. 841.

9. Evidentiary value.

——S. 32—Evidentiary value—Corroboration.

Though the accounts which are relevant under S. 32 (2) do not require corroboration as a matter of law the Judge is not bound to believe them without corroboration. 226 Ind. Cas. 307=1946 N.L. J. 561=I.L.R. 1946 Nag. 707=A.I.R. 1947 Nag. 106.

——Ss. 32, 49, 60—Value of evidence.

The value of the evidence admissible under Ss. 32, 49 and 60, Evi. Act, depends on the character of the witnesses who depose to what they heard from deceased persons and also on the character of the deceased and whether they were expressing their own opinion or merely repeating hearsay. A.I.R. 1933 Sind 213=150 Ind. Cas. 266.

10. Facts in issue.

——S. 32 (4)—Facts in issue — Statements relating to, when admissible.

There is no reason for excluding from the operation of cl. (4) of S. 32 statements relating to facts in issue. The inconvenience and expense to be taken into account must be with respect to individual witnesses and not arising merely from the number of witnesses which a party wishes to call. 34 Ind. Cas. 875 (Mad.)

——S. 32—Facts in issue, when relevent.

Facts in issue are relevant facts within S. 32 and statements made by deceased persons about facts in issue are admissible under this section. 15 Bom. 565 Dist., 27 M. 228 Ref. 34 Ind. Cas. 875 (Mad.).

11. Guardianship certificate.

——S. 32—Guardianship certificate.

An approximate estimate of the age of the defendant made by third parties who might not have had any special means of knowledge is not of much value.

Guardianship certificate cannot be admitted under S. 32 because it is signed by the District Judge who cannot be said to be a person having any special means of knowledge as to its contents. A.I.R. 1934 All. 406=1934 A.L.J. 318=56 All. 766=3 A.W.R. 529=149 Ind. Cas. 781 (F.B.).

——S. 32—Guardianship certificate.

Where the person who had filed the application and affidavit in the Guardianship proceedings was alive during the pendency of the suit in the Trial Court, and might have been called as a witness, but was not called, the defendant-minor was held not be entitled to the benefit of S. 32 (5), Evidence Act. 71 Ind. Cas. 336=38 C.L.J. 186=A.I.R. 1924 Cal. 526.

——S. 32 (5)—Guardianship certificate.

The recital in a guardianship certificate as to age of a person is admissible under Section 32 (5). 34 C. L. J. 302=66 Ind. Cas. 433=A.I.R. 1921 Cal. 581.

12. Hearsay.

——S. 32—Hearsay evidence—Admissibility—Discretion of Judge.

It is entirely erroneous to state that "the principle of exclusion adopted by the Evi. Act, should not be applied so as to exclude matters which may be essential for the ascertainment of truth." This mode of regarding the law of evidence is very unsound and hearsay evidence which does not fall under S. 32. Evi. Act, cannot be admitted upon such principle. What matters should be given in evidence as essential for the ascertainment of truth, it is the purpose of the law of evidence whether at common law or by statute, to define. Once a statute is passed which purports to contain the whole law, it is imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. The rules of evidence, whether contained in a statute or not, are the result of long experience, chosing, no doubt, to confine evidence to particular forms, and therefore, eliminating others which, it is conceivable, might assist in arriving at truth. But that which has been eliminated has been considered to be of such doubtful value as on the whole to be more likely to disguise truth than discover it. To allow a Judge to introduce it at his own discretion would be to destroy the whole object of the general rule. A.I.R. 1941 P.C. 16=I.L.R. (1941) Kar. (P.C.) 54 Sup=I.L.R. (1941) 1 Cal. 468=1941 A.W.R. 34=43 Bom. L.R. 794=73 C.L.J. 555=7 B.R. 656=1941 M.W.N. 351=53 L.W. 469=(1941) 1 M.L.J. 746=22 P.L.T. 286=1941 O.W.N. 572=45 C.W.N. 435=68 I.A. 34=193 Ind. Cas. 220 (P.C.).

——S. 32—Hearsay—Statement of deceased.

A statement of a witness as to what he heard from the deceased, when it does not relate to the cause of his death or the circumstances of the transaction which resulted in his death, is hearsay and is not admissible; they must be proved in the ordinary way, viz., by evidence of a primary character and not by hearsay testimony. (1901) 5 C.W.N. 574=28 C. 397.

——S. 32 (5) — Hearsay evidence—Relationship—Fosterage—Admissibility.

Hearsay evidence is inadmissible to prove connection by fosterage. 1 O.L.J. 281; 24 Ind. Cas. 643.

13. Horoscope.

——S. 32—Horoscope—Proof of minority.

In the matter of proof of minority the horoscope is not a document of very great evidentiary value but the birth register is. A.I.R. 1941 All. 385=1941 A.L.J. 560=197 Ind. Cas. 866.

——S. 32 (5)—Horoscope.

A horoscope may be admissible in evidence under S. 32; Evi. Act, but it must be shown that the person who prepared the horoscope had special means of knowledge. A.I.R. 1938 Cal. 43=174 Ind. Cas. 756.

——S. 32, cl. (5)—Horoscope.

Where a horoscope has been prepared by an astrologer who has had special means of knowledge relating to the date of birth of a person, and the astrologer is dead, the horoscope is admissible in evidence under S. 32, cl. 5. Evi. Act. A.I.R. 1933 Cal. 51=36 C.W.N. 838=56 C.L.J. 253=142 Ind. Cas. 36.

——S. 32—Horoscope.

Horoscopes containing date of birth and prepared by a person having special means of knowledge and who is dead, are admissible to prove date of birth. 102 Ind. Cas. 449=6 Pat. 388=8 P.L.T. 730=A.I.R. 1927 Pat. 271.

——S. 32 (5) & (6)—Horoscope.

Horoscope brought into the Court by the family pandit was held as evidence of the proof of age. 83 Ind. Cas. 840=11 O.L.J. 164=A.I.R. 1924 Oudh 353.

——S. 32—Horoscope.

A horoscope is often accepted as substantive evidence of the date of the birth of the person mentioned in it, perhaps with a vague idea of reference to Section 32. No part of that section can make any statement of a date in such a document a relevant fact. 71 Ind. Cas. 140=6 N.L.J. 1=A.I.R. 1923 Nag. 164.

——S. 32 (5) and (6)—Horoscope—Statements in.

Statements as to age made by deceased persons e. g., in horoscopes in the circumstances mentioned in S. 32 of the Evidence Act, are admissibile in evidence. 21 C. L. J. Foll. A horoscope prepared by a deceased person is admissible in evidence to prove age. 5 Pat. L. J. 605=1 Pat. L.T. 511=58 Ind. Car. 72.

——S. 32 (5)—Horoscope—Evidence of person drawing up.

A statement about the date of the son's birth by a father at the time of preparing a horoscope is admissible in evidence under S. 32 cl. (5) of the Evidence Act as it was the date of the commencement of a relationship. 10 L.W. 67=52. Ind. Cas. 456.

——S. 32 (5) — Horoscope—Admissibility of evidence.

A horoscope is receivable in evidence under S. 32 (5) but the party making it must have had special means of knowledge. 3 L. W. 210= (1916) 1 M.W.N. 208=33 Ind. Cas. 969.

14. Interested Statements.

——S. 32 (3)—Interested statement—Statement by person not witness that certain property belonged to him—Evidence as to.

An isolated piece of paper or memorandum made by a person not before the court as a witness embodying a statement for his own information that certain property belonged to him containing nothing against his own pecuniary interest or exposing him to a criminial prosecution or a civil suit, is not admissible in evidence under S. 32, Evi. Act. A.I.R. 1940 Sind 173=I.L.R. (1940) Kar. 334=191 Ind. Cas. 911.

——S. 32—Settlement deed—Statement as to prior partition—Interested.

A statement of a person who is dead, contained in a deed of settlement to the effect that after the death of his father a partition was effected amongst the brothers is a statement which is not admissible in evidence to prove separation under any provision of the Evi. Act, it being obviously in the interest of the person who made it. A.I.R. 1937 Oudh 133= 1936 O.W.N. 1203=165 Ind. Cas. 785.

——S. 32 (3)—Statements of dead persons—Not against his interest—Evidence as to—Inadmissible.

The evidence of witnesses tendered for the purpose of proving certain statements by deceased person would not be admissible under S. 32 (3) Evi. Act, where such statements are not against the pecuniary or proprietary interest of the deceased. A.I.R. 1936 Rang. 5=14 Rang. 11=161 Ind. Cas. 387.

——S. 32—Interested statements—Statement by Hindu in will in his own favour.

A statement made by the deceased in his will in his own favour is not admissible under the Evi. Act, for the purpose of proving that there was a severance of joint fam ly tie between him and his son. This statemeet cannot be brought within the provisions of any of the clauses enumerated in S. 32, Evi. Act. A.I.R. 1936 Sind 217 (221)=167 Ind. Cas. 444.

——Ss. 32 (3), 10 — Interested Statements—Charge under Ss. 420 and 120-B, Penal Code—Accused inducing Insurance Company to accept proposal by securing false medical report—Statement of doctor.

The accused was charged under Ss. 420 and 120-B, I.P.C, for committing fraud on an Insurance Company by inducing the said Company to accept the proposal for insurance on the life of one M securing a false medical report about the said M and by suppressing and misrepresenting facts about him and his family history to the said Company:

Held, that conceding that the confession of the doctor that the report was made out according to the instructions of the accused was not admissible in evidence under S. 32 (3), Evi. Act, there could be no doubt that the statement was admissible under S. 10 seeing that other evidence in the case disclosed reasonable grounds for believing that there was a conspiracy, and that the dector was a conspirator. A.I.R 1935 Cal. 26=38 C.W.N. 1015 =36 Cr.L.J. 678=155 Ind. Cas. 261.

——S. 32—Interested statements of deceased—If admissible under.

Where the judgment debtor, since deceased dedicated certain property to wakf after it was attached and it appeared that the wakf deed contained a recital as to dedication.

Held, that the recital was not admissible in evidence under S. 32 (7). 128 Ind. Cas. 791=11 Pat. L.T. 658=A.I.R. 1930 Pat. 610.

——S. 32—Interested statement of deceased—Statements in a will.

Statements in a will of an interested party in the disputes who was then taking a position adverse to another cannot be regarded as evidence against the other and are inadmissible even though the testator is dead. 83 Ind. Cas. 418=22 A.L.J. 254= 34 M.L.T. 70=5 Lah. 92=5 L.R.P.C. 113=51 I.A. 163=28 C.W.N. 953=1924 M.W.N. 650=20 M.L.W. 406=26 Bom. L.R. 1108=A.I.R. 1924 P.C. 126=47 M.L.J. 938 (P.C.).

15. Ordinary course of business.

(i) Interpretation

(ii) Scope and applicability (instances)

15 (i) Interpretation.

——S. 32 (2)—Interpretation—"In the ccurse of business".

The words 'in the course of business' in S. 32 (2), Evidence Act, mean in the way that business (which may be of a purely private or even trivial nature) is conducted. It is not necessarily connected with a course of business which suggest a series of acts of business. A.I.R. 1937 Mad. 19= 44 L.W. 681=167 Ind. Cas. 30.

——Ss. 32 (2), 34—Interpretation—Books kept in the ordinary course of business—'Book', what is,

A collective unity of sheets even at the time that the entries came to be made is implied in the conception of 'a book'. It connotes an intention that it should serve as a permanent record. Beyond these two ideas, it is not necessary that it should consist of a particular number of sheets or that it should be bound in a particular way. A.I.R. 1936 Mad. 871=44 L.W. 467=1936 M.W.N. 1274=170 Ind. Cas. 749.

——S. 32 (2)—"Ordinary course of business"—Scope and meaning of.

The words "in the ordinary course of business" indicate the regular routine of business usually followed and adhered to, on all occasions by the person whose declaration is sought to be introduced; but it has no reference to business of other stray character. 23 B. 63 Foll. 4 Bur. L.T. 185=11. Ind. Cas. 854.

——S. 32 (2), 35—Chowkidari registers, entry of Chakran land in, if made in discharge of official duty—"Made in the ordinary course of business".

Reg. XX of 1887 does not impose on the Darga any duty of keeping a register of Chowkidari Chakran lands. From the precise and uniform character of the entries as to such lands appearing in a register kept under the regulations:

Held,—That there could be no doubt that they were made under proper direction in the ordinary course of business though outside the statutory duty of the person who made them; that S. 35 of the Evidence Act did not cover such entries but S. 32 of the Act applied, and they are admissible in evidence. (1902) I.L.R. 25 A, 90 ref. to. The phrase "in the course of business" does not apply to any particular transaction of an exceptional kind, such as the execution of a deed of mortgage, but to business or professional employment in which the declarant was ordinarily or habitually engaged. The "business" referred to may be of a temporary character. 13 C.W.N. 71=1 Ind. Cas. 376.

15 (ii) Scope and applicability (instances).

——S. 32 (2)—Statement made in ordinary course of businss — Judgment signed by President (dead) of the British Indian association—If comes under.

A judgment passed by the British Indian Association which was not filed in a Court of Financial Commissioner within six months after the passing of the Oudh Estates Act, cannot be treated as a decree of a competent court or as having any legal effect as a decision on a question of title, and is not relevant under Ss. 40 to 43 of the Evi. Act. The fact that such a judgment is signed by the President of the British Indian Association, who is dead, cannot make the judgment admissible under cl. (2), S. 32, Evi. Act, as a statement made by a person in the ordinary course of business, if there is no such statement in the judgment upon the point in issue as could have been made by President, in the ordinary course of business. A.I.R. 1943 Oudh 91=1942 O.W.N. 657=18 Luck. 346=205 Ind. Cas. 433.

——S. 32 (5) — Entry in his diary by father regarding birth of his son.

Where entry by father in his pocket book regarding the births of his various sons which is relevant under the provisions of S. 32 (5) is proved to be in his handwriting by witnesses acquainted with his handwriting in their official capacity, the fact that it is very long time since any of them saw his hand-writing would not shake the value of the evidence which they have given. A.I.R. 1941 Pesh. 38=194 Ind. Cas. 824.

——S. 32 (2) and (7) — 'Statement made in the ordinary course of business' meaning of — If includes arbitrator's report.

Criminal case regarding land—Parties agreeing to appoint **mukhtar** as arbitrator—Report submitted by **mukhtar**—Subsequent suit between same parties for possession of same land—**Mukhtar** arbitrator in previous suit dead—His report is not admissible under S. 32 (2), but under S. 32 (7). A.I.R. 1938 Cal. 150=65 C.L.J. 603=174 Ind. Cas. 511.

——S. 32 (2)—Ordinary course of business.

Entry in police diary—Statement made to Police Officer by third person regarding complicity of accused — Murder of maker of the statement—Charge of murder:

Held, that S. 32 (2) applied and the statements were admissible under that section though not under S. 162, Criminal P. C. A.I.R. 1932 All. 442=1932 A.L.J. 301=34 Cr.L.J. 109=140 Ind. Cas. 578.

——S. 32 (2) and (3)—Ordinary course of business.

A receipt, stating the disputed property as one of the boundaries to an adjacent plot, executed by a deceased person in the ordinary course of business and consisting of an acknowledgment written or signed by him of the receipt of money, is admissible in evidence under S. 32, and not under S. 13. 113 Ind. Cas. 414=5 O.W.N. 174=A.I.R. 1928 Oudh 248.

—S. 32 (2)—Post mortem report— Admissible under.

Where the Civil surgeon who conducted the **post mortem** examination had since died.

Held, that the **post mortem** report would be admissible under S. 32 (2) of the Evidence Act as being a statement made by a dead person in the ordinary course of business and in the discharge of his professional duty. 85 Ind. Cas. 647=26 Cr. L. J. 551=6 L.R.A.Cr. 49=A.I.R. 1925 All. 413.

——S. 32 (2)—Ordinary course of business.

An endorsement of the deceased scribe of a document after the mark of the executant, that it was his mark, is admissible. 77 Ind. Cas. 798=18 N. L. R. 85= A.I.R. 1922 Nag. 227.

——S. 32 (2)—Ordinary course of business.

Entries made in the diary of a deceased illiterate **chaukidar** not by the **chaukidar** himself but by other persons at his instance are not admissible under S. 32 (2) of the evidence Act. 2 P.L.J. 42, **Foll.** 67 Ind. Cas. 57=A.I.R. 1922 Pat. 111.

——Ss. 32 (2) and 34—Ordinary course of business—Talab Baki papers—Admissibility.

Talab Baki papers are not sufficient evidence to charge any person with liability under S. 34. Such papers may be evidence under S. 32 Cl. (2); but before they can be admitted, a landlord must show that the person making the statement is dead and the entries are made by him in the ordinary course of business. 47 Cal. 266=31 C. L. J. 68=56 Ind. Cas. 38.

——S. 32 (2) — Ordinary course of business — Statement made in gossip—Admissibility.

Statement by a person made in ordinary course of gossip and not in ordinary course of business is not admissible under S. 32 (2) of Evidence Act. 16 N.L.R. 30=21 Cr.L.J. 486=56 Ind. Cas. 582.

——Ss. 32, Cl. (2) and 34 — Ordinary course of business—Zemindari papers—Admissibility of—Independent evidence.

Although Zemindari papers cannot be admitted under S. 34 of the Evidence Act as corroborative evidence without independent evidence of the fact of collection at certain rates, they can be used as independent evidence if they are relevant under S. 32, Cl. (2) of that Act. 4 Pat. L.W. 213=(1918) P.H.C. C. 145=3 Pat. L. J. 306=44 Ind. Cas. 422.

——S. 32 (2)—Ordinary course of business—Statements not made in the usual course of business.

S. 32 (2) Evidence Act does not include statements of deceased not made in the usual course of business. 2 L.W. 941=(1915) M.W.N. 793=31 Ind. Cas. 184.

——S. 32 (2) — Ordinary course of business—Papers kept in ordinary course of business.

There is nothing in S. 32 (2) which requires any formal proof that certain settlement papers were kept as a fact in the ordinary course of business. 29 Ind. Cas. 219 (Cal.).

——S. 32 (2) — Ordinary course of business—Statement by deceased scribe as to marks of executant.

A bond was executed by three persons who were all dead. They were illiterate and their signatures were indicated by marks (**nishani**). The scribe and the attesting witnesses had also died. The whole of the bond including the marks was proved to be in the handwriting of the deceased scribe by the evidence of his father, a bond writer. **Held,** direct evidence found in the body of the bond itself that the marks were those of the executant by the written statement therein of the scribe is relevant under S. 32 (2) it having been made by him in the ordinary course of business as a bond writer. 11 N.L.R. 9= 27 Ind. Cas. 866.

——S. 32 (2) — Ordinary course of business — Revenue surveyor's report—Probative value.

A Revenue Surveyor's reports though admissible in evidence under S. 32 (2) have very little probative value when they are not signed by the transferors and are not supported by evidence of persons who purport to sign them as witnesses. 8 Bur. L. T. 85=27 Ind. Cas. 777.

——Ss. 32 (2) and 33—Ordinary course of business —Endorsement of a postal peon—Admissibility of.

An endorsement on the cover of a letter by a postal peon is at best a record of a statement of the peon and must be proved by calling him as a witness unless the statement becomes admissible under S. 32 (2) or S. 33. Such an endorsement is not admissible even as a statement made by a public officer in the discharge of his duty. 20 C.L. J. 455=19 C.W.N. 489=26 Ind. Cas. 962.

——Ss. 32 (2) and 34—Ordinary course of business — Jamabandi — Entries made 70 years ago — Presumption.

The entries in **Jamabandi** papers began in 1838 and ended in 1872; **Held,** that with regard to the bulk of these entries the presumption was that the men who made them could not be called and the Court may treat the papers as evidence under S. 32 (2). Entries may be made evidence either under S. 32 or under S. 34. Under S. 32, the necessity for corroboration is not imposed. 28 B. 294 Foll. 16 C. L. J. 24=16 Ind. Cas. 467.

——S. 32—Ordinary course of business—Destruction of a will.

To prove that a will was destroyed, the alleged declarations of testator, before death that he revoked and destroyed the will, are not admissible. 14 O.C. 14 =8 Ind. Cas. 695.

16. Panda's Register.

——Ss. 32, 90, 50—Pandah's bahis and Prohit's statement regarding relationship—How proved.

Pandah's bahis are admissible under S. 32 (5) and (6) and S. 90, Evidence Act only if evidence is led to prove the identity, signature and handwriting of the writer. The mere fact that a **bahi** is old is no justification for admitting it either under S. 32 (5) and (6) or under S. 90.

Relationship can be established either under S. 32 (5) and (6) or under S. 50, Evidence Act. A **purohit's** statement also stands on the same footing. A.I.R. 1940 Lah. 245=190 Ind. Cas. 597.

——S. 32 (5), (6)—Entries in Pandas' books—Proof of.

Where reliance was placed on extracts from **Pandas'** books from Hardwar but neither the person from whose custody the books were produced nor his clerk wrote the entries in question and neither of them could say by whom they were written:

Held, that the extracts were inadmissible in evidence. A.I.R. 1936 Lah. 261=16 Lah. 1007=38 P.L.R. 26=161 Ind. Cas. 916.

——S. 32 (5), and(6)—Entries in books of priests.

Entries in the books of priests at a place of pilgrimage, are admissible in evidence under S. 32, Evidence Act. But the probative value of such entries is considerably reduced, if they are not placed before the trial Judge. A. I. R. 1934 Pesh. 78=151 Ind. Cas. 622.

——S. 32 (5)—Panda's Register.

Evidence of Hardwar **Purohits** is admissible to prove pedigrees. A.I.R. 1931 Lah. 722=32 P.L.R. 696=133 Ind. Cas. 874.

——S. 32 (5), (6)—Panda's register.

Entries in the books of priests at places of pilgrimage visited by Hindus are admissible for proving relationship under S. 32. 31 P. L. R. 509=A. I. R. 1930 Lah. 579.

——S. 32 (5) and (6)—Panda's register.

The statement contained in a deceased priest's bahi regarding the relationship by blood between persons deceased, before the question in dispute arose, is admissible in evidence under Cl. (6). 89 Ind. Cas. 989 =A.I.R. 1926 Lah. 157.

——S. 32 (5) and (6)—Panda's register.

The papers, books and statement of a **Panda** are admissible under S. 32 to prove relationship. 84 Ind. Cas. 912=6 L.L. J. 550=A.I.R. 1925 Lah. 281.

——S. 32—Panda's register.

Entries in the **Purohit** book are admissible to prove the relationship between parties. 30 P.L.R. 1922= 3 P.W.R. 1922 A.I.R. =1921 Lah. 380.

——S. 32 (4) and (35)—Panda's register—Entries in books of Hardwar Priests—When admissible as evidence.

Entries in books of Hardwar priests, if made **ante litem motam** would be of great value in establishing a pedigree table. 171 P.L.R. 1914=97 P.W.R. 1914= 23 Ind. Cas, 550.

——S. 32 (6)—Panda's register—Family relationship in Panda's book—Admissibility—Secondary evidence.

Entries in **Panda's** register or note-books are admissible in evidence upon a question of family pedigree but they should be received with caution and subjected to severe scrutiny to guard against fabrication. 15 Ind. Cas. 625 (All).

17. Redigree.

(i) Admissibility

(ii) Family pedigree

(iii) Proof.

17 (i) Pedigree—Admissibility.

——S. 32 (5) and (6)—Inam inquiry—Statement containing genealogical table—Signed by counsel alone admissible.

A statement containing the genealogical table relating to the parties to a suit had been put in during an **inam** inquiry by some of the members of the family to which the parties to the suit belonged. The statement was signed, not by those persons but by their Pleader as made on their behalf and with a certificate that the statement was true. The form and contents of the statement showed that it was attested by two **karnams** and received by a proper officer. The name of the common ancestor was not there but the branches originating from him were clear including the names of the parties to the suit:

Held, that the statement should be held to be duly authorised and made by the persons on whose behalf the Pleader had signed, and hence was admissible under S. 32, Evidence Act, to show the pedigree of the parties to the suit. A.I.R. 1932 Mad. 198=35 M.L.W. 73= 1932 M.W.N. 31=62 M.L.J. 116=55 Mad. 40=139 Ind. Cas. 684.

——S. 32 (5) and (6)—Pedigree—Admissibility.

Genealogical tree merely copied by the dead person from an old one is inadmissible. 79 Ind. Cas. 1335= 923 P. H. C. C. 266=A.I.R. 1923 Pat. 585.

——S. 32 (5)—Pedigree filed by general agent of deceased person—Admissibility.

A pedigree filed by a general agent in a suit to which the deceased was a party can be presumed to have been filed under his instructions, and such pedigree if other conditions be satisfied would be admissible in evidence in a subsequent litigation. 21 O.C. 251=48 Ind. Cas. 308.

——S. 32 (5)—Pedigree with doubtful circumstances not to be admitted.

When at the time of the village settlement some papers were put in, one of which was a pedigree and at the end of it some names found in the pedigree also ppeared and it was doubtful whether the attached names were intended to show the correctness of all the papers or only of the last of such papers, **Held** the pedigree could not be admitted in evidence. 3 O.L.J. 5 =19 O.C. 321=37 Ind. Cas. 138.

——S. 32 (5)—Pedigrees filed in settlement courts —Admissibility.

Pedigrees filed in the Settlement Courts are only admissible under the provisions of S. 32 Cl. (5) and in order to make them admissible as the statements of deceased persons relating to family connections, it must be shown that the persons making the statement had some special means of knowledge with regard to the relationship deposed to, which knowledge can be presumed in the case of members of the family or closely related to the family. 3 O. L. J. 327=36 Ind. Cas. 66.

——S. 32 (5)—Pedigree—Admissibility.

A pedigree though not prepared by a member of the family or an official bound to record it, and not signed by any family member but which were adopted by members of the family is admissible under S. 32 (5) of the Act. 1 O.L. J. 447=25 Ind. Cas. 823.

——Ss. 32 (6) and 50—Pedigree from settlement record—Admissibility.

Where the pedigree is extracted from a settlement record it is presumed to be genuine under S. 90 of the Evidence Act and it is admissible in evidence under S. 50 and not under S. 32 (6) of the Act. 21 Ind. Cas. 274 (Oudh).

——Ss. 32, Cl. (5) and (6) and 90—Pedigree filed in Settlement Record—Admissibility.

A pedigree filed in settlement record must before it is admitted in evidence, be proved to have been made by a person having knowedge of it before the question in dispute has been raised, though a presumption may be made in its favour under S. 90 of the Act because it is more than 30 years old and is produced from proper custody. 15 O.C. 364=14 Ind. Cas. 339.

——S. 32 (5)—Pedigree in settlement court.

A pedigree accepted by the setlement court is not admissible in evidence without proof. 8 Ind. Cas. 728 (Oudh).

——S. 32 (5) and (6)—Pedigree—Admissibility—Declaration of relationship—Ante litem motam.

In support of his claim as the nearest reversionary heir of a deceased Hindu, plaintiff filed certain pedigrees in evidence, **Held** with the plaintiff's pedigree that although they were not family records handed down from generation to generation and added to from time to time, they were nevertheless admissible in evidence so far as they consisted of declarations shown to have been made or adopted **ante litem motam** by deceased members of the family touching the family reputation or tradition on the subject of its descent. To render a statement inadmissible as having been made **post litem motam** the same thing must be in controversy both before and after it is made. 30 All. 510=5 A.L.J. 701=10 Bom. L.R. 1038=13 C.W.N. 1 =35 I. A. 166=8 C. L. J. 447=18 M. L. J. 424=1 Ind. Cas. 175 (P.C.).

17 (ii) Pedigree—Family pedigree.

——S 32 (5)—Pedigree prepared by family bard—Admissibility and value.

A pedigree prepared by a **Mirasi**, who is a hereditary family bard, is admissible under S. 32 (5) of the Evidence Act. It is his business to acquaint himself with the relationship of his clients and the value of his evidence is not taken away by the fact that no documents were available to him and he spoke from hearsay. 50 P.L.R. 249=A.I.R. 1949 E.P. 158.

——S. 32—Statement of deceased as to family pedigree—Matters occurring prior to his birth —Evidentiary value.

The statement of a deceased person as to the family pedigree, which is admissible under S. 32 of the Evidence Act, has little evidential value when it relates to matters which occurred before his birth or in early youth, if the source of his information is not disclosed 223 Ind. Cas. 394=12 B.R. 459= 1946 M.W.N. 389=1946 A.L.W. 258=1946 A.L.J. 228=81 C.L.J. 107=48 Bom. L.R. 430=1946 O.W. N. 207=1946 P.W.N. 250=1946 O.A. (P.C.) 94= 1946 A.W.R. (P.C.) 94=59 L.W. 268=50 C.W.N. 477=A.I.R. 1946 P.C. 50=I.L.R. (1946) Kar. (P.C.) 24=(1946) 2 M.L.J. 98 (P.C.).

——S. 32 (6)—Pedigree of talukdari family.

In talukdari families governed by the custom of lineal primogeniture, seniority is important and they got into the habit of mentioning persons in that order. Where pedigrees are given by such persons and they indicate the persons by numbers, the numbers are given for the purpose of showing the order in which each of the persons was born. The purpose for which the pedigree was given is immaterial. A.I.R. 1944 Oudh 162=1944 O.W.N. 83=20 Luck. 108=1944 A.W.R. C.C. 27.

——S. 32 (6)—Family pedigree.

Pedigrees prepared by persons having personal knowledge—Order of mentioning the names consistently followed in pedigrees must be held to be the plan to state names in order of birth. A.I.R. 1944 Oudh 162=20 Luck. 108=1944 O.W.N. 83= 1944 A.W.R. C.C. 27.

——S. 32 (5) and (6)—Family pedigree.

Family pedigree is not admissible in evidence either under Cl. 5 or 6 of S. 32, Evidence Act, unless shown to be one by member of family or maintained in family as family pedigree. A.I.R. 1944 Oudh 162=20 Luck. 108=1944 O.W.N. 83= 1944 A.W.R.C.C. 27.

——S. 32 (6)—Pedigree table—Plaintiff's incapacity to attend Court—No adverse inference from.

When plaintiff cannot be called to testify to the correctness of a pedigree upon which he relied, being 84 years old and physically unfit to come to

Court, no adverse inference can be drawn against him. A.I.R. 1944 Oudh 162=1944 O.W.N. 83=1944 A.W.R.C.C. 27=20 Luck. 108.

——S. 32 (5) and (6)—"Family pedigree"—Construction—When admissible.

The word "family pedigree" in Cl. 6 should not be construed accordirg to the standard adopted by Courts of England in regard to pedigrees of English families. Peoples of India and peoples of England widely differ in their habits of thought, modes of their expression and indeed in their entire system of family life.

Where a pedigree brings one down from the remotest ancestor to the generations living contemporaneously with a person in whose time it is prepared, the document is a record of family traditions as to pedigree and of the existence of persons contemporaneously alive. The authenticity of that part of the record which embraces the names of persons who existed before the living memory rests on the absence of anything showing directly or inferentially that the pedigree was prepared with any motive other than the natural motive of preparing and preserving a record of family traditions relating to the family pedigree. Such a pedigree is admissible in evidence. 110 Ind. Cas. 466=3 Luck. 256=1 L.C. 700=A.I.R. 1928 Oudh 125.

——S. 32 (5)and (6)—"Family pedigree" need not necessarily be ancient family record handed down from generation to generation.

The ruling of the Privy Council in 30 All. 510 does not compel the conclusion that "family pedigree" as used in S. 32 (6) is confined to a document coming strictly within the description contained in that ruling, viz., "an ancient family record handed down from generation to generation and added to as member of the family dies or is born".

A genealogical tree was received by the witness, a member of the family from his deceased father with whom he had seen it 20 years ago. The witness did not know who wrote it and when.

Held, that the document would be admissible under S. 32 (6) or at least, as the declaration of the witness's deceased father who must be taken to have adopted it. 86 Ind. Cas. 847=8 N.L.J. 29=A.I.R. 1925 Nag. 271.

——S. 32 (5) and (6)—Family pedigree.

Family pedigree writer need not have special means of knowledge. 63 Ind. Cas. 968=4 N.L.J. 33=A.I.R. 1921 Nag. 49.

——S. 32 (5) and (6)—Family pedigree.

The words "family pedigree" in Cl. (6) do not necessarily include only such a pedigree as is in the possession of a member of the family concerned. 63 Ind. Cas. 968=4 N.L.J. 33= A.I.R. 1921 Nag. 49.

17 (iii) Pedigree—Proof.

——S. 32(6)—Pedigree, proof of.

A pedigree put forward as an old family pedigree in possession of a deceased ancestor who said that it came from his ancestor would be admissible under S. 32 (6) if the statement is true, or might be considered to be admissible under Cl. 5 of S. 32. But if it is not an old family pedigree but one prepared by, or for the person producing it, it would be no more than a statement of a person who is alive and can only be used by him to refresh his memory. A.I.R. 1939 Oudh 17=1938 O.W.N. 1267=178 Ind. Cas. 950.

——S. 32 (5), (6)—Evidence regarding pedigree

The rule of English Law is particularly strict in the mater of evidenre regarding a pedigree, and the admission of hearsay evidence in pedigree cases is confined to the proof of pedigree and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage when they have to be proved for other purposes. In India S. 32. Evi. Act, does not seem to be so strict. A.I.R. 1934 All. 406=1934 A.L.J. 318=56 All. 766=3 A.W.R. 529=149 Ind. Cas. 781 (F.B.).

——S. 32 (5)—Pedigree, proof of.

It is the duty of the party producing a witness on the question of pedigree to elicit from him, if it is a fact, that he heard from a person deceased, so as to fulfil the requirements of S. 32 (5), Evidence Act. A. I.R 1934 All. 117=151 Ind. Cas. 338.

——S. 32 (5)—Muhammadan pedigrees—Proof of.

Where the family indicated in the predigree is not a family governed by the custom of primogeniture in the descent of property, there can be no motive in the preparation of the pedigree to place the name of the first born as the first on the right hand side and in the absence of sufficient material on record, there would be no justification for the inference that a pedigree of a family of similar status would be invariably prepared on a plan of descent by primogeniture. The eldest son is generally shown on the right side in the Muhammadan pedigrees but that is not a rule of invariable practice.

The point of view with which the decision of the question whether a certain pedigree relied on by a party has been proved should be approached is that, if the documentary evidence on which he relies is found to be reasonable, explicit and reliable, the oral evidence which consists mainly of the depositions of the members of the family should also be accepted as trustworthy, being consistent with the documentary evidence. On the other hand, if the documentary evidence is not of the character mentioned above, the oral evidence must be treated as wholly inconclusive. A.I.R. 1931 Oudh 246=8 O.W.N. 306=131 Ind. Cas. 903.

——S. 32 (5), (6), (7)—Pedigrees—Requisites to be proved.

Before a pedigree said to have been prepared by a deceased member of the family can be admitted in evidence under S. 32(5) Evidence Act, it must be proved that it was either prepared by the deceased or that the deceased had that personal knowledge and belief which must be presumed in any statement of the deceased person which is admissible in evidence.

Declarations as to the existence of relationship by blood, in order to be admissible, must be made **ante litem motam** which means not merely before the commencement of legal proceedings, but before even the existence of any actual controversy concerning the subject-matter of declaration.

A pedigree which had been subjected to investigation many years prior to the institution of the litigation in which it was questioned and which had been previously relied upon by competent authorities and which is supported by oral evidence can safely be accepted as correct. A.I.R, 1931 Oudh 177=8 O.W.N. 349 =136 Ind. Cas. 642.

——S. 32 (5)—Settlement pedigree—Proof of.

A settlement pedigree is admissible in evidence under S. 52, Cl, (5) if it be shown that it amounts to the statements of deceased persons, who were the members of the family and as such had special means of knowledge and further that these statements were made before there was any controversy as to the point, which is sought to be established by the said pedigree. 112 Ind. Cas. 834=4 Luck. 39=6 O.W.N. 1285=A.I.R. 1929 Oudh 129.

——Ss. 32 (6) and 90—Pedigree—Proof of.

Pedigree satisfying conditions of Ss. 32 (6) and 90—Relationship as given corroborated—Presumption as to its genuineness ought to be made. 105 Ind. Cas. 81=A.I.R. 1928 Nag. 20.

——S. 32(6) — Pedigree — Proof of—Person making the statements not known.

A document ancient and genuine purporting to be a family pedigree was produced in evidence in a mutation case by J who stated he had received it from his grand-father. No objection was taken to its admission though its genuineness was not admitted. It was not proved who had prepared the pedigree. **Held**, that under the circumstances it was not necessary to show who had made the statements mentioned in the pedigree and that it was admissible in evidence under S. 32, Cl. 6 of the Evidence Act, Objection to the admissibility of evidence taken at a late stage in litigation is not to be encouraged. The proper time to object is at the trial when the evidence is tendered. 37 All. 600=13 A.L.J. 817 =30. Ind. Cas. 505.

——S. 32 (5)—Pedigree—Proof of special means of knowledge.

The pedigree produced in another court is admissible in evidence in a civil suit, upon proof that the person making the statement contained in the pedigree was dead and that he had special means of knowledge. 10 Ind. Cas. 199 (Oudh).

——. S. 32. Cl. (5)—Pedigree, proof of—Reliability of—Relationship no ground for rejection.

In a question of pedigree, relationship of one class of the witnesses is no consideration which should inspire more than the ordinary caution with which testimony is sifted where sympathy with one side is to be taken for granted. The fact that one relation assists the plaintiff in the case is no safe ground for rejecting his evidence on behalf of the plaintiff. Public assertion of the relationship of plaintiff's family on several occasions requiring the same by the representatives of plaintiff's family at the time of the assertions, without such assertions meeting with any denial, were heldto be evidence of pedigree. 9 C.W.N. 161 =32 C. 84=31 I. A. 160 (P. C.)

——S. 32, Cl. (5)—Pedigree—Proof—Relationship.

A pedigree alleged to have been prepared by certain bards at the instance of a Raja is inadmissible in proof of relationship when neither the bards nor the Raja were examined and no proof was adduced that they were dead or could not be found or had become incapable of giving evidence or could not be produced without unreasonable expense or delay. (1900) 5 C.W.N. 49=2 Bom. L.R. 492=23 A. 72=27 I.A. 183 (P.C.).

——S. 32, Cl. (5)—Pedigree — Findings of panchaitdars in a previous dispute.

The findings of a competent local tribunal (Panchait) in 1819, wherein a minute local inquiry into the history of the family of the disputants in the present litigation was made, will be strong evidence, in matters of family pedigree, especially when the parties to the dispute were the heads of the two family lines now disputing. (1898) 3 C.W.N. 130=25 B. 1=28 I.A. 48 (P.C.)

17 (a) Pedigree Table.

——S. 32—Pedigree table—Value of—Presumptions.

While a pedigree table may be presumed to be correct about the relationship shown in it and while the devolution of property may be rightly shown in the pedigree table, the reason for the devolution is not a matter which is strictly an essential part of a pedigree table. Hence the accuracy of such an entry carries no presumption with it. A.I.R. 1939 Lah. 309=41 P.L.R. 133= 182 Ind. Cas. 990.

——S. 32—Pedigree table.

A pedigree-table relied on in a suit of 1864 is not admissible under S. 32, Evidence Act. A.I.R. 1934 Lah. 283 (2)=15 Lah. 688=36 P.L.R. 503=149 Ind Cas. 943.

——S. 32 (5), 90—Pedigree table—Ancient and filed in preparation of khewat.

Where a pedigree table had been filed for the purpose of preparation of the khewat and it was a document more than 30 years old and was produced from the misl haqiat of the first regular settlement:

Held, that it could be presumed to be genuine, and when the signatories of the pedigree who were all dead were members of the family having special means of knowledge, it would be admissible under S. 32 (5), Evidence Act. A.I.R. 1934 Oudh 210=148 Ind. Cas. 1041.

——S. 32—Pedigree table.

Entries made in the pedigree table prepared at the time of the Settlement under instructions legally issued under the Land Revenue Act giving the history of the Land in respect of which a suit is brought is not inadmissible in evidence. A.I.R. 1928 Lah. 214, Foll. 110 Ind. Cas. 710=10 L.L.J. 237=29 P.L.R. 678.

——S. 32 (5)—Pedigree tables.

Pedigree Tables are inadmissible unless the persons who made them are proved to be dead or incapable of giving evidence. 84 Ind. Cas. 927=6 L.L.J. 299=A.I.R. 1925 Lah. 63.

18. Previous Statements.

——Ss. 32, 33, 145 and 155 (3)—Previous Statements—Relevancy and proof of.

Previous statements may be relevant, (a) when the person making the statement is not called as a witness, and (b) when such a person is called as a witness. In the former case previous statements may be relevant under S. 32 of the Evidence Act while previous depositions made in a judicial proceeding may be relevant under S. 33. Where the person making the statement is called, they may be proved under S. 155 (3) or under S. 157 of the Act. In the former case the provisions of S. 145 must be complied with. 1948 R.D. 461.

——S. 32—Previous statements — Documents coming from official sources recording statements as to adoption, made before dispute.

Documents, coming from official sources, and recording statements, as to the adoption made to officials in the locality, not merely by the plaintiff himself in the presence of others, but also by other members of the family and the dismissed Sirdar himself, made at a time when no dispute had arisen, and in connexion, with a matter of undoubted local interest, viz., the appointment of a new Sirdar, had been produced in evidence to prove adoption:

Held, that the documents carried greatest possible weight and could not be dismissed as mere self assertions. A.I.R. 1940 P.C. 153=1940 A.L.J. 671=1940 O.W.N. 1108=42 Bom. L.R. 1148=7 B.R 548=I.L.R. (1940) Kar. (P.C.) 349 Sup.=1940 A.W.R. 166=192 Ind. Cas. 536 (P.C.).

——S. 32 (5)—Previous Statements—Ante litem motam, meaning.

The condition of ante litem motam involves the idea that the dispute, if any, on the former occasion must not be the same in substance as the dispute in the later suit. In other words, the statement now sought to be used will not be excluded if it merely related to some other matter foreign or collateral to the matter in controversy on the former occasion. A.I.R. 1939 All. 61=1939 A.L.J. 128=1938 A.W.R. 776=179 Ind. Cas. 974.

——S. 32 (5), (7)—Mere statement in Will as to status.

A mere statement in a Will made by a person who is dead and not relating to any transaction does not fall within cl. (7), S. 32, Evidence Act. Nor can it fall under cl. (5) which relates only to statements as to relationship by blood, adoption or marriage. A.I.R. 1939 Sind 145=I.L.R. (1939) Kar. 573=183 Ind. Cas. 67.

——S. 32—Entry in heading of deposition sheet of witness showing that he is Burmese Buddhist—Effect of the entry to prove his religion.

An entry in the heading of the deposition sheet showing that the person deposing is a Burmese Buddhist is of no probative effect when, in a subsequent suit, the question arises whether such a person is or is not a Burmese Buddhist. Much importance cannot be attached to such an entry. A.I.R. 1938 Rang. 81=176 Ind. Cas. 242.

——S. 32, cls. (5) (6) — Definite person must be indicated as author of statement.

Clauses (5) and (6), S. 32, Evidence Act, become operative only when it is proved that the maker of the statement intended to be proved is dead or cannot be found, etc., and unless a definite person is indicated as the author of the statement, it would be impossible to hold the conditions precedent to be established in his case. A.I.R. 1937 Lah. 599=39 P.L.R. 370=I.L.R. (1937) Lah. 732=173 Ind. Cas. 779.

——Ss. 32 (7), 13 (a) — Statements of facts in will.

Statements of facts in a will must come under cl. (7) of S. 32, Evidence Act, but they will be admissible only if they are statement of relevant facts and are contained in documents relating to transaction mentioned in S. 13, cl. (a). But statements of that kind will, of course,

justify scrutiny in the light of the other evidence in the case because they are self-serving but that is different from saying that they are inadmissible in evidence. A.I.R.. 1937 Mad. 538=1937 M.W.N. 309=45 L.W. 422=I.L.R. (1937) Mad. 1012=170 Ind. Cas. 107.

——Ss. 32 (2), 21—Previous statements.

Where the point in issue was whether there was a family settlement which was binding on the plaintiff and a letter written by defendant to his wife making reference to a settlement and asking her to do certain acts to forward the settlement was adduced in evidence to prove settlement:

Held, that the document was not admissible under Ss. 11 and 13 but was admissible under S. 32 (2) read with S. 21, Evidence Act. A.I.R. 1937 Mad. 19=44 L.W. 681=167 Ind. Cas. 30.

——S. 32 (5)—Statement in previous suit as to relationship.

If a statement in a former suit is to be admitted in evidence, the person who made it must be shown by some independent evidence to have had special means of knowledge. Again, the condition of ante litem motam involves the idea that the dispute, if any, on the former occasion, must not be the same in substance as the dispute in the later suit. In other words, the statement subsequenily sought to be used will not be excluded if it merely related to some matter foreign or collateral to the matter in controversy on the former occasion. A.I.R. 1936 Mad. 808=1936 M.W.N. 218=170 Ind. Cas. 369.

——S. 32 (7)—Statement in a will—Custom of exclusion of daughters from inheritance.

There could be no better or stronger evidence about the existence of custom of exclusion of daughters in the family than the admission of the ancestor in the will and the statement having been made before any controversy had arisen, it was admissible under S. 32, Evidence Act. A. I. R. 1936 Oudh 87=1935 O.W.N. 1376=159 Ind. Cas. 780.

——S. 32—Previous statement.

Evidence recorded for the purposes of proceedings under the Fugitive Offenders Act can be admisssible under Ss. 32 and 33 of Evidence Act in proceedings under Penal Code against the same accused. 112 Ind. Cas. 673=29 Cr. L. J. 1089=A.I.R. 1928 Sind 161.

——S. 32—Previous statement—Objection in probate proceedings—No power to make a will—Inadmissible.

Statements that the testator had no power to make a will, contained in an objection filed in a probate case are not admissible in another proceeding to show that one of the members of the family had admitted the existence in the family of prohibition on testamentary disposition. 82 Ind. Cas. 886=40 C.L.J. 331=A.I.R. 1925 Cal. 116.

——S. 32 — Previous statements — Plaint in rent-suit—Admissibility—Conditions.

When the conditions prescribed by S. 32 do not exist, a plaint filed in a rent-suit is not admissible to prove a statement made by the superior landlord. 80 Ind. Cas. 357=39 C. L. J. 90=28 C.W.N. 1033=A.I.R. 1924 Cal. 558.

——S. 32—Previous statements of insolvent under S. 27 (1) of Insolvency Act.

Statements made by insolvents under S. 27, sub-S. (1) of the Presidency Towns Insolvency Act cannot be received in evidence in a subsequent suit brought by their creditors against them. Sections 32 and 33 of the Evidence Act are of no avail. The omission to object through mistake to the acceptance of such evidence does not make it legally admissible. 66 Ind. Cas. 15=49 Cal. 93=34 C.L.J. 107=A.I.R 1922 Cal. 267.

——S. 32, Cl. (4)—Statements made 'ante litem motam'—Production of documents from public office.

Statements made ante litem by a testatrix as to who were her heirs and contained in documents coming from a public office bearing endorsements excluding all doubt of their genuineness are admissible in evidence and are conclusive on the issue of legitimacy. 5 Bom. L. R. 410=7 C.W.N. 465=25 A. 236=30 I. A. 94 (P. C.).

19. Public Interest.

——S. 32 (4)—Public interest—Statements by dead person.

Declarations made ante litem motam by persons who are now dead in respect of a question relating to a matter of general or public interest, even if they be no more than evidence of reputation or hearsay evidence, are admissible. 119 Ind. Cas. 116=33 C.W.N. 439=A.I.R. 1929 Cal. 533.

——S. 32 (4), S. 42 — Opinion as right to public or custom, etc—Trade mark—Foreign judgment—Admissibility in evidence.

Where in a suit in India the existence of a trade mark is in question, a judgment in a foreign court as against a stranger as to the existence of the trade mark is not admissible in evidence either under S. 32 (4) or S. 42 of the Evidence Act, which deal with public rights and not rights of a private individual as against the public. 3 Bom. L. R. 1=25 B. 433.

20. Recitals.

——Ss. 32 (7) and 13 (a)—Recital in Will that property dealt with was property of testator—Admissibility in evidence.

The recital in a Will that the property dealt with thereunder is the property of the testator is relevant evidence under the Indian Evidence Act. (1916) 36 Ind. Cas. 882 dissented from; (1928) I.L.R. 56 Cal. 275, relied on.

The term "transaction" in the realm of law bears the sense of "any act affecting legal rights" which is not confined to a dealing with property between two persons inter vivos but can, without any strain of language, be taken to include a testamentary dealing with the property.

The recital in the will can be taken as a statement made in the course of a transaction under S. 13 of the Evidence Act. 63 L. W. 310=A.I.R. 1950 Mad. 486=1950 M.W.N. 242=(1950) 1 M.L.J. 325.

——S. 32 (5)—Recital in deed of gift that donee was married wife of executant—Admissibility in evidence to prove marriage—Unregistered deed—Admissibility for collateral purpose—Presumption of valid marriage—Evidence to rebut.

A deed of gift of immovable property which is unregistered, though inadmissible in evidence to prove the gift, by reason of S. 49 of the Registration Act, is nevertheless admissible in evidence with reference to collateral recitals therein. Where the executant of the deed makes a categorical statement in that deed that the donee of the property is his married wife, and a question arises after the death of the executant long afterwards, as to whether the donee is his wife or not, the statement is clearly admissible under S. 32 (5) of the Evidence Act as evidence of the relationship of the parties as husband and wife.

Such a recital or statement raises a strong presumption of marriage and is sufficient to throw the burden of proof to the contrary on the party denying the marriage. The presumption can only be rebutted by evidence of persons having special means of knowledge and not by mere opinion evidence or by mere evidence of concubinage which is not expressed by conduct according to S. 50, Evidence Act. There is a strong presumption in favour of a legal and valid marriage and of the performance of the requisite ceremonies, which cannot be rebutted by vague evidence that persons of the caste keep concubines and treat them as wives or that women of that caste live in concubinage. I. L. R. (1949) Cut. 527.

——S. 32 (5)—Recitals in a deed—Transaction related in it impugned—Weight of ricitals.

Where a deed relates to the very transaction which has been impugned by the plaintiff, the Court should not attach much weight to the recitals therein as statements under S, 32 (5), Evidence Act. A.I.R. 1941 Pat. 205=7 B. R. 274=191 Ind. Cas. 674.

——S. 32 (5) — Deed of transfer — Recitals regarding consideration.

As a rule, a recital in a deed of transfer is no evidence to prove the payment of consideration. But in a case where the transaction took place some 60 years back and where the parties to the transaction are all dead, the recital in the deed may be relied upon as a reliable piece of evidence regarding the passing of consideration. A.I.R. 1940 All. 101=1939 A.W.R. 872=1939 A.L.J. 1056=186 Ind. Cas. 515.

——S. 32—Transfer deeds reciting necessity—Value of.

Recitals in mortgages or deeds of sale of the existence of necessity are admissible in evidence, but they are not evidence by themselves of the fact. A.I.R. 1937 Oudh 406=1937 O.W.N. 825=13 Luck. 357=168 Ind. Cas. 725.

——S. 32 (2) (7)—Recitals in deed.

Ordinarily recitals in a deed are not evidence against third parties. It cannot be said that a recital in a deed in any way recognises the title to the property by merely reciting that the property, the subject-matter of the deed, is bounded on one side or the other by property over which some other person purports to exercise proprietary rights. The statement to the effect that the land is bounded on the north, south, east and west by the property of another person cannot be brought within S. 32 (3) or S. 32 (7). A.I.R. 1934 Pat. 617 (2)=1 B.R. 112=16 P. L. T. 197=152 Ind. Cas. 829.

——S. 32—Rectials in sale-deed by land-lord's predecessor in favour of third parites.

Where, after admitting the title of the land-lord to the land in suit, the tenant resisted the land-lord's suit for assessment of fair rent, filed after the Record of Rights declaring the land in suit to be liable to enhancement of rent, on the ground of the land being held rent-free from the land-lord's predecessors and in proof of it adduced in evidence deeds of sale executed by the plaintiff's predecessors in favour of third parties containing recitals showing that the land was being held rent-free:

Held, that the recitals were not admissible under S, 32, Evidence Act, and could not be admitted to prove the land to be rent-free being hearsay evidence as regards matters of which hearsay evidence would not be admissible. A,I.R. 1932 Cal. 427=59 Cal. 454=137 Ind. Cas. 860.

——S. 32—Recital in deed of gift respecting prior gift.

A recital in a deed of gift by a widow that the gift had been already made by her deceased husband and that she is simply executing a formal document to give effect to that gift in consonance with the oral direction of the deceased is admissible in evidence as evidence in respect of gift by the deceased. A.I.R. 1932 Mad. 267=34 L.W. 776=61 M.L.J. 887=136 Ind. Cas. 340.

——S. 32—Recitals in compromise not stating the previous rights are not admissible.

Where there were no recitals in the consent decree as to the previous rights of the respective parties in the subject-matter of the litigation but it was stated at the outset that, regardless of the rights of the parties, they had come to an arrangement that in future their rights would be regulated in the manner specified in the decree,

Held, that such recitals in the decree cannot be used as evidence under S. 32. 78 Ind. Cas. 219=40 C.L.J. 39=A.I.R. 1924 Cal. 1042.

——S. 32—Recitals in document.

If the conditions of this section are fulfilled a recital in a document not inter-partes is admissible in evidence. 57 Ind. Cas. 194 (Pat.).

——S. 32—Recitals in Will—Statement of dead person—Statement in Will showing sum due by a third person.

Statements in the will made by the deceased that he had spent a particular sum in effecting the repairs of the house was not a statement made against his pecuniary or proprietary interest and it could not be held that the memo of expenses made by the deceased was made in the ordinary course of the business. Both the statements were held inadmissible. 44 Bom. 192=22 Bom. L.R. 57 =55 Ind. Cas. 316.

——S. 32—Recitals in documents—Third persons.

A statement of boundaries in document of title is admissible against third parties if the third parties are dead or outside the jurisdiction of the Court. (1914) M.W.N. 779; 16 C.W.N. 252; 17 C.W.N. 108; 11 A.L.J. 139, Foll.; 36 Ind. Cas. 610 (Pat.)

——S. 32 (2)—Recitals—Secondary evidence of —Reports of public officer.

As Ss. 65 and 91 make it clear that when a written grant is lost, secondary evidence can be given of it only as defined by law, a translation of parwana or grant forming the enclosure and the report of a public officer is not admissible as secondary evidence of the contents of the grant under any of the Ss. 65, 32 (2) or 35. 4 L.W. 331=35 Ind. Cas. 201.

——Ss. 32 (7) and 13 (a)—Recitals in Will.

Wills not admitted to probate are not admissible in evidence under Ss. 13 (a) and S. 32 (7) except on proof by an attesting witness that they are in accordance with S. 50 of the Indian Succession Act. 22 C. L. J. 551=33 Ind. Cas. 342.

——S. 32 (7)—Recitals in documents — Statement by deceased mortgagor in mortgage deed —Admissibility.

Statements in mortgage deeds made by a deceased mortgagor as to the ownership of the property comprised in the mortgage are admissible in evidence under S. 32 (7) and can be acted on if corroborated by other oral evidence in the case. Recitals in deeds, when the executant is deceased are admissible under S. 32 (7). 29 Ind. Cas. 974 (Mad.).

——S. 32 (5)—Recital—Mode of succession—Admissibility.

A document containing a statement of a deceased person as to the mode of succession in a particular family is admissible. 25 M. 183 Foll. 24 Ind. Cas. 519=28 M.L.J. 669.

——S. 32 (6)—Recital in a will.

A statement in a will of a deceased co-parcener that he and his brothers were living separately is not admissible under S. 32 of the Evidence Act. 4 S.L.R. 225=10 Ind. Cas. 967.

——S. 32 (2) and (3)—Recital in a document relating not to suit land but to neighbouring land.

Where the question was as to the ownership of a certain land a recital in a document dealing with a neighbouring land that the land in question belonged to the plaintiff was not legal evidence and was not admissible under S. 32 (2). (1910) M.W.N. 668=9 M.L.T. 91=8 Ind. Cas. 268.

——Ss. 32 and 33—Recitals in documents—Affidavits, admissibility of, when.

Affidavits admissible under other Acts are admissible under the Evidence Act and affidavits not admissible otherwise are not admissible under Ss. 32 and 33 of this Act. 4 S.L.R. 88=8 Ind. Cas. 897.

——Ss. 32 and 34—Recitals in documents.

Documents which are admissible under S. 34 may also be admissible under S. 32 if the conditions under S. 32 are established. 6 Ind. Cas. 369 (Cal).

21. Relationship—Statements as to.

(i) Admissibility
(ii) Adoption
(iii) Inadmissible
(iv) Interpretation
(v) Miscellaneous

21 (i) Admissibility of statements.

——S. 32 (5)—Statement as to relationship—Adimissibility—Pre-requisites.

S. 32 (5), Evidence Act, embraces every statement made by a deceased person as to relationship if (1) he had special means of knowledge and (2) it was made ante litem motam. These are the only pre-requisites to its admission and it does not affect its admissibility whether it was made in a judicial proceeding or otherwise. 1937 P.C. 101, relied on. A.I.R. 1949 H.P. 11.

——S. 32 (5)—Witnesses as to an alleged relationship—Their evidence when admissible.

Where the witnesses speaking to an alleged relationship depose to their having knowledge of the said relationship from both the parties who are dead and alive, their evidence cannot be discarded as inadmissible. (1948) A.W.R. (Rev.) 54=1948 R.D. 111.

——S. 32 (5)—Statement by a dead person about relationship in a suit not inter partes before dispute—Admissiblity.

A Statement made by a person who is dead, in a suit not inter partes, relating to the relationship by adoption, which was made at a time when the dispute as to the validity of adoption had not arisen, is relevant under S. 32 (5) though not admissible under S. 33. 225 Ind. Cas. 8=A.I.R. 1947 Lah. 54.

——S. 32 (5)—Admissibility—Statements regarding the order of birth of different members of a family.

Under S. 32 (5) of the Evidence Act a statement relating to the existence of any relationship (by blood, marriage or adoption) is admissible to prove the facts mentioned in the statement. As the question as to existence of any relationship also includes the question as to the commencement of that relationship, declarations of deceased competent declarants are admissible to prove a person's date of birth and consequently his age, minority or majority or the order in which the members of the family were born. Such declarations are admissible to prove parentage, names of relations or the date of death of a member of the family as death implies the termination of a relationship just as birth implies its commencement. I.L.R. (1946) A. 649=1946 A.L.W. 543=1946 A.L.J. 411=1946 A.W.R. (H.C.) 597=A.I.R. 1947 A. 161.

——S. 32 (5)—Evidence as to seniority — Statement if admissible.

A Statement whether an ancestor of the person making the statement was related to him as an elder or younger uncle etc., of a certain person is a statement as to relationship within the meaning of S. 32 (5). Since the dates of birth of the ancestors indicate commencement of the relationship with the person making the statement, the statement as to relative seniority is also equally admissible showing that the relationship with one commenced earlier than the relationship with the other, and evidence relating to it is admissible under S. 32 (5). A.I.R. 1944 Oudh 162=20 Luck. 108=1944 O.W.N. 83=1944 A.W.R. C.C. 27.

——S. 32 (6)—Statement as to relationship in grounds of appeal—Admissibility.

A statement as to relationship in grounds of appeal drafted by a lawyer must be deemed to have been made on the instructions of the client and would be admissible in evidence under S. 32 (6). A.I.R. 1944 Oudh 162=1944 O.W.N. 83=20 Luck. 108=1944 A.W.R. 27.

——S. 32 (5)—Statement as to relationship.

A statement made by a dead person who had special means of knowledge in respect of the relationship of the parties at a time before the question in dispute was raised is covered by sub-s. (5), S. 32, Evidence Act, and is admissible to prove the correctness of a pedigree. A.I.R. 1941 Lah. 73=I.L.R. (1941) Lah. 872=195 Ind. Cas. 873.

——S. 32 (5)—Admissibility of statements.

Statement as to the relationship between the adoptive parent and the adoptee by the adoptive parent's deceased sister would be admissible. A.I.R. 1941 Rang. 276=1941 Rang. L.R. 445=198 Ind. Cas. 42.

——S. 32 (5)—Statements as to relationship in a document—Some of them dead—Admissibility under.

A document containing statements regarding relationship of persons, signed by several persons, some of whom are dead, is admissible in evidence although the persons who are alive have not been summoned as witnesses, especially when no objection is taken in the trial Court, but its evidentiary value may not be very high. A.I.R. 1939 All. 61=1939 A.L.J. 128=1938 A.W.R. 776=179 Ind. Cas. 974.

——S. 32 (5)—Statement as to relationship.

Statement as to relationship made by a person having special means of knowledge in prior litigation in which question of relationship was not in dispute, is a statement made **ante litem motam** and is admissible in subsequent litigation. A.I.R. 1939 Mad. 446=(1939) 1 M.L.J. 227=49 L.W. 273=1939 M.W.N. 275=189 Ind. Cas. 325.

——S. 32 (5)—Statement made before dispute.

Statement made as to relationship by a member of the family who is dead and before the dispute arose is admissible under S. 32 (5), Evidence Act. The language of sub-s. (5) requires only that the statement tendered in evidence must be one made by a person having special means of knowing the relationship to which it relates, and that it must have been made **ante litem motam** and it is no where laid down that a third condition should be fulfilled, namely, that the statement should be relevent to the matter in issue in respect of which it was made. The language embraces every statement as to relationship made **ante litem motam** by a person having special means of knowledge of it; and it is immaterial whether it was made in a judicial proceeding or otherwise. It is clear that for an extra-judicial statement, there can be no issue with reference to which the question of relevancy may be determined. A.I.R. 1937 P.C. 101=1937 A.W.R. 344=1937 O.W.N. 302=3 B.R. 407=45 L.W. 451=41 C.W.N. 645=1937 A.L.J. 462=1937 M.W.N. 424=39 P.L.R. 429=18 P.L.T. 377=39 Bom. L.R. 726=(1937) 1 M.L.J. 646 =31 Sind L.R. 262=65 C.L.J. 309=64 I.A. 92=167 Ind. Cas. 346 (P.C.).

——S. 32 (5)—Admissibility of statements.

A statement by a deceased person as to the existence of relationship, the person having special means of knowledge, and the statement being made before the legitimacy of a certain person was called in question, is admissible in evidence. 109 Ind. Cas. 310=3 Luck. 416=5 O. W. N. 143=A. I. R. 1928 Oudh 233.

——S. 32 (5)—Relationship—Statement as to, in plaint—When admissible.

A statement by a deceased plaintiff as to his relationship with certain persons contained in a plaint filed before the existence of any dispute concerning that relationship is admissible under S. 32 (5) in a subsequent suit in which that relationship is in dispute. 15 A.L.J. 349=39 A. 426=39 Ind. Cas. 666.

21 (ii) Adoption.

——S. 32 (5)—Statements as to Adoption.

The declaration by Burmese Buddhist as to devolution of property is admissible and relevant as conduct throwing light on question of adoption. A.I.R. 1941 Rang. 276=1941 Rang. L. R. 445=198 Ind. Cas. 42.

——S. 32 (5)—Relationship created by adoption.

Where the relationship created by adoption is of such importance and specifically included in the Act, evidence of incidents bearing more or less directly on the fact or otherwise of an adoption and its validity would be allowed, subject, of course, to careful scrutiny as to value. A.I.R. 1936 Cal. 1=160 Ind. Cas. 332.

——S. 32 (5)—Statements as to Adoption.

Statement by testator that beneficiary is his adopted son—Suit for declaration of adoption—Statement can be used. 101 Ind. Cas. 289=5 Pat. 777=8 P.L.T. 510 =A.I.R. 1927 Pat. 61.

——S. 32 (5)—Relationship — Adoption — Mohant and Chela.

The relationship between a **Mohant** and a **Chela** is a relationship by adoption and a statement by a **mohant** that he has one **chela** is a statement relating to the existence of a relationship. A statement as to the time of commencement of relationship is so indissolubly associated with the existence itself of the relationship that it may be rightly regarded as a statement relating to the existence of that relationship under clause 5, S. 32 of the Evidence Act. 21 C.L.J. 96=20 C.W.N. 122=27 Ind. Cas. 739.

—S. 32 (3) (5)—Relationship— Adoption—Consent of Sapinda—Admission of receipt of consideration.

A statement by a deceased **Sapinda** admitting the receipt of consideration for consenting to an adoption is within S. 32 (3) and is admissible in evidence. Such a statement is also within S. 32 (5) as it relates to the existence of the relationship by adoption. It is immaterial for its admissibility that the time of making it the status of adoption had not been created or that it was not made **ante litem motam**. 36 Mad. 19=18 Ind. Cas. 989.

21 (iii) In-admissible.

——S. 32 (5)—Relationship—In-admissible.

Statement by officiating priest that essentials of marriage were performed does not come within S. 32 (5). A.I.R. 1944 Bom. 29=45 Bom. L. R. 924=211 Ind. Cas. 315.

——S. 32—Relationship—Not ante litem motam.

Plaintiff brought a suit for declaration that the property originally belonging to one **J**, deceased, was his personal property. The basis of his claim was that **M**, the father of the plaintiff was a **bandhu** having heritable rights of J, and the point in question was whether **M** was **bandhu** of **J**. Plaintiff produced a pedigree and in proof thereof relied on a statement made by **M** in a previous suit which was filed by Secretary of State for India claiming the property left by **J** on the ground that no heir of **J** was in existence and that the property had escheated to the Crown. Thus the question as to whether **J** had left any heirs or not had arisen and the question of the alleged relationship of **M** with **J** was in controversy:

Held, that the statement of **M** relied on was inadmissible. A.I.R. 1938 All. 443=1938 A.L.J. 670=1938 A.W.R. 533=176 Ind. Cas. 441.

——S. 32—Mere hearsay evidence about relationship of parties is not admissible.

Where the witnesses gave no pedigree table but stated vaguely that they were related to the parties and, therefore, knew that the parties were related in the fifth degree, and as regards their personal knowledge they referred to their previous conduct in attending certain ceremonies described as **oos moos** where the attendance of persons other than relatives is possible, and further stated that they heard there the bhats reciting the pedigree table,

Held, that the statements were not admissibe for proving agnate relationship. 109 Ind. Cas. 774=A.I.R. 1928 Lah. 824.

——S. 32 (5)—Statement of living person as to relationship—If comes under.

The dispute between the parties was whether the defendant **S** was or was not the mother of one **K** deceased. At the trial a document executed by one **M** was put in evidence by the defendant. This document was a deed of gift in which the donor had described **K** as her grandson, and if he were her grandson the presumption was that he was the son of **S** as she was the daughter of **M**.

Held, that the document was not admissible under S. 32 because **M** was still alive and there was no other section of the Evidence Act which would make a statement by a person not a party to the suit admissible in evidence in the circumstances of the case. 1921 P.H.C.C. 17=A.I.R. 1921 Pat. 61.

——S. 32, Cl. (5)—Relationship, statement as to, made upon information received from others, when admissible.

On a question of relationship the statements of certain witnesses who were supposed to be speaking from information derived from others were sought to be made admissible under S. 32 of the Evidence Act. They did not, however, state the persons from whom they derived that information nor at what period of time they derived it. **Held**, that the courts in India had properly applied the provisions of S. 32, Evidence Act, in rejecting this evidence. (1904) 26 A. 581= 6 Bom. L. R. 750=9 C. W. N. 105=30 I. A. 217 (P.C.).

21 (iv) Interpretation.

——S. 32 (5)—"Existence of any relationship", meaning—Includes non-existence.

Where the question at issue is whether a person died issueless or left a son, the statement that he died issueless amounts to a statement relating to the existence of a relationship by blood, because the question whether he left a son involves the question whether there is any blood relationship between him and the person who claims to be his son. "The existence of any relationship" includes the non-existence of such relationship. A. I. R. 1941 Pat. 205=7 B.R. 274=191 Ind. Cas. 674.

——S. 32 (5)—Interpretation of.

Obiter.—Very liberal interpretation should be given to the words "when the statement relates to the existence of any relationship by blood-relations".

Statements made by deceased members of the family about certain facts of family history and statements regarding the seniority of members of the family are admissible in evidence under S. 32, Cl. (5) of the Evidence Act. 104 Ind. Cas. 299=1 L. C. 97=A.I.R. 1927 Oudh 278.

21 (v) Miscellaneous.

——Ss. 32 (5), 50 — Relationship — Statement of witness.

The statement of a witness on the question of relationship can be admissible either under S. 32 (5) or S. 50, Evidence Act. Where the statement relates to the existence of relationship between two persons, one or both of whom could not have been seen by the witness, it cannot be presumed that he heard of the relationship from his own deceased ancestor. In the absence of evidence that the witness is reproducing the statement of a person deceased having special means of knowledge and fulfilling other requirements of S. 32 (5), his evidence may be admissible if it amounts to "the opinion, expressed by conduct, as to the existence of such relationship of any person, who as a member of the family or otherwise has special means of knowledge on the subject" (S. 50, Evidence Act). Where, therefore, the statement of a witness giving the pedigree connecting two living persons is found to be inadmissible under S. 32 (5), but he deposes to facts which establish such treatment as is contemplated by S. 50, it should be admitted to that extent. A.I.R. 1934 All. 117=151 Ind. Cas. 338.

——S. 32 (5)—Statement regarding marriage.

A statement made by a deceased person that there was a marriage between him and a certain woman is admissible in evidence to prove the legitimacy of his children under S. 32 (5), Evidence Act, as a statement as to marriage. The doctrines of Muhammadan Law cannot be held to exclude such evidence and the Evidence Act applies to the case.

A person who is not a party to a deed is not entitled to question the passing of consideration between the parties to the deed. A. I. R. 1933 All. 329=1933 A.L. J. 483=55 All. 139=144 Ind. Cas. 433.

——S. 32—Relationship—Statements as to.

Statements made by a person who is dead as to the name of her mother and other relations (except her husband) are admissible under S. 32 (5) in a charge under S. 368, I.P.C. 120 Ind. Cas. 81=1929 Cr.C. 678=30 Cr.L.J. 1121=A.I.R. 1929 Sind 250.

——S. 32 (5)—Relationship—Statements as to.

Statement in a previous suit admitting relationship by a person who is dead is admissible in a subsequent suit, not under S. 33 but under S. 32 (5). 105 Ind. Cas. 26=7 Pat. 90=9 P.L.T. 180=A. I. R. 1928 Pat. 113.

——S. 32 (5)—Relationship—Statements as to.

Illustration (k) to S. 32 does not indicate that a declaration by a son as to his parentage would not be admissible in evidence. 85 Ind. Cas. 407=A.I.R. 1925 Oudh 537.

——S. 32 (5)—Relationship—Statements of relatives and servants.

The statements made by the deceased relatives, servants and dependants of a family are admissible under S. 32 (5) of the Evidence Act, equally with the statements of the members of the family if they had special means to know things requisite to make their statements admissible. 21 O. C. 251=48 Ind. Cas. 308.

——S. 32 (5) and 50—Relationship—Evidence of—Joint ownership of an open plot of land—Oral evidence of persons with no means of knowledge.

The mere fact of joint ownership of an open plot of land by a number of persons in the same locality has a very remote bearing on their relationship **inter se**; and the oral evidence of persons with no means of knowing the alleged relationship and interested in the success of the suit has little value in proving title to property. 171 P. L. R. 1914=97 P. W. R. 1914=23 Ind. Cas. 550.

——S. 32, Ill. (K)—Relationship.

Relationship which may be proved by the statement of a deceased person, may be the relationship of the person making the statement. Thus recitals in sale deed and mortgages by the adopted son and in his Will in which he described himself as adopted son were admissible under S. 32 (5) and (6) of the Act. 13 M. L.T. 515=25 M.L.J. 373=19 Ind. Cas. 740.

——S. 32 (5)—Relationship—Admission by female member of family as to the status of heir.

Where the status of **B** as a daughter's son of **A** is in question, an admission of such relationship by another wife of **A**, is of great weight in favour of **B**. 15 Bom. L.R. 467=(1913) M.W.N. 403=13 M.L.T. 434=127 P.L.R. 1913=77 P. R. 1913=40 C. 555=25 M.L.J. 176=17 C.W.N. 797=18 Ind. Cas. 946 (P.C.).

——S. 32 (5) — Relationship — Statement about birth and death of relatives, admissible.

The words, "relating to the existence of any relationship" in S 32 (5) are about the birth and death of relatives, that is, events which either commence or terminate the relationship. 7 Ind. Cas. 218 (Cal).

22. Revenue Papers.

——S. 32 (2)—Batwara papers.

Entries in the **batwara** papers only bind the co-sharer **zemindars** who were parties to the proceedings, and do not create any estoppel against any tenant unless these tenants were co-sharer **zemindars** themselves and, in that capacity, were parties to the proceedings.

Zemindari papers can be used as independent evidence, provided they are brought within S. 32 (2), Evi. Act by showing that the persons who prepared them are dead or cannot be found, etc., but the weight to be attached to them must depend on the circumstances. A.I.R. 1933 Pat. 6=11 Pat. 701=14 P.L.T. 509=141 Ind. Cas. 157.

——S. 32—Revenue papers.

The hudabandi papers are admissible under S. 32. A.I.R. 1927 Cal. 855, **Rel. on.** 108 Ind. Cas. 883=55 Cal. 1167=32 C.W.N. 580=A.I.R. 1928 Cal. 854.

——S. 32—Jamawasilbaki and jamabandi papers are admissible.

Jamawasilbaki and jamabandi papers can be admitted in evidence under S. 32 (2), but it must be clear that the persons who made them are dead and that the papers were made in the ordinary course of business. The entry as to the rate of rent cannot be distinguished from other entries in the jamawasilbaki papers as being entries not made in the ordinary course of business. 90 Ind. Cas. 564=A.I.R. 1926 Cal. 359.

——S. 32—Applicability of.

A statement that certain land is in the **khas** possession of the landlord is of doubtful accuracy and ought not to be used in his favour when made in a Return by invoking the aid of S. 32 of the Evidence Act or some other adjective law. 79 Ind. Cas. 412=A.I.R. 1925 Cal. 408.

23. Scope.

——S. 32—Scope.

If overridden by S. 10-A, Dekkhan Agriculturists' Relief Act. **See** Dekkhan Agri. Relief Act, S. 10-A. 52 Bom. L. R. 288=A.I.R. 1950 Bom. 340.

——S. 32—Scope—Whether controlled by S. 33.

S. 32 of the Evidence Act is not controlled by S. 33 of that Act. I.L.R. (1947) Kar. 224=A.I.R. 1949 Sind 12.

——S. 32—Scope—Applicability—Conditions.

In order that a statement of a person who has not been called as a witness may be admissible in evidence, the conditions in S. 32 or S. 33 must be satisfied. A. I. R. 1946 Nag. 84=I. L. R. (1945) Nag. 892.

——S. 32—Scope — Statement to be one before dispute arose.

Statements made by persons who are dead long before the dispute arose are admissible under S. 32. A.I.R. 1946 Nag. 84=I.L.R. (1945) Nag. 892.

——S. 32—Scope — Statement that witness was adopted without permission of adoptive father—Witness stating from knowledge received from his natural father—Statement is inadmissible.

Where a witness states that he was adopted by his adoptive mother without the premission of her husband and that he heard of this fact from his natural father, the statement is not admissible in evidence either under S. 32 or under any provision of the Evidence Act. A.I.R. 1946 Oudh 163=1946 O.W.N. 26=223 Ind. Cas. 373=21 Luck. 1.

——S. 32 (3)—Scope.

Where a person (e. g., approver) makes certain statements in a criminal trial implicating not only himself but also the accused who is absconding, the statements of that person who is since dead, cannot be admitted against the absconding accused for convicting him in a subsequent trial.

A man cannot by his statement expose himself to criminal proceedings when those criminal proceedings have already started. As soon as criminal proceedings have been started against the person making those statements the words of S. 32 (3), Evidence Act cease to apply and cease to have any force. That sub-section cannot be stretched or extended in such a way as to admit a statement made after proceedings have been instituted. ('46) I.L.R. (1946) Kar. 79=A.I.R. 1947 Sind 122.

——Ss. 32, 33—Scope and applicability.

Statement by a person who could be put in witness-box but was not, is not admissible under S. 32 or S. 33. A.I.R. 1945 Cal. 360=79 C.L.J. 149=46 Cr.L.J. 683=221 Ind. Cas. 24.

——S. 32—Scope.

Quaere.—Whether under S. 32, besides statements of relevant facts, statements of facts in issue are also admissible. A.I.R. 1944 Bom. 29=45 Bom. L. R. 924 =211 Ind. Cas. 315.

——S. 32 (2)—Scope of.

Section 32 (2), Evi. Act, relates only to the relevancy of evidence and not to the manner of its proof. A.I.R. 1941 Mad. 602=53 L. W. 631=1941 M.W.N. 518=(1941) 1 M.L.J. 759=198 Ind. Cas. 606.

——S. 32 — Scope — Person making statement alive at time of suit—Statement, if admissible.

Per **Manohar Lall, J.** — Where the maker of the statement in the recital is alive at the date of the trial but is not examined as a witness, that statement is inadmissible. A.I.R. 1938 Pat. 487=19 P.L.T. 35= 5 B.R. 129=178 Ind. Cas. 762.

——S. 32 (7)—Scope.

Where there is no evidence whatever which falls to be considered under S. 32, Evi. Act, the document cannot be considered as relevant under S. 32 (7) of the Act. A.I.R. 1936 Pat. 315=2 B.R. 527=162 Ind. Cas. 999.

——S. 32—Scope of—Deposition by deceased not falling under S. 32—Applicability of S. 11.

If the terms of a deposition made by a person since deceased do not fall within the purview of S. 32, Evi. Act, the provisions of S. 11 will not avail to make such deposition evidence. A.I.R. 1935 Oudh 41=11 O. W. N. 1589=10 Luck. 423=152 Ind. Cas. 1042.

——Ss. 32 (7), 158 and 33—Scope.

The depositions of deceased attestors to the registration before Sub-registrar are admissible under S. 32 (7) taken with S. 158 and not under S. 33. ('33) 1933 M.W.N. 1148.

——S. 32—Application of—Conditions precedent.

Before evidence is admitted under S. 32, Evi. Act, it must be proved that the witnesses who made statements sought to be admitted are either dead or are not available as witnesses for any other reason. A.I.R. 1933 Rang. 212=147 Ind. Cas. 414.

——S. 32—Scope.

Section 32 of the Indian Evidence Act is much wider than the Common Law-Rule in England. 105 Ind. Cas. 26=7 Pat. 90=9 P.L.T. 180=A.I.R. 1928 Pat. 113.

——S 32 (1)—Scope—Statement must relate to the injuries by which death was caused.

The sub-section applies to the class of statements made by a dying person as to the injuries which have brought him or her to that condition, or her circumstances under which those injuries came to be inflicted. The rule as to the admissibility of evidence under S. 32 (1) has worked ill in India. 81 Ind. Cas. 964=4 Lah. 451=25 Cr. L. J. 1140=A. I. R. 1924 Lah. 253.

——S. 32 (2)—Scope of—S. 34—Contrasted.

Per **Mukerji, J.**—The only material difference as between an entry relevant under S. 34, and one relevant under S. 32, Cl. (2), is that in the former case the person who made the entry may be available as a witness, while in the latter case he is not. Such entries, no matter whether they are relevant under one or the other section are not to be considered as alone sufficient to charge any person with liability. 108 Ind. Cas. 883=55 Cal. 1167=32 C.W.N. 580=A.I.R. 1928 Cal. 854.

——S. 32 (3)—Scope of.

Section 32, Cl. (3) does not make the statement in a document between third parties admissible against a party in suit. 41 Bom. 300 (P. C.), **Relon.** 97 Ind. Cas. 265=45 C. L. J. 55=30 C.W.N. 761=A.I.R. 1926 Cal. 948.

——Ss. 32, 11—Scope of—Relevant facts—Statements by persons who cannot be found or called as witnesses.

As a general rule S. 11 of the Evidence Act is controlled by S. 32 of the Act when the evidence consists of statements of persons who are dead or who cannot be found, but this rule is subject to certain exceptions. S. 32 imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the Court to give their own evidence. The whole scope and object of the section centres upon securing the highest degree of truth possible in the circumstances for the statement. It follows that where the person tendering such a statement is indifferent as to the truth or falsehood there is nothing to bring that section into play. The test whether the statement of a person who is dead or who cannot be found is relevant under S. 11 and admissible under that section (presuming that it is in other respects within the intention of the section) although it would not be admissible under S. 32 is this. It is admissible under S. 11 when it is altogether immaterial whether what the dead man said was true or false but highly material that he did say it. In these circumstances, no amount of cross-examination could alter the fact, if it be a fact, that he did say the thing, and if nothing more is needed to bring the thing said in under S. 11 then the case is outside S. 32. (1907) 9 Bom. L. R. 1047.

——S. 32, Cl. (7)—Admissibility in evidence of statements of deceased—Persons alive when exhibiting—Party's case closed—Essentials for the admissibility of deceased person's statement —Personal knowledge and belief essential.

Written statements of a deceased person are inadmissible in evidence where the deceased person was alive at the time when the party founding on them closed his case. A document brought home to a person who died before the trial only as an exhibit binding upon him for the purpose of another suit but of the contents of which there was no proof that he had personal knowledge or belief is inadmissible in evidence, such personal knowledge and belief being essential to the admissibility of statements of a deceased person. (1902) 7 C.W.N. 209=25 A. 143=30 I. A 27 (P. C.).

24. Special means of knowledge.

——S. 32—Special means of knowledge—Presumption in case of members of family.

When a family has migrated from one province to another years ago, it is not possible to have in all cases anything but hearsay evidence which could be obtained from those having special means of knowledge (their ancestors) regarding the migration. The family tradition is necessarily narrated from an ancestor to a descendant and it goes on being repeated from one person to another in the family. Special knowledge required by S. 32 (5), Evi. Act should be presumed in the case of members of the family. A.I.R. 1943 Nag. 253=1943 M. L. J. 320=I.L.R. (1943) Nag. 779=208 Ind. Cas. 211.

——S. 32 (5)—General agent — If has special means of knowledge.

The fact that a man is the general agent of another does not by itself justify the conclusion that he has special means of knowledge with regard to the members of his employer's family. A.I.R. 1943 Oudh 316=209 Ind. Cas. 310.

——S. 32 (5)—Statement of old man related to family Presumption of special means of knowledge.

A statement of the nature described in S. 32 (5), Evi. Act made by an old man, admittedly relating to the family, can be admitted in evidence, by presuming that he had special means of knowledge. A.I.R. 1943 Oudh 91=1942 O.W.N. 657=18 Luck. 346=205 Ind. Cas. 433.

——S. 32 (5)—Matters which could not be within knowledge of witness.

Witnesses should not be permitted to give their testimony as to matters which could not be within their own knowledge without first stating the source of their information. Time, trouble and expense would be saved if cl. (5), S. 32, Evidence Act, is properly applied and witnesses required to prove the statements relied upon with proper particularity and with due attention to the requirement that the person making the statement had special means of knowledge. It cannot rightly be left to time or chance or cross-examination to disclose whether a statement has any basis which could give it value or admissibility. A.I.R. 1937 P. C. 201=3 B.R. 562=1937 A.W.R. 1010=39 P L.R. 540=18 P. L. T. 471=46 L. W. 88=1937 O.W N. 724=39 Bom. L. R. 1005=1937 M. W. N. 1271=31 Sind L. R. 575=168 Ind. Cas. 881 (P. C.).

——S. 32 (5) and (6)—Special knowledge—Servant of the family.

Where in order to prove a family pedigree, the statement of a servant of the family is tendered, it must be shown that he had special means of knowledge. When there is no such proof it is not admissible under S 32, Evidence Act. A.I.R. 1936 Oudh 340=163 Ind. Cas. 770.

——S. 32 (5)—Special means of knowledge—Statement by adoptive mother regarding age of adopted son.

The statement made by the adoptive mother as regards the age of the boy, although it would not show her own relationship with him, is admissible. An adoptive mother who sees the boy at the time of the adoption, and who would, in all probability, have made enquiries about him, is a person who must be deemed to have special means of knowledge within the meaning of S. 32 (5). A.I.R. 1934 All. 406=1934 A. L. J. 318=3 A.W.R. 529=56 All. 766=149 Ind. Cas. 781 (F. B.).

——S. 32 (5)—Relationship—Statement of deceased relatives—Special means of knowledge—Question of fact.

For the purpose of proving relationship, statements of deceased relatives, servants, and dependents of the family are admissible and in every instance, it must be a question of fact as to whether the person who made the statement had special means of knowledge. A.I.R. 1932 Mad. 198=35 L. W. 73=1932 M.W.N. 31=55 Mad. 40=62 M.L.J. 116=139 Ind. Cas. 684.

——S. 32—Will—Statement as to division in family—Admissibility.

As to the question relating to the admissibility of the recital in a Will that testator had become divided from his coparceners:

Held, that it was admissible in evidence and the weight to be attached to it depended upon the circumstances of each case. ('34) 1934 M.W.N. 673.

——S. 32—Statements of deceased members of the family about migration—Evidence of witnesses —Admissibility.

Where evidence to support immigration of a Hindu family from one province into another is of witnesses who have heard about it from deceased members of the family, it is inadmissible. Clauses (5) and (6) of S. 32, Evidence Act, do not apply to it. 123 Ind. Cas. 907=A.I.R. 1930 Nag. 267.

——S. 32 (5)—Special means of knowledge—Statement of a qanungo about relationship between a tal qdar's branch and another taluqdar's branch is admissible.

A **qanungo** of the taluqdar must be presumed to have special means of knowledge as to the relationship between the different branches of the taluqdar. In the character of a **qanungo**, it is his duty to furnish information to the Settlement Court on questions relating to title and his statement is recorded by the Settlement Officer in the discharge of the official duty. 109 Ind. Cas. 422=3 Luck. 326=5 O.W.N. 299=A.I.R. 1928 Oudh 307.

——S. 32 (5)—Special means of knowledge.

Pedigree—Proof of special means of knowledge necessary before admission of pedigree—Relationship far removed in degree—Presumption of special means of knowledge does not exist. 69 Ind. Cas. 421=9 O. L. J. 186=26 O. C. 109=A.I.R. 1922 Oudh 218.

——S. 32 (5)—Adoptee—'Special means of knowledge.'

A person's statement about his being the adopted son of a particular person—Adoption taken place when he was very young—He should still be regarded as having "special means of knowledge." 68 Ind. Cas. 566=A.I.R. 1921 Nag. 153.

——Ss. 32 (5) and 49—Special means of knowledge—Custom—Proof of.

When direct evidence of instances of a custom is not available, persons having special means of knowledge are permitted to testify to it either by their knowledge of the practice of the community or their hearsay information from persons having such special means of knowledge under Ss. 32 (5) and 49 of the Evidence Act. 21 O. C. 276=5 O. L. J. 701=48 Ind. Cas. 767.

——S. 32—Special means of knowledge—Relationship.

A statement by a Muzumdar that the estate should be handed over to a certain person by name **A** as the sole wife of a **Zamindar** is admissible under S. 32, as made by a person having special means of knowledge. (1917) M.W.N. 201=33 M. L. J. 277=40 Mad. 871=39 Ind. Cas. 263.

——S. 32 (5), S. 21 (1)—Special means of knowledge—Statement as to date of birth, when admissible.

Statements as to the date of birth of a person contained in his deposition and in affidavits filed by him are admissible in evidence under S. 21 (1) read with S. 32 (5) if made by a person having special means of knowledge whether personal or hearsay. (1916) M. W. N. 208=3 L. W. 210=33 Ind. Cas. 969.

——S. 32, Cl. 5—Special means of knowledge—What is.

It is not necessary that the special means of knowledge of a witness should be of a particular character in order to make his statement admissible. It is for the Court to decide whether the witness had such special means or not. 26 Ind. Cas. 110 (Mad).

25. Statements after dispute.

——S. 32 (5)—Statements after dispute.

Statements made after the controversy had arisen are not admissible under S. 32(5), Evi. Act. A.I.R. 1941 Oudh 337=1941 O.W.N. 33=1941 A.W.R. 37=16 Luck. 551=192 Ind. Cas. 131.

——S. 32 (5)—Statement by husband as to paternity.

A written statement filed by the father in an application for maintenance in which the father denied the paternity of the son, is not admissible as a statement by the father under S. 32 (5), Evidence Act, in a dispute as to the son's paternity when it has not been made before the dispute arose. A.I.R. 1934 P. C. 49=11 O.W.N. 229=39 L. W. 244=1934 M.W.N. 199=66 M. L. J. 288=38 C.W.N. 427=1934 A. L. J. 250=36 Bom. L. R. 394=59 C. L. J. 126=12 Rang. 243=3 A.W.R. 319=147 Ind. Cas. 891 (P. C.).

——S. 32 (5)—Statements after dispute.

Father of plaintiff died leaving behind married daughter **A** by his first wife and plaintiffs born of second wife whom he had married in **Udki** form—**A** suing for recovery of her father's property from plaintiff's mother—**Udki** marriage, held, was not proved—On death of her mother plaintiff suing to recover possession, as unmarried daughter, of her father's property from **A**—Plaintiff relying on depositions in revenue inquiry which was held under S. 71, Bombay Land Revenue Code:

Held, that the depositions in the heirship proceedings were inadmissible in evidence as substantive evidence relating to the question of **Udki** marriage with the plaintiff's mother because the depositions or statements were made after the question in dispute was raised. A.I.R. 1933 Bom. 126=35 Bom. L. R. 118=144 Ind. Cas. 442.

——S. 32 (5)—Statements of deceased as to existence of a custom made after controversy arose.

Evidence, oral or documentary, as to statements of a deceased person as to the custom in a family is not admissible if it appears that such statements were made after a controversy as to the custom had arisen. A.I.R. 1933 Oudh 246=10 O.W.N. 268=17 R. D. 274=8 Luck. 445=150 Ind. Cas. 282.

——S. 32—Statements of deceased persons after dispute—If relevant under Cl. 7.

Statements made by deceased person after the controversy had arisen, and, therefore, inadmissible under S. 32, are not admissible under Ss. 48 and 49 of

the act. Nor can they be admitted under S. 32, cl. (7), either. "Statements," cannot be called "instances" though the whole litigation ending with the judgment may be an instance. A. I. R. 1933 Oudh 246=10 O.W.N. 268=17 R. D. 274=8 Luck. 445=150 Ind. Cas. 282.

——S. 32 (5)—Statement as to adoption of party made in prior suit—After dispute.

Statements regarding the fact of adoption of the party in a suit, made in previous suits in which the question of adoption was directly in issue, should not be admitted in evidence in a subsequent suit under S. 32 (5), if they were not made before the question in dispute was raised. A.I.R. 1932 Mad. 198=35 L. W. 73=1932 M.W.N. 31=62 M.L. J. 116=55 Mad. 40=139 Ind. Cas. 684.

——S. 32—Statement after dispute.

Statement made after a dispute has arisen is not admissible. 25 A.L. J. 861=A.I.R. 1927 All. 818.

26. Statements against interest.

(a) Admissibility of

(b) Principle of

(c) Value of

(d) Whether amounts to.

26 (a). Admissibility of.

——S. 32 (3)—Statements made by a deceased person against his pecuniary interests are relevant under S. 32, Evidence Act. A.I.R. 1942 Oudh 130=1941 A.W.R. 397=1941 O.W.N. 1290=43 Cr.L. J. 280=197 Ind. Cas. 839.

——S. 32 (3)—Cancelled Will.

A cancelled Will is admissible under S. 32, Evidence Act, if it is used in support of a statement made by the testator in the interest of other persons, his sons, and against his own interest. A.I.R. 1939 Nag. 274=1939 N.L. J. 421=185 Ind. Cas. 210.

——S. 32—Statements against interest—Admissibility of.

——Dispute regarding nature of land—Recitals in sale deeds in favour of one party to suit showing nature of same land are admissible under S. 32. 1930 A.L. J. 564 =A.I.R. 1930 All. 299.

——S. 32 (3) — Statements against interest—Admissibility of.

Where a person sentenced to death for murder makes a statement to a Magistrate about the time of his being hanged that the approver appointed to give evidence in the case, who had previously retracted his confessions, was not involved in the crime, the statement may be admissible under S. 32 (3). 124 Ind. Cas. 459=A.I.R. 1930 Nag. 259.

——S. 32 (3) — Statements against interest—Admissibility of.

(**Obiter**)—Where the question, whether there was partition between the ancestors of the parties or not, is in issue, the statements made by the deceased ancestors of the parties to the effect that there was partition are admissible in evidence as they are statements against the proprietary interest of the persons making them. A.I.R. 1929 Nag. 131.

——S. 32 (3)—Application of.

An admission against interest by a Hindu widow that she borrowed a loan for a particular purpose cannot be split up into two parts making one part admissible and the other inadmissible, but must be admitted as a whole for the purpose of ascertaining the purpose and nature of the loan under S. 32. 94 Ind. Cas. 13=5 Pat. 168=7 P.L.T. 573=A.I.R. 1926 Pat. 255.

——S. 32 (3) — Statements against interest—Admissibility of.

Statement in sale-deed that a certain sum alone is due from the executant thereof on account of a promissory note executed by him is admissible for controverting the presumption that a promissory note is executed for consideration and showing that only a part of the consideration really passed. 78 Ind. Cas. 1033=A.I.R. 1925 All. 130.

——S. 32 (3)—Statements against interest—Admissibility of.

Declarations made by persons in disparagement of title to land, if made whilst in actual possession, are admissible in evidence under S. 32 (3) of the Evidence Act. 63 Ind. Cas. 685=14 S.L.R. 137.

——S. 32 (3) — Statements against interest—Admissibility.

A statement made by the manager of a joint Hindu family, since deceased, that he bought properties out of his own earnings as a provision for the son-in-law and in his name, is admissible in evidence against the surviving members of the family who claim that the property was acquired benami for the joint family. 40 All. 159=21 C.W.N. 1065=20 O.C. 211=2 P L.W. 160 =33 M.L.J. 180=15 A.L.J. 684=19 Bom. L. R. 737 =22 M.L.T. 121=26 C.L.J. 267=6 L.W. 509= (1917) M.W.N. 477=4 O.L. J. 762=44 I.A. 201= 40 Ind. Cas. 988 (P.C.).

——S. 32 (3)— Statements against interest — Documents not inter partes — Boundary dispute.

Recitals in documents not inter partes are ordinarily irrelevant unless the statements in the documents can be brought within S. 32 of the Evidence Act. Statements in documents not inter partes limiting the interest of the executants by declaring the boundaries of certain land fall within S. 32 cl. (3) and are, therefore, admissible in evidence. 53 Ind. Cas. 863 (Cal).

——S. 32 (3) — Statements against interest —Recital in document — Admissibility.

A recital in a deed of sale, that the land conveyed is limited by certain boundaries is an admission that his proprietary interest does not extend over any land outside the boundaries mentioned, and as such is admissible under S. 32 (3). 21 C.W.N. 996=25 C.L.J. 619=45 Cal. 159 =41 Ind. Cas. 116.

——S. 32 (3) and S. 18 — Statement against interest.

The statement of the vendor in a sale deed as to the ownership of a land included as a boundray of the landlord is relevant under S. 32 (3) as a statement against interest and is evidence against the vendee and strangers. But such a statement cannot be proved against the vendee as an admission under S. 18. 34 Ind. Cas. 834 Oudh.

——S. 32. Cl. (3)—Statements against interest —Cess Act, S. 95—Road cess return filed by Hindu widow—Admissibility in evidence in favour of reversioner.

A Road cess Return filed by a Hindu widow while she was in possession of the estate, is admissible in evidence under S. 32 (3) in favour of the reversioner and S. 95 of the Cess Act does not bar its admissibility. 18 Cr.L.J. 633=22 Ind. Cas. 594.

——S. 32 (3) and (7)—Statements by donor at the time of registration of the Will.

Statements made by the testator at the registration of the Will and in judicial proceedings relating to the property comprised in the bequest to a charity are admissible under Ss. 6 and 32 of the Evidence Act. 37 M.L.J. 489=47 Ind. Cas. 611.

——S. 32 (3) — Statements against interest— Conditions of admissibility.

Under S. 32 of the Evidence Act, the tests of admissibility of statements against interest made by deceased persons are (1) the deceased must have had personal knowledge of the facts he was stating; (2) the facts stated should have been to the immediate prejudice of the deceased; (3) the statement must have been to the knowledge of the deceased, contrary to his interest and (4) the interest must be either pecuniary or proprietary. (1916) 1 M.W.N. 208=3 L.W. 210=33 Ind. Cas. 969.

——S. 32, Cls. 3 and 2, Ss. 11 and 12—Statements against interest.

A vendor describing in a conveyance that the land is limited to certain boundaries makes a statement against his proprietary interest as it admits that the land does not extend over any land outside the boundaries mentioned and is admissible under S. 32, Cl. (3). It does not fall under Ss. 11 or 12 or 32, Cl. 2. 16 C.W.N. 252=14 C.L.J. 467=12 Ind. Cas. 149.

——S. 32, Cl. (3)—Statement against interest— Admissibility.

A statement made by a person against his own interest is admissible in evidence under S. 32 Cl. (3) of the Evidence Act. (1911) 1 M.W.N. 368=11 Ind. Cas. 380.

26 (b) Principle of.

——S. 32 (3) — Principle of — Applicability — Party making statement not knowing it to be against his interest.

The principle upon which hearsay evidence is admitted under S. 32 (3), of the Evidence Act is that a man is not likely to make a statement against his own interest unless true, but this sanction does not arise unless the party knows the statement to be against his interest. 76 I.A. 255=63 L.W. 45=54 C.W.N. 233=A.I.R. 1950 P.C. 1=1950 A.L.J. 134 = 1950 A.W.R. 220= (1950) 1 M.L.J. 163 (P.C.).

——S. 32 (3)—Principle of—Admission of deceased as to receipt of documents got by criminal breach of trust—Liability for prosecution— Admissibility.

According to S. 32 (3) of the Evidence Act, the statement of a deceased person which exposes him to a criminal prosecution or a suit for damages is admissible. Where a deceased has made statements to a witness as to the receipt of certain documents from a person accused of criminal breach of trust in respect of them and also as to his anxiety to ascertain their contents to find out how they could be useful to him, they are admisssible as they expose him to prosecution for abetting criminal breach of trust or for himself misappropriating the documents. 51 Cr. L.J. 1139=A.I.R. 1950 Kutch 52.

——S. 32 (3) — Principle of — Applicability— Statement by person against whom there is already evidence leading to his prosecution and conviction—Admissibility.

The principle underlying S. 32 (3) of the Evidence Act is that when a person makes a statemet rendering him liable to criminal prosecution, the statement is likely to be a true statement. But when there is already against him evidence which would inevitably lead to his prosecution and conviction, a statement made by him cannot be admitted in evidence under S. 32 (3). The section does not apply in such a case. 25 Pat. 347=228 Ind. Cas. 567 =48 Cr.L.J. 242=13 B.R. 250=A.I.R 1947 Pat. 90=27 P.L.T. 298.

——S. 32 (3)—Principle of—Statement remotely against interest—Admissibility.

The sanctity attaching to a statement by a person who is dead, on the ground that it was against his interest to make it, must depend upon the measure of that interest; and when it appears that the statement was probably to the immediate interest of the person who made it, the fact that more remotely, it was against his interest does not afford much guarantee of its truth. A.I.R. 1939 Sind 145=I. L. R. (1941) Kar. 573=183 Ind. Cas. 67.

——S. 32 (3)—Application to detrimental statement of Hindu widow desiring to adopt.

The principle upon which statements coming under S. 32 (3) are regarded as admissible in evidence is that in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true. But this sanction is of no use in the case of a Hindu widow who, after a life-long enjoyment of her husband's property, desires at the end to pass it on to her relations, and for this purpose goes through the form of adopting her brother's grandson, to effectuate which she is bound to allege authority from her husband. 122 Ind. Cas. 8=1930 A.L.J. 122=7 O.W.N. 295=34 C.W.N. 369=32 Bom. L.R. 487=51 C.L.J. 230=57 I.A. 14=52 All. 1=A.I.R. 1930 P.C. 79=58 M.L.J. 446 (P.C.).

——S. 32 (3)—Principle of—Statement and not document to be against interest.

Under S. 32 (3) it is the statement and not the document containing the statement which must be against the proprietary interest of the person making it. 1910 M.W.N. 668 and 1914 M.W.N. 779, Foll.; 22 W.R. 231, Diss. from.

Parties making statements which are not material to their interests have no occasion to be accurate. It is for this reason that a statement to be admissible must be against the interest of the person making the same. 107 Ind. Cas. 293=A.I.R. 1928 Mad. 105.

26 (c) Value of.

——S. 32 (3).—Mortgage by trustee of mosque—Suit for redemption by successor of trustee—Former suit against trustee resulting in compromise-decree declaring suit property as mosque property—Compromise-decree is admissible under S. 32 (3) and is sufficient to establish title of mosque. A.I.R. 1941 Mad. 666=(1941) 1 M.L.J. 754=1941 M.W.N. 532=53 L.W. 731=198 Ind. Cas. 309.

——S. 32 (3)—Statement against interest—Evidentiary value of.

So far as a statement against the pecuniary or proprietary or other interest of the person making it is concerned, such statement may be given in evidence against third persons, provided that the reference to such third persons is not foreign to that portion of the statement which is against the interest of the declarant. But although the whole statement of a deceased person is admissible in evidence, the value which the Court will attach to such evidence will depend in each case upon a variety of circumstances. If the statement happens to be recorded in a document it must naturally possess greater value than when it depends upon the evidence of a witness who purports to have heard it. The Court in each case will also have to consider whether or not the statement in question bears on its face the appearances of truth, also the circumstances under which it came to be made, and whether or not the deceased person had a motive in making it or an object in naming the particular person whom he charges with complicity in the crime in question. These are all matters which affect the weight of the evidence and not its admissibility. 89 Ind. Cas. 252=26 Cr.L. J. 1308=A.I.R. 1926 Lah. 54.

26 (d) Whether amounts to.

——S. 32 (3)—Deed of gift—Statement that the property is donor's—If falls under.

In order to determine whether a certain statement is against the pecuniary or proprietary interest of the person making it, the Court must look to the statement itself and not to the nature of the transaction in the course of which the statement is made. Where the statement made by a donor in a deed of gift amounts to an assertion that the property gifted is his property, such an assertion cannot be held to be a statement against the pecuniary or proprietary interest of the donor and is not, therefore, admissible under S. 32. cl. (3), Evidence Act. A.I.R. 1940 Pat. 16=20 P.L.T. 877=6 B.R. 33=184 Ind. Cas. 246.

——S. 32 (3) (7)—Statement against interest—Whether amounts to.

A statement contained in a deed of adoption that the sons of adopter were suffering from virulent and incurable form of leprosy at the time of adoption is a relevant fact deciding whether adoption during life-time of those sons was valid or not and is admissible in evidence under S. 32 (7), Evidence Act, and where the sons suffering from leprosy have attested the deed, they may be deemed to have acquiesced in the truth of that statement which is against their pecuniary interest and the statement is admissible under S. 32 (3), Evidence Act also. A.I.R. 1931 Mad. 264=33 L.W. 269=1931 M.W.N. 501=61 M.L.J. 19=54 Mad. 576=131 Ind. Cas. 9.

——S. 32 (3)—If applies.

The statement by a person since dead that certain lands lie on the boundary of the land forming the subject-matter of the document cannot be regarded as having been made against the pecuniary interest of the person making it under S. 32 (3). A.I.R. 1926 Cal. 948, Foll. 101 Ind. Cas. 542=45 C.L.J. 138=A.I.R. 1927 Cal. 918.

——S. 32 (3)—Applicability.

Attesting with knowledge a document showing that the attestors have no interest in the land passed by the documents, amounts to a statement against interest and is admissible under S. 32. 79 Ind. Cas. 2=19 M.L.W. 494=1924 M.W.N. 451=A.I.R. 1924 Mad. 542.

——S. 32 (3)—Statement by members of a community regarding rule of succession is one against interest.

A statement by some members of the Rajgond community that amongst Rajgonds a son takes interest by birth is a statement against the proprietary interest of the declarant and therefore is clearly admissible in evidence under S. 32 (3). 78 Ind. Cas. 185=A.I.R. 1924 Nag. 330.

——S. 32 (3)—Statement not against pecuniary interest.

A statement by a plaintiff as a witness that her father told her that he had mortgaged the land in suit to the defendant is inadmissible under S. 32. U.B.R. (1915) II, 56=29 Ind. Cas. 607.

——S. 32, Cl. (3)—Statement contrary to proprietary interest—Landlord's statement about tenancy.

A statement by a deceased landlord that there was a tenant on the land is a statement against the landlord's proprietary interest and, therefore admissible under Cl. 3, S. 32, of the Evidence Act. (1904) 31 C. 965.

——S. 32, Cl. (3)—Statement made against interest — Preliminary enquiry under the Merchant Shipping Act—Statements not challenged.

The refusal of a party to reject a charge made in a Court of Justice or to cross-examine or contradict a witness or to reply to an affidavit may afford a strong presumption that the imputations made against him are correct. Held, that a statement made by the master of the ship of the defendant company that he was negligent in the matter of a collision and made in the presence of the defendants who did not care to challenge it was admissible in evidence. (1908) 35 C. 751.

27. Unreasonable delay or expense.

——S. 32—Unreasonable delay or expense.

In a case in Madras, the mere fact that a witness happens to live at Rangoon is not a ground for holding that his evidence cannot be procured without unreasonable delay or expense. 86 Ind. Cas. 576=21 M.L.W. 210=A.I.R. 1925 Mad. 444.

28. Verbal statements.

——S. 32—'Verbal statements'—Meaning of.

The questions put to the dying person who could not speak and the signs made by him taken together amount to verbal statements within the meaning of S. 32 of the Evidence Act. 41 C.W.N. 513 (P.C.), foll. I.L.R. (1949) Nag. 301=1949 N.L.J. 354=A.I.R. 1949 Nag. 405=3 A.I.Cr.D. 607.

——Ss. 32 (1), 8—Verbal statements—Gestures of deceased in reply to questions—Admissibility.

Per Broomfield, J.—Gestures of the deceased shortly before his death in reply to questions put to him as explained by the questions will be relevant as conduct under S. 8, Evidence Act, although it is doubtful whether his gestures in reply to the questions put to him or the questions put to him taken together with his gestures in reply to them, could, without straining of language be regarded as a verbal statement made by him within the meaning of S. 32.

Per Wassoodew, J.—The form of the question cannot affect the admissibility of the signs if such signs are rendered admissible under the Evidence Act. The evidence of this kind is admissible under S. 32, not under S. 8. A.I.R. 1936 Bom. 372=38 Bom. L.R. 818=37 Cr.L.J. 1140=I.L.R. (1937) Bom. 68=165 Ind. Cas. 422.

——S. 22—Verbal statements—Questions with answers by signs owing to throat being cut are admissibe under Cl. (1).

Where the man's throat had been cut and he could not speak but he was said to have replied to the questions put to him by means of signs,

Held, that the questions put to the deceased and the signs made by him taken together might properly be regarded as "verbal statements" made by a person as to the cause of his death within the meaning of S. 32. 7 All. 385 (F.B.); 1922 Cal. 402, Foll. 84 Ind. Cas. 552=5 Lah. 305=26 Cr.L.J. 328=A.I.R. 1924 Lah. 581.

——S. 32—'Verbal statements'.

Signs made by the deceased in answer to questions amount to 'a verbal statement.' 77 Ind. Cas. 993=49 Cal. 600=26 C.W.N. 414=25 Cr.L.J. 529=A.I.R. 1922 Cal. 409,

——S. 32—Verbal statements—Relevancy of.

Gestures by the person murdered are relevant but not their interpretation by witnesses present. 71 Ind. Cas. 353=1 Pat. L.R.Cr. 77=24 Cr. L. J. 129=1 Pat. 401=3 P.L.T. 779=1923 P.H.C.C. 26=A.I.R. 1922 Pat. 535.

29. Miscellaneous.

——S. 32 (5)—Order of mutation giving effect to gift—Reference therein to relationship of donee with donor's husband—Admissibility.

A reference made in the order of mutation giving effect to a gift, to the relationship of the donee with the donor's husband is admissible in evidence under S. 32 (5) of the Evidence Act, although there is no such reference in any statement made by the donor before the Revenue Officer. In mutation proceedings, it is not the practice to record the statements of the persons appearing before the Revenue Officer in the way in which statements of parties or witnesses are usually recorded in civil or other proceedings. What happens is that the Revenue Officer concerned puts questions to the parties or other persons present before him and embodies the answers elicited in the order recorded by him. A.I R. 1948 Lah. 113.

——S. 32 (7)—Object of.

The object of S. 32 (7) of the Evidence Act is that the statement must have been made in relation to a transaction where it was necessary to make the statement. The section aims at keeping out gratuitous statements which were either not necessary to be made at the time and on the occasion, when they were made or which it was not the duty of the party who made them to make. A.I.R. 1948 Pat. 426.

——S. 32 (5)—"Question in dispute"—Interpretation of.

The expression "question in dispute" in S. 32 (5), Evidence Act must be interpreted as meaning that the dispute raised in the latter suit must be identical, or in substance the same as in the former suit. It is not enough that the question was merely in dispute in the former litigation, but it must have been also directly in dispute. Even if the dispute has been raised collaterally, it does not matter. 53 Mys. H.C.R. 473=28 Mys. L.J. 251.

——S. 32.—The statement that a document is a copy of the original is admissible where made by a deceased person in a document relating to a relevant fact and also as an admission under S. 21. 117 Ind. Cas. 507=33 C.W.N. 578=52 Mad. 453=29 M.L.W. 804=31 Bom. L.R. 756=49 C.L.J. 566=56 I.A. 146=1929 M.W.N. 553=A.I.R. 1929 P.C. 115 (56 M.L.J. 730 (P.C.).

——S. 32—Statement of living person—Not examined as witness—Inadmissible.

Statements of living persons not examined as witnesses are inadmissible in evidence to prove the allegation that the executant was a major at the time when he executed the document. 114 Ind. Cas. 801=5 O.W.N. 1111=A.I.R. 1929 Oudh 113.

——S. 32—Statement—Person making not proved to be dead—Appellate Court.

In the absence of proof of some fact within S. 32, what the appellate Court has to do is to find whether or not there was any real contention that the writer was still alive and if so grant a remand. 104 Ind. Cas. 733=46 C.L.J. 253=A.I.R. 1927 Cal. 855.

——S. 32.

A statement made by deceased as to who will be his successor in case of his failure to have a son is inadmissible in evidence under S. 32. 93 Ind. Cas. 385=42 C.L.J. 280=A.I.R. 1926 Cal. 1.

——S. 32—Applicability.

Statements of deceased persons are admissible under S. 32 if certain conditions are fulfilled. The statements in a deceased person's will as to the time when a certain member of the family left the house or as to the restriction imposed upon him by a will of a pre-deceased person do not fall within any of the clauses of S. 32. 80 Ind. Cas. 118=16 S.L.R. 25=A.I.R. 1921 Sind 177.

——S. 32—Witness dying during trial after examination.

Where a witness in a suit has been fully examined and cross-examined, S. 32 has no application and if the witness happens to die before the completion of the suit, it is not open to either party to apply for the admission of a statement made by him in a previous suit. 5 Pat. L.J. 164=46 Ind.Cas. 929.

——S. 32—Independent Evidence — Appeal—Objection to admissibility.

Where the document can be brought under S. 32 of the Evidence Act by proof of the death of the person who prepared it or other facts contemplated by that section, it can be used not only as corroborative but as independent evidence. 4 P.L.W. 213=1918 Pat. 145=3 P.L.J. 306=44 Ind. Cas. 422.

——S. 32—Defamation— Libel—Statement of the deceased.

The statement of a deceased person, even if true is insufficient to prove the truth of a libel as it lacks the test of cross-examination. A libellous statement of a deceased whose truth would have been a complete defence is inadmissible as evidence under this section. 15 Bom. L.R. 130=19 Ind. Cas. 98.

——S. 32 (2) and (5)—Legitimacy—Proof of.

The appellant's legitimacy being in question the person who challenged it was entitled to prove the fact that the appellant's deceased mother made a statement on a certain occasion that she was a concubine of the appellant's father and not his wife under Sec. 32 (2) and (4). 10 Ind. Cas. 188 (Oudh).

——S. 32, Cl. (7)—Documents "res inter alias acta".

Documents res inter alias acta will be admissible against parties even though they did not fall within any of the classes of evidence enumerated in S. 32 of the Evidence Act, if they would be admissible against persons through whom such parties claimed. (1904) 31 C. 871=31 I. A. 127=9 C.W.N. 74 (P.C.).

——S. 33. Synopsis.

1. Adverse party.
2. Conditions for applicability.
3. Consent of parties.
4. Prior depositions.
5. Procedure.
6. Revision.
7. Scope.
8. Witness dead before cross-examination.
9. Miscellaneous.

1. Adverse party.

——S. 33—"Adverse party"—Meaning of.

The expression "adverse party" in S. 33, Evidence Act, is used to distinguish that party from the party who calls the witness; the distinction has nothing to do with the nature of the evidence given by the witness. A party calling a witness does not become the "adverse party" because the witness gives evidence which favours the adverse party or is hostile to the party calling the witness. "Adverse party" in the proviso can only refer to the party who was the adverse party at the time when the deposition was recorded in the first proceeding. 49 Cr.L.J. 558=A.I.R. 1948 Sind 122.

2. Conditions for applicability.

a. Death, not found or delay and expense.
b. Duty of Court.
c. Proof necessary.
d. Parties and representatives.
e. Right and opportunity to cross-examine.

2 (a) Death, not found or delay and expense. See also under 2 (b) and (c).

——S. 33—Applicability.

Murder charge against accused—T's deposition in committing Court important evidence against accused—T joining army and was at Muttra—Delay and expense, consideration of.

Held, that any delay or expense which might be involved was disproportionate to the public interests. A.I.R. 1944 Mad. 319=I.L.R. (1944) Mad. 687=(1944) 1 M.L.J. 137=57 L.W. 108=1944 M.W.N. 126=46 Cr.L.J. 85=215 Ind. Cas. 242.

——S. 33—Transferring evidence from committing Court to Sessions Court—Expense.

The evidence of a witness in the committing Magistrate's Court cannot be transferred to the Sessions Court merely because "it would be expensive to retain the assessors until he is served." A.I.R. 1943 Lah. 118=45 P.L.R. 151=44 Cr. L. J. 627=207 Ind. Cas. 243.

2 (b) Duty of Court.

——S. 33—Witness in Committing Magistrate's Court—Deposition of—Use of as evidence at trial—Conditions for—Duty of Court.

Before the deposition of a witness in the committing Magistrate's Court is treated as evidence at the trial, the reason for such a course being adopted should be strictly proved, and unless the Court is satisfied about it, it should not be allowed. In the absence of proper explanation for not securing the attendance of the witness at the trial it would not be proper to treat his deposition in the Committing Magistrate's Court as evidence at the trial. 54 Mys. H.C.R. 237.

——S. 33—Previous deposition of witness—Admission in evidence at the subsequent trial.

Where a witness who gave evidence at a previous trial and whom the accused had an opportunity to cross-examine, died subsequently:

Held, that the evidence was admissible in the subsequent trial of the case. A.I.R. 1932 Mad. 559=37 M.L.W. 134=1932 M.W.N. 857=33 Cr.L.J. 738=139 Ind. Cas. 203.

——S. 33—Statement of living person in previous judicial proceeding—Admissibility.

A conviction based on the statements of living witnesses on a prior trial is unsustainable. 12 P.L.R. 1919.

——S. 33—Prior deposition—Admission in—Deponent alive—Admissibility under.

The record of an admission made in the course of evidence given before a magistrate by the agent for a party, is not admissible in a subsequent litigation when the deponent is alive and available for examination. 43 Cal. 707=20 C.W.N. 802=14 A.L.J. 621=(1916) M.W.N. 406=31 M.L.J. 1=18 Bom. L.R. 490=3 L.W. 556=24 C.L.J. 116=20 M.L.T. 267=43 I.A. 73=33 Ind. Cas. 583 (P.C.).

——S. 33—Applicability — Conditions — Compliance with—Duty of Court.

A Court making use of the provisions of S. 33 of the Evidence Act must place on record its satisfaction with the conditions laid down in that section which justify the admission of evidence taken before the committing Magistrate. A bare statement that the witnesses whose evidence was put in under the section are police officers who have opted for India and their whereabouts are not known, cannot be regarded as sufficient. 1 D.R. 98.

——S. 33—Applicability—Conditions of—Duty of Court to insist on strict judicial proof of justifying circumstances.

A Court, before taking action under S. 33, Evidence Act, should insist on strict judicial proof of the fact that in spite of the bona fide efforts of the prosecution, they were unable to trace the whereabouts of the witness whose previous deposition is sought to be let in as evidence. 2 A.I.Cr.D. 126.

——S. 33—Applicability—Admission of deposition in committal court at sessions trial—Conditions—Duty of court—Consent if cures.

When evidence given by a witness before the committing Magistrate is sought to be put in trial before the Court of Session without calling the witness, the Judge must satisfy himself that the persence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. The consent or want of objection on the part of the other side will not cure the defect. A.I.R. 1944 Bom. 338=46 Bom. L.R. 589.

——S. 33—Applicability—Admission of witness's statement before committing magistrate —Condition precedent—Finding on, necessary.

Before the evidence of a witness given before the committing Magistrate can be admitted at the trial, the court must arrive at a finding on evidence formally and regularly taken and recorded that one or other of the grounds specified in the section exists. A.I.R. 1945 Cal. 137=I.L.R. (1944) 2 Cal. 76=46 Cr.L.J. 580=219 Ind. Cas. 310.

——S. 33—Applicability — Requirements—Non-observance—Effect.

The deposition of a witness brought on record, without requirements of the section having been observed, cannot be treated as evidence. A.I.R. 1944 Lah. 206=46 P.L.R. 69=45 Cr.L.J. 660=213 Ind. Cas. 355.

——S. 33—Applicability — Requirements—Duty of court to record findings on.

Before the Sessions Judge can transfer statement under S. 33, he must record a finding that any of the circumstances mentioned in that section exists and he must be so satisfied. A.I.R. 1944 Lah. 377=46 P.L.R. 135.

——S. 33—Duty of Court—No findings as to condition of delay and expense being unreasonable—Evidence held, improperly admitted.

Deposition of important witness in committing Court admitted in Sessions Court on production of medicial certificate that such witness should have rest for some time:

Held, that before admitting the deposition, the Sessions Judge should have come to a finding whether it was unreasonable in the circumstances, on account of the dealy or expense which might be involved, to postpone the trial for a week in order that the investigating officer might be examined. Consequently, the evidence was improperly admitted. A.I.R. 1943 Cal. 222=44 Cr.L.J. 567=47 C.W.N. 271=I.L.R. (1943) 1 Cal. 405=207 Ind. Cas. 106.

——S. 33—Applicability—Duty of court—Bare statement that deposition is admitted under S. 33, not sufficient to bring it within terms of S. 33.

Where a committing Court has recorded the deposition of a witness and has presumably admitted it under S. 33, Evidence Act, but there is nothing on the record to show that such evidence came within the terms of S. 33, the bare statement "admitted under S. 33, Evi. Act," signed by the Judge, appearing on the face of the deposition is insufficient to bring such evidence within the terms of S. 33. A.I.R. 1939 Rang. 225=40 Cr.L.J. 725=183 Ind. Cas. 145.

——S. 33—Transfer of deposition in commital court—When permissible.

Under S. 288, Criminal P.C., statement made by a person before committing Magistrate can be transferred to record on Sessions Court only if the person is examined as a witness before Sessions Judge. When he is not so examined, it is necessary for Sessions Judge to hold that the witness was incapable of giving evidence within the meaning of S. 33, Evidence Act and unless this is done, statement cannot be admitted under that section. A.I.R. 1934 Lah. 212=35 Cr.L.J. 349=35 P.L.R. 75=147 Ind. Cas. 234.

——S. 33—Duty of court—Statement of witness before Magistrate—Transfer to record of Sessions Court.

The Sessions Judge, before transferring the deposition of a witness in the court of the committing Magistrate to his own record, ought to take

evidence and record proceedings and, if as a result of the evidence thus taken, he arrives at the judicial decision that the witness could not be found or his presence could not be secured without an amount of delay or expense, which under the circumstances of the case the Court considers unreasonable, he can bring his former deposition on the record. But if the Sessions Judge transfers the statement of the witness to the record of the Sessions case simply because the public prosecutor makes a statement before him that the witness could not be found the procedure is contrary to law and wholly irregular and the deposition of the witness thus brought on the record cannot be treated as evidence. 1930 Cr.C. 1217=A.I.R. 1930 Lah. 1041.

——S. 33—Evidence before Committing Magistrate—Admissibility in sessions trial—Duty of Court.

Where a witness who gives evidence before the Committing Magistrate, leaves the district, the Sessions Judge cannot, without taking evidence to see whether S. 33 of the Evidence Act has been satisfied, admit the evidence given before the Committing Magistrate. 88 Ind. Cas. 30=7 L.L.J. 105=26 Cr.L.J. 1086=26 P.L.R. 458=A.I.R. 1925 Lah. 319.

——S. 33 and 58—Duty of court while admitting statement of absent witness—Statement of public prosecutor—Consent of accused.

Under S. 33 of the Act it is the duty of the court to satisfy itself that the presence of the witness cannot be obtained without an amount of delay or expense which it considers unreasonable before the statement of the witness in a previous judicial proceeding can be admitted. The mere statement of the public prosecutor to the effect is not sufficient. There must be independent evidence. 2 A. 646; 3 M. 48; 41 C. 601; 5 C. 958, Foll. **Prima facie** the consent of the accused or his counsel is presumptive evidence of the absence of prejudice. 28 M. L. J. 329=17 M.L.T. 214=(1915) M.W.N. 229=16 Cr.L.J. 294=39 M. 449=28 Ind. Cas. 518.

——S. 33—Admissibility of copy of deposition—Requisites for.

Copy of a deposition is not admissible in evidence under S. 33 of the Evidence Act, unless the deponent is dead or cannot be found or is incapable of giving evidence or his attendance cannot be procured without an unreasonable amount of delay or expense, and even then only when the proceedings are between the same parties or their representatives in interest and the adverse party in the first proceeding had the opportunity to cross-examine the witness. (1904) 2 A.L.J. 91.

2 (c) Proof necessary.

——S. 33—Witness incapable of giving evidence—Need for proof—Admission of counsel in criminal case—If sufficient.

Where evidence of a witness already recorded is sought to be used by the prosecution under S. 33, Evidence Act, alleging that the witness is seriously ill and incapable of giving evidence, the prosecution must prove these allegations. No admission by defence counsel can relieve the prosecution of the duty of satisfying the Court by proper evidence that the witness is seriously ill. The Law makes no provision for an admission by counsel in a criminal case. A.I.R. 1950 Cal. 435=86 C.L.J. 21=4 A.I.Cr.D. 370.

——S. 33—Applicability—Conditions—Strict proof of.

Before a previous deposition of a witness can be accepted as evidence the contitions mentioned in S. 33 of the Evidence Act must be proved to exist. The section has to be strictly applied and complied with, and the circumstances mentioned therein must be strictly proved. 16 Cut. L. T. 141=A.I.R. 1950 Orissa 202=51 Cr.L.J. 1493.

——S. 33—Former deposition — Admissibility—Conditions requisite—Need for proof.

When evidence given by a witness in a judicial proceeding is sought to be used under S. 33 of the Evidence Act in a subsequent judicial proceeding or in a later stage of the same judicial proceeding on the ground that the presence of the witness could not be obtained without an amount of delay or expense which under the circumstances of the case the Court considers to be unreasonable, that fact must be proved strictly. 51 P.L.R. 74=A.I.R. 1949 E.P. 228=50 Cr.L.J. 568.

——S. 33—Applicability—Conditions—Proof of.

Before recourse can be had to S. 33 of the Evidence Act on the ground that a witness is incapable of giving evidence, that fact must be proved and proved strictly. The conditions laid down by the statute must be strictly proved. 51 Mys. H. C. R. 266=25 Mys. L. J. 69.

——S. 33—Applicability — Evidence recorded in committing Court put in before Court of Session—Proof of conditions under section.

Before the evidence of a witness, as recorded in the committing Court, is accepted in the Court of Sessions, the prosecution must establish affirmatively by evidence in that Court that it is impossible to procure the attendance of the witness for reasons which fall within the scope of S. 33 of the Evidence Act. 2 D.R. 276.

——S. 33—Admission of statement of witnesses before committing Magistrate at Sessional trial—Physical incapacity of witness—Need for strict proof—Evidence of medical man, if necessary—Consent of accused—If enough to dispense with proof.

Where it is desired to have recourse to S. 33 of the Evidence Act on the ground that a witness is incapable of giving evidence that fact must be proved, and proved strictly. It cannot be laid down that in every case there must be evidence of a medical man, where excuse is sought on the ground of physical incapacity. In a civil case a party can if he chooses waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence, and the consent of the accused to the evidence being

read does not do away with the necessity of the Court being satisfied by proof. It may be that there are some matters as to which it would be possible for an accused to consent to be taken as proved though no strict evidence was given; if there are they could only be such as might reasonably be supposed to be particularly within the knowledge of the accused. Great care must be exercised before admitting a statement made before the committing Magistrate at the Sessions trial. In very many of these cases, the accused is not represented at that stage, so while he has the opportunity to cross-examine it is not often that this would be effectively done. The previous statement, it was held, was wrongly admitted. 72 I A. 270=223 Ind. Cas. 189=59 L.W. 92=1946 P.W.N. 49=I.L.R. (1945) Lah. 451=12 B.R. 274=1946 M.W.N. 180=48 Bom. L. . 284=1946 A.I.Cr.D. 71=I.L.R. (1945) Kar. (P.C.) 366=1946 O.A. (P.C.) 82=1946 A.W R. (P.C.) 82=27 P.L.T. 1=50 C. W. N. 201=A.I.R. 1946 P.C. 1=(1946) 1 M.L.J. 125 (P.C.).

——S. 33—Incapacity of witness to give evidence at the trial –Proof—Mode of.

It cannot be laid down that in every case there must be evidence of a medical man, where excuse is sought on the ground of physical incapacity. That is not the law in England, and there is no reason for a different rule to apply in India. There may be many cases, in which the facts are such that the incapacity can be proved by a lay witness. A.I.R. 1946 P.C. 1=1945 A. L.J. 550=12 B. R. 274=50 C.W.N. 201=(1946) 1 M.L.J. 125=27 P.L.T. 1=59 M.L.W. 92=292 Ind. Cas. 189 (P. C.).

——S. 33—Death of witness after examination-in-chief but before cross-examination — Proof of, whether necessary.

When a witness is examined-in-chief but on the day fixed for his cross-examination the Court is informed that he is dead it is not incumbent upon the Court to require the proof of the death of the witness in the absence of any suggestion by the other party that he is not in fact dead but for some reason or other is keeping out of the way. A.I.R. 1946 Pat. 384=12 B.R. 527=224 Ind. Cas. 402=47 Cr.L.J. 614.

——S. 33—Whereabouts of witness known.

When the whereabouts of the witness were known to the prosecution agency and the failure of the witness to appear was due to the failure of the prosecution agency to issue a summons for the witness in good time, the use of S. 33, Evidence Act is improper. A.I.R. 1943 Lah. 89=44 Cr.L.J. 552=45 P.L.R. 82=207 Ind. Cas. 32.

——S. 33 — Witness not appearing at sessions trial.

To prove age, prosecution producing horoscope and the maker thereof in committing Court—Witness summoned in Sessions Court but not appearing—Prosecution cannot rely on S. 33—Sessions Judge can rightly refuse to admit the evidence given in committing Court, in the Sessions Court. A.I.R. 1934 Cal. 766=36 Cr.L.J. 364=153 Ind. Cas. 493.

——S. 33—Proof of — Strict compliance with requirements essential.

A previous deposition can be admitted in evidence only under the provisions of S. 33, Evidence Act, but before it can be placed on the record of a criminal trial the Court must decide judicially that a proper effect had been made on behalf of the prosecution to secure the presence of the witness, that in spite of that effort he had not been traced and could not be found out, or that he was incapable of giving evidence, or was kept out of the way by the adverse party, or his presence could not be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. 39 Mad. 449; 41 Cal. 601; A.I.R. 1925 Lah 418, **Foll**.

The fact that the counsel for the accused gave his consent does not make any difference. 116 Ind. Cas. 329=10 Lah. 837=30 P.L R. 192=30 Cr. L.J. 623=1929 Cr. C. 85=13 A.I.Cr.R. 34=A.I.R. 1929 Lah. 542.

——S. 33—Incapable of giving evidence—Illness the cause—Examining the doctor if essential for proof of.

Facilities for obtaining qualified doctors in England are very different from those in India, and thus it cannot be accepted as a proposition of law that it is absolutely necessary to examine a qualified medical practitioner before evidence can be accepted under S. 33 of the Eyidence Act when the witness is ill and thus unable to attend. 103 Ind. Cas. 846=31 C.W.N. 908=28 Cr. L. J. 766=A.I.R. 1927 Cal. 679.

——S. 33— Compliance with section—Strict proof of compliance with the provision is necessary specially in a murder trial—Reasons should be recorded before admission of evidence.

Per **May Oung, J.** — The power given by S. 33 requires to be exercised with great caution and the Court must insist on strict proof before holding that the requisite conditions have been satisfied. More especially is this necessary where a man is being tried for his life and the evidence sought to be put in is of signal importance. Moreover, it is essential that a Judge or Magistrate admitting such evidence should either in his judgment or preferably in a separate order record his reasons for doing so.

Per **Lentaigne, J.** — The section pre-supposes a consideration of the grounds for admission of the deposition prior to the admission of the evidence and if the grounds and reasons are recorded prior to the admission of the deposition as evidence, the order constitutes a more convincing proof of the considered adequacy of the grounds than a passage in a judgment subsequently written which in a case near the border line might easily assume the appearance of a subsequent statement of excuses for a previous ill-considered action. 76 Ind. Cas. 817=1 Rang. 512=2 Bur. L. J. 205=25 Cr.L.J. 257=A.I.R. 1924 Rang. 209.

——S. 33.—Evidence taken in another case is inadmissible unless requirements of S. 33 are satisfied. 74 Ind. Cas. 860=25 O.C. 142=24 Cr.L. J. 828=A.I.R. 1922 Oudh 254.

——33—Prior depositions recorded in a criminal trial—Admission of—No proof of conditions precedent in.

In the absence of proof of the circumstances specified in S. 33 of the Evidence Act, the importing in bulk in a civil suit of depositions of witnesses recorded in a criminal trial is a serious irregularity. The depositions could not be used to support the evidence the witnesses gave in civil suit. Nor could they be used to contradict the witnesses without giving them an opportunity to tender their explanation or to clear up the particular points of ambiguity. 39 Bom. 441=13 A.L. J. 570=19 C.W.N. 729=17 Bom. L. R. 527=22 C.L. J. 1==29 M.L. J. 34=18 M.L.T. 1=(1915) M.W.N. 484=2 L.W. 611=42 I.A. 135=29 Ind. Cas. 639 (P.C.).

——S. 33—"Cannot be found"—Proof of.

A mere statement of a police officer that a witness is a man of another district and cannot be found is not a sufficient ground for the reception of evidence under S. 33. 41 C. 601=15 Cr.L. J. 713=26 Ind. Cas. 161.

——S. 33—Depositions of witnesses.

Deposition of witnesses in previous proceedings between the parties can be admitted in their entirety provided the requirements of S. 33 of the Act are fulfilled. 15 C.L. J. 621=13 Ind. Cas. 678.

2 (d) Parties and representatives.

——S. 33—Evidence taken in proceeding before Magistrate in Simla—Admissibility in subsequent proceeding in Koti State.

Evidence taken in a proceeding under S. 411, I. P. Code, in the Court of a Magistrate in Simla, can be received as evidence under S. 33 of the Evidence Act in a subsequent proceeding under S. 411, I. P. Code, in Koti State, although the former proceeding was between the Crown and the accused and the subsequent proceeding is between Koti Darbar and the accused. Explanation to S. 33, Evidence Act, makes it clear that a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused. The prosecutor in both the proceedings are owners whose articles were stolen. A.I.R. 1949 H.P. 15=51 Cr.L. J. 160.

——S. 33—Applicability—Defendant not a party—Persons dead when their depositions tendered in evidence.

Where the depositions of certain persons were recorded in a case to which the defendant was not a party and those persons who had deposed had been dead on the date on which their depositions were tendered in evidence, the depositions do not fall within the ambit of S. 33, Evidence Act, and are inadmissible in evidence. A.I.R. 1942 Mad. 528=1942 M.W.N. 272=(1942) 1 M. L. J. 485=202 Ind. Cas. 274.

——S. 33—Statement in previous proceedings not between same parties.

Where the previous proceedings and the present proceedings are not between the same parties, the statements made in the previous proceedings are not admissible under S. 33, Evidence Act, in the subsequent proceedings. A.I.R. 1941 Oudh 337=1941 O.W.N. 33=16 Luck. 551=1941 A.W.R. 37=192 Ind. Cas. 131.

——S. 33—Applicability—Previous suit not between same parties.

When parties to the subsequent suit are not the same as those to the previous suit nor are they representatives of the parties to the previous suit, a deposition of a witness in the former suit cannot be accepted as evidence in the subsequent suit. A.I.R. 1938 Rang. 170=177 Ind. Cas. 547.

——S. 33—Proviso—Statement of descendant in fermer case as to whether ancestor was thekadar—Admissibility.

The statement of the descendant of a person who had produced the papers in a previous case about his ancestor being **thekadar** of a village is admissible under S. 33, Evidence Act, when the issue is whether the ancestor was such **thekadar** or not. A.I.R. 1935 Oudh 289=1935 O. W. N. 387=1935 R. D. 171=11 Luck. 35=154 Ind. Cas. 965.

——S. 33, Proviso 1—Conditions of admissibility in subsequent proceeding.

Proviso 1 to S. 33, Evidence Act, means "provided that the first proceeding was between the parties to the second proceeding or between representatives in interest of the parties to the second proceeding."

The person who is called by the proviso a 'representative in interest' of another is a person who was a party to the first proceeding. The first proviso requires that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which "the facts which the evidence states" were relevant. It covers not only cases of privity in estates and succession of title, but also cases where both the following conditions exist, **viz.**, (1) the interest of the relevant party to the second proceeding, in the subject-matter of the first proceeding, is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding, and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical.

What S. 33 intends is to allow the admission of evidence given in a former proceeding, which it is, for the specified reasons, impossible to give in a later proceeding, subject to the protection which the provisos afford to the party to the later proceeding against whom the evidence is tendered. What the first proviso aims at securing is that the evidence shall not be admitted unless the person who tested, or had the opportunity of

testing the evidence by cross-examination, either is himself, or represented the interests of the party to the later proceeding against whom the evidence is tendered, i. e., that he was (in the latter case), in effect, fighting that person's battle as well as his own. A.I.R. 1933 P.C. 202=1933 A. L.J. 1039=38 M. L W. 409=65 M. L. J. 479=35 Bom. L. R. 1076= 58 C.L. J. 305= 1933 M.W.N. 1191=38 C.W.N. 1=15 P.L.T. 1=57 Mad. 1=60 I. A. 336=145 Ind. Cas. 216 (P.C.).

[Overrules 15 Beng. L.R. 1; Reverses A.I.R. 1928 Mad. 994=55 M.L. J. 894 (F.B.)].

——S. 33—Different parties.

A deposition of a witness made in a previous suit cannot be accepted as evidence in any subsequent suit when the witness is still living and more so when the parties to the previous suit are different from the parties to the subsequent suit. 107 Ind Cas. 243=50 All. 113=25 A.L.J. 775=A.I.R. 1928 All. 140.

——S. 33—Representatives-in-interest.

In seeing whether a person is the legal representative of another or not for the purpose of rendering evidence admissible under S. 33, regard must be had to the state of affairs when the evidence is sought to be admitted.

Where the defendant in a subsequent suit was the natural son of the plaintiff in previous suit and claimed in the subsequent suit not as the natural son of the plaintiff but as adopted son of a third person,

Held, that the depositions in the previous suit were not admissible. A.I.R. 1927 Mad. 733, **Appr.** 116 Ind. Cas. 673=51 Mad. 893=28 M.L.W. 422=A.I.R. 1928 Mad. 994=55 M.L. J. 894 (F.B.).

——S. 33—Different party.

Statement in a previous suit cannot be used against person who was not a party to previous suit. 25 A.L. J. 861=A.I.R. 1927 All. 818.

——S. 33—'Representatives-in-interest'—Meaning of.

The words "representatives-in-interest" mean that the parties in the second proceedings in which evidence is tendered must be the representatives-in-interest of the parties in the first proceeding, or in other words should be persons who derive their title through or claim under them, or, shortly, are their privies.

Section 33 cannot be applied without any reference to the subject-matter of the two suits. The interests involved in each case must be the same, or similar. 102 Ind. Cas. 713=A.I.R. 1927 Mad. 733.

——S. 33—'Representative-in-interest' — Partners and joint contractors.

The expression "representatives-in-interest" in proviso to S. 33 must at least include privies in estate. Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts and must be regarded as privies in estate and are included in the expression "representatives-in-interest" in proviso to S. 33. 101 Ind. Cas. 289=5 Pat. 777=8 P.L.T. 510=A.I.R. 1927 Pat, 61.

——S. 33—Applicability—Previous suit not between same parties.

A Court has no jurisdiction to decide a matter on evidence recorded in another proceeding to which the applicant was not a party. 27 Ind. Cas. 704 (Cal.).

——S. 33—"Party to suit or representative"—Essentials for making a previous deposition relevant.

To make a previous deposition relevant, three elements have to be established, namely, first that the proceeding was between the same parties or their representatives in interest; **secondly,** that the adverse party in the first proceeding had the opportunity and the right to cross-examine, and, **thirdly,** that the question in issue was substantially the same in the first as in the second proceeding. **Quaere.**—Whether a Hindu widow, in possession of the estate of her husband, completely represents that estate and whether consequently a reversioner can be said to be representative of the party within the meaning of S. 33 of the Evidence Act. (1910) 12 C.L. J. 434=7 Ind. Cas. 892.

2 (e) Right and opportunity to cross-examine.

——S. 33, Proviso—Right and opportunity to cross-examine—Accused allowed to cross-examine witness irrespective of his right to do so—Statement of that witness—If can be brought on record when witness not available.

Where in a criminal case, apart from the right of the accused to cross-examine a prosecution witness at a particular stage, he was in fact allowed to and in fact did, cross-examine that witness, S. 33 of the Evidence Act would apply to the statement of that witness and it can be brought on record when that witness is not available. 1950 A.L. J. 155=A.I.R. 1950 All. 167=51 Cr.L. J. 571.

——S. 33, Proviso—Accused having only partial opportunity to cross-examine witness after charge is framed—Requirements of proviso—If satisfied.

Where after a charge had been framed the accused had only a partial opportunity to cross-examine the witness but not full opportunity as the witness ceased to be available before cross-examination could be concluded, the second requirement of the proviso to S. 33, Evidence Act, is not fulfilled. 4 A.I.Cr.D. 370=A.I.R. 1950 Cal. 435=86 C.L. J. 21.

——S. 33—Proviso (2)—Applicability—Requisite—"Right and opportunity to cross-examine" — Whether accused had opportunity is question of fact.

In order to apply S. 33, two things, right and opportunity to cross-examine, must co-exist. Even if the accused had the right to cross-examine, whether he had the opportunity to exercise his right, is a question of fact to be determined in each case. The condition will not be satisfied merely because the accused was physically present in police custody at the time of the examination of a witness. There must be something more than that. He should know that the witnesses would be produced and the time when and the place where they would be produced or could have known of it, but not where a witness is sprung upon him as a surprise. The object of the section is to afford a genuine opportunity which could be effectively availed of and not for show only. A.I.R, 1946 Lah. 275=48 Pun. L. R. 39.

——S. 33—Applicability—Conditions for admissibility of deposition—Actual cross-examination, if necessary.

For a statement to be relevant and admissible, three conditions are necessary. Firstly, that the witness whose statement is sought to be used in evidence is either dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party or his presence cannot be obtained without an amount of delay or expense which, in the opinion of the Court, would be unreasonable; secondly, that the proceeding was between the same parties or their representatives in interest; and thirdly, that the adverse party in the first proceeding had the right and opportunity to cross-examine. It will make no difference if, for some reason or the other, the party did not find it convenient to utilize the opportunity to cross-examine the witness. A.I.R. 1946 Oudh 26=1945 O. W. N. (C.C. 331)=1945 A.W.R. (C. C.) 248.

——S. 33—Applicability—Witness not found after charge—(Criminal P. C., S. 256.)

The accused has a right of cross-examining a prosecution witness before the framing of a charge against him and if he fails to do so, the action of the Court in treating the evidence of such witness under S. 33, Evidence Act, when it is found impossible to produce him for further cross-examination under the provisions of S. 256, Criminal P. C., is justified. A.I.R. 1935 Nag. 8=36 Cr. L. J. 578=31 Nag. L. R. 276=154 Ind. Cas. 369.

——S. 33—Witness not cross-examined.

The true reading of S. 33 is that the adverse party in the first proceeding had both the right and the opportunity of cross-examining and not "the right **or** opportunity to cross-examine." Where a Hindu widow made an adoption about fifty years after the alleged power to adopt was given by the husband and it appeared that in certain prior proceeding regarding mutation of names the widow had referred to the power but there was no issue on the point and the Court had disallowed cross-examination regarding the same,

Held, that the previous statement was not admissible in a later suit in which the validity of the adoption was questioned. 122 Ind. Cas. 8=1930 A. L. J. 122=7 O.W.N. 295=51 C. L. J. 230=52 All. 1=67 I. A. 14=32 Bom. L. R. 487=34 C.W.N. 369=A.I.R. 1930 P. C. 79=58 M. L. J. 446 (P.C.).

——S. 33—Applicability—Right and opportunity to cross-examine.

If the cross-examination of a witness is reserved by a Magistrate during committal proceedings of his own accord, that deposition is not complete and should not be admitted in evidence at the trial in the Court of Session. 120 Ind. Cas. 524=1930 Cr. C. 70=31 Cr. L. J. 121=A.I.R. 1930 Sind 54.

——S. 33—Applicability—Right and opportunity to cross-examine.

In a warrant case until the stage provided for in S. 256 is reached the accused has no right to cross-examine and consequently the evidence of a witness given before framing of the charge is not admissible under S. 33. 1929 Cr, C. 669=A.I.R. 1929 Cal. 822.

——S. 33—Witness—No cross-examination because of his incapacity—Consideration of deposition.

A witness was examined by prosecution but no cross-examination was put to him and after the charge it was discovered that he was too ill to attend the Court and was unable to answer the interrogatories. The result was that he was never subjected to cross-examination. It was contended that the statement being incomplete his evidence could not be considered.

Held, that such evidence was admissible but the weight to be attached to it depended upon the circumstances of each case. 118 Ind. Cas. 647=1929 Cr. C. 568=11 L. L. J. 384=30 Cr. L. J. 951=A.I.R. 1929 Lah. 840.

——S. 33—Applicability—Right and opportunity to cross-examine.

Where the formalities prescribed in Ch. 25 of Cr. P. Code are not observed in recording evidence, the accused cannot be said to have had opportunity to cross-examine within S. 33. 89 Ind. Cas. 1043=26 Cr. L. J. 1475=A.I.R. 1926 Pat. 58.

——S. 33—Interrogatories—Answers.

Answers to interrogations may be admitted under S. 33 of the Evidence Act where cross interrogatories have been administered to the person making the interrogatories as such interrogatories satisfy the requirement that the opposite parties have the "right and opportunity to cross examine." 39 Ind. Cas. 893 (Mad.).

—S. 33—Applicability—Right and opportunity to cross-examine.

Where a witness for the prosecution is examined and cross-examined before charge and leaves for England, and after charge the accused requires him to be cross-examined under S. 257, Cr. P. Code, the Magistrate may act under the provisions of S. 33, Evidence Act. 104 Ind. Cas. 637=6 Bur. L. J. 114=9 A.I.Cr.R. 33=28 Cr. L. J. 861=A.I.R. 1927 Rang. 248.

3. Consent of parties.

——S. 33—Consent—Estoppel.

The scheme of the Evidence Act is that the evidence must, to be relevant or admissible, fall within one or other section of the Act. If a particular statement or document cannot be brought within the four corners of any section of the Evidence Act, it will have to be rejected. Irrelevant evidence cannot be made relevant or admissible by the consent of parties.

Where the witnesses whose depositions in a prior proceedings were tendered in evidence were alive and the application to have those witnesses summoned was cancelled with the consent of the other party after the statements made by those witnesses were admitted in evidence:

Held, that having once agreed to the statement being brought on the record and having thus allowed the other party to act to his detriment by cancelling his application to summon those witnesses, it was no longer open to the party on the ground of estoppel, to object to those documents from being referred to in the case. A. I. R. 1942 Mad. 528=1942 M.W.N. 272=(1942) 1 M. L. J. 485=202 Ind. Cas. 274.

——S. 33—Prior desposition—Evidence recorded by arbitrator—Consent—Admissibility.

When an arbitrator has examined witnesses and recorded their evidence with all due formality, it is open to the parties, by consent, to make the evidence so taken, evidence in the case, in as much as the consent in such cases relates only to the manner in which evidence shall be proved and not to the relevancy of the evidence itself. A I.R. 1934 Mad. 610=40 M.L.W. 356=67 M.L. J. 358=1934 M.W.N. 1015=151 Ind. Cas. 621.

——S. 33—Consent of pleader—One accused not a party to prior proceedings.

Evidence in previous proceedings admitted with pleader's consent—One accused no party to previous proceedings—Admission of evidence is bad 117 Ind. Cas. 241=30 Cr. L. J. 736=A.I.R. 1928 Rang. 284.

——S. 33—Consent of parties.

Evidence in a previous proceeding between the same parties can be made admissible in a subsequent proceeding by consent of parties. A.I.R. 1924 All. 845, **Foll** 104 Ind. Cas. 518=39 M.L.T. 198=A.I.R. 1927 Mad. 1107.

——S. 33—Consent of parties—Admission of prior deposition.

Evidence recorded in a previous judicial proceeding between the same parties can be made admissible in a subsequent proceeding by the consent of both parties. 43 Mad. 699, Foll. 90 Ind. Cas. 743=22 M.L.W. 230=A.I.R. 1925 Mad. 1160.

——S. 33—Consent of parties.

Conditions imposed by the section may be dispensed with by consent of parties. 24 Bom. 591 and 43 Mad. 609, Foll. 80 Ind. Cas. 874=46 All. 815=22 A.L.J. 761=5 L.R.A. Civ. 536=A.I.R. 1924 All. 845.

——S. 33—Consent of parties.

Strict requirements can be dispensed with by consent of parties. 43 Mad. 609, Foll. 78 Ind. Cas. 176=19 M.L.W. 205=1924 M.W.N. 270=34 M.L.T. 355=A.I.R. 1924 Mad. 537.

——Ss. 33 and 165—Evidence before Sub-Registrar—Admissibility by consent.

Evidence recorded in prior proceedings cannot be treated as such in subsequent judicial proceedings by consent of parties unless the case falls under S. 33. A judgment based on such evidence is void. 38 M. 160, diss. from. 41 M. 731=34 M.L.J. 526=(1918) M.W.N. 768=46 Ind. Cas. 849.

[Overruled by 43 Mad. 609=56 Ind. Cas. 957.].

——Ss. 33 and 165—Depositions of witnesses in prior suit—Admissibility by consent.

If the parties to a suit agree, the evidence given in a previous judicial proceeding between them is admissible even in a case in which the conditions prescribed by S. 33 of the Act do not exist. 38 M.L.J. 532=28 M.L.T. 23=(1920) M.W.N. 360=12 L.W. 61=43 Mad 609=56 Ind. Cas. 957 (F.B.).

——S. 33—Former deposition—Suit not between the same parties.

Evidence given in one suit can, by consent of party to another suit, be treated as evidence in that suit although the former suit was not between the same parties. (1914) M.W.N. 951=26 Ind. Cas. 384.

4. Prior depositions.

(a) Committal proceedings.
(b) De Novo trials.
(c) Ex-parte.
(d) Judicial proceedings.
(e) Jurisdiction not existing.
(f) Person not authorised by law to take evidence.
(g) Registration proceedings.

4 (a) Committal proceedings.

See also under 2 (b) Duty of court.

——S. 33—Evidence of witness recorded in committal proceedings—Admissibility in Sessions trial—Same witness partly examined in Sessions Court—Cr. P. Code, S. 288.

A witness's evidence which has been recorded in committal proceedings cannot be admitted at the sessions trial under S. 33 of the Evidence Act, if the same witness has been partly examined in the Court of Session. Such evidence can be admitted only under the provisions of S. 288, Cr. P. Code, 51 Cr. L.J. 641=A.I.R. 1950 Assam 75.

——S. 33—Depositions before magistrate of witnesses who could not be traced—Admissibility in Sessions Court.

The depositions before the magistrate of witnesses who are nomads and who could not be traced, can on that ground be taken into evidence under S. 33 of the Evidence Act at the trial in the Sessions Court. 51 Cr. L. J. 657=A.I.R. 1950 Kut. 29.

——S. 33—Applicability—Evidence of witnesses examined in committal Court admitted in sessions trial on ground of witnesses not being available—Omission to examine process server to prove that summonses could not be served—If vitiates trial. See Cr. P. Code. S. 288=1949 A.M.L.J. 49=50 Cr.L.J. 1003=3 A. I. Cr. D. 147.

——S. 33—Relation of accused, examined and personal recognizance taken for re-appearance—Witness not attending sessions trial—Admissibility of deposition in committing court.

A witness, a relation of the accused, was examined in the committing Magistrate's Court twice and on both the occasions, personal recognizance was taken from him for his appearance when called upon. He did not turn up at the Sessions trial and his deposition was admitted under S. 33, Evidence Act, as the Sub-Inspector of Police deposed that he had searched for him on several occasions but could not find him and that he had absconded:

Held, that the evidence was properly admitted as the case fell within the meaning of the words "cannot be found" or "kept out of the way by the adverse party" in S. 33 of the Evidence Act. A.I.R. 1931 Cal. 473=35 C.W.N. 143=32 Cr. L.J. 810=131 Ind. Cas. 855.

——S. 33—Witness not cross-examined—Death before trial—Admissibility of evidence of.

Dying declaration made to Sub-Inspector—Sub-Inspector examined under S. 208, Cr. P. Code but not cross-examined—Sub-Inspector dying before Sessions Trial—Deposition can be admitted in evidence. 50 C.L.J. 584=1930 Cr.C. 196=A.I.R. 1930 Cal. 228.

——S. 33—Prior depositions—Committal proceedings.

Witness examined in committal proceedings but not cross-examined immediately—Witness dying before sessions trial—His deposition in committing court can be admitted in sessions trial. 101 Ind. Cas. 661=31 C.W.N. 410=28 Cr. L.J. 485=8 A.I.Cr.R, 134=A.I.R. 1927 Cal. 398,

——S. 33—Deposition of witnesses before committing Magistrate—Use of, in sessions trial on failure of witnesses to attend.

Depositions given before the committing Magistrate cannot be used in the sessions trial under S. 33, merely because the witnesses have failed to attend. The proper course for the Judge is to issue warrants. (1905) A.W.N. 202=2 A.L.J. 599=28 A. 98.

——S. 33—Admissibility in trial—Deposition of witness not cross-examined—Dead before trial.

Held, that the deposition of a witness, who was not cross-examined before the committing Magistrate, and who died before the trial, was admissible in evidence under S. 33 of the Evidence Act, because the accused persons had the right and opportunity of cross-examining him notwithstanding the omission of their pleader to avail himself of that right. (1900) 2 Bom. L.R. 761=25 B. 168.

4 (b) De novo trial.

——S. 33— De novo trial—Re-calling of witness for de novo trial entailing considerable expenses and delay—Witness cross-examined—Admissibility of prior deposition.

A witness had been brought from Calcutta and examined once before framing of the charge and again after framing of the charge. He had been examined, cross-examined and re-examined in great detail, so that there could be no doubt that all that could be got out of this witness had been got out of him. The complainant was not a man of means, and to bring a witness from Calcutta for de novo trial, must have been a very heavy drain on his purse. Moreover, there would be delay in securing the attendance of such a witness:

Held, that the difficulty and expenses involved in calling this witness were sufficient to make such evidence admissible under S. 33. A.I.R. 1935 Rang. 484=37 Cr. L. J. 256=160 Ind. Cas. 215.

——S. 33—Trial de novo.

Criminal Trial—Evidence—Trial de novo—Witnesses not examined de novo—Depositions at the previous trial filed—Procedure is illegal—Consent of accused will not cure irregularity. 69 Ind. Cas. 636=16 M.L.W. 697=1922 M.W.N. 644=23 Cr.L. J. 748=46 Mad. 117=A.I.R. 1923 Mad. 32=43 M.L.J. 659,

4 (c) Ex-parte proceedings.

——S. 33—Ex-parte decree set aside after plaintiff's death—Evidence of plaintiff, if admissible at subsequent trial—Acceptance of part of pleadings—Admission of execution not separable from discharge pleaded.

Where an ex-parte decree is set aside and the case is re-tried, evidence given by the plaintiff at the former trial, when the defendants had no opportunity to cross-examine him even in part, is not admissible at the subsequent trial after his death under S. 33, Evidence Act.

Though it is permissible for a tribunal to accept part and reject the rest of a witness's testimony, an admission in the pleadings cannot be so dissected and if it is made subject to a condition, it must either be accepted subject to the condition or not at all. Where the plaintiff sued on a promissory note alleging that it was lost and the defendant, while admitting the execution of the note pleaded that it was discharged except for a small amount and that the payment was endorsed on the note, and the plaintiff was not able to prove the loss:

Held, that the defendant's admission of the execution of the document cannot be divorced from the plea that it had been discharged and the suit was liable to be dismissed on the ground that the loss of the note had not been proved. A.I.R. 1934 Mad. 100=39 M.L.W. 34=150 Ind. Cas. 132.

——S. 33 and 70—Prior depositions—Ex-parte decree—No opportunity for cross-examintion.

A witness was produced who stated that he was the whole surviving attesting witness and he swore that the mortgagor had executed the deed. A decree was passed ex-parte in favour of the plaintiff. Subsequently the ex-parte decree was set aside at the instance of the mortgagor's widow. When the ex-parte decree was set aside the surviving attesting witness too had died. A witness was produced to prove the attesting witness's handwriting. This he failed to prove. Both the Courts below dismissed the suit on the ground that the bond had not been proved. Held, that the deposition of the attesting witness was not admissible, as there was no opportunity for his cross-examination, and that the registration endorsement was no proof of the admission of the executant as required by S. 70 of the Evidence Act. 38 All. 1=13 A.L.J. 881=30 Ind. Cas. 576.

4 (d) Judicial proceedings.

——S. 33—Applicability—Counter-cases—Depositions in one case if can be admitted in the other.

Where two persons bring cases of mutual assault the Magistrate cannot use evidence given in one case as evidence in the other and a conviction based on such evidence cannot be upheld. A.I.R. 1940 Cal. 59 =41 Cr. L. J. 247=186 Ind. Cas. 67.

——S. 33—Applicability—Statement made in mutation court proceedings—(S. 193, U. P. Land Revenue Act, 1901.)

In order to decide whether a statement made by a person in the mutation court in proceeding to which plaintiff and defendant were parties is admissible or not, the question is not only whether the proceeding before the Revenue Court was a judicial proceeding but also whether the Collector was not a person authorised by law to take such evidence. When the Collector is directed to make a summary enquiry and then pass an order as to who is the person entitled to possession, the proceeding before him is certainly before an officer who is authorised by law to take evidence. To such a proceeding, S. 193 of the U.P. Land Revenue Act would be applicable and persons who are summoned to attend the Court have to state the truth upon the subject respecting which they are examined and are called upon to make statements. Consequently, even if the proceeding be not, strictly speaking, a judicial proceeding, the Collector is certainly a person authorised by law to take evidence, and S. 33, Evi. Act is applicable to the statement of a person made in the proceeding. A.I.R. 1936 All. 124=1935 R.D. 567=1935 A.W.R. 1422=159 Ind. Cas. 903.

——S. 33—Applicability—Proceedings before Settlement Officer, if "judicial proceedings."

Section 33, Evi. Act, makes evidence given by a witness in a "judicial proceeding" admissible in evidence in a subsequent judicial proceeding, where the question in controversy in both proceedings is identical and where the witness is dead or cannot be found or is incapable of giving evidence, etc. But where the evidence of the existence of custom is given in proceedings before the Settlement Deputy Collector in a dispute in respect of the boundary between two villages for fiscal purposes, S. 33, Evi. Act, would not make the statements admissible in proof of the custom sought to be established in subsequent proceedings, for the proceedings before the Settlement Deputy Collector cannot be considered to be "judicial proceedings". At the same time, the statements in the Deputy Collector's Report and in the order of the Settlement Officer recognizing the existence of the custom cannot be excluded altogether. They may not be admissible by themselves as evidence of the custom in controversy in subsequent proceedings but they can be looked into to assess the value of the Deputy Collector's Report and of the Settlement Officer's order which recognised the existence of the custom. The report and the order are admissible in evidnce under S. 13, Evi. Act, as recognising the custom in dispute. A.I.R. 1935 All. 187=18 R.D. 635= 1935 A.L.J. 235=57 All. 588=4 A.W.R. 1208=153 Ind. Cas. 708.

——S. 33—Judicial proceedings.

The judgment and evidence given in a civil suit filed by a party against the Pleader is admissible as evidence in an enquiry against the Pleader under the Legal Practitioners' Act but judgment and evidence are not conclusive proof in the enquiry. A.I.R. 1935 All. 1023=1935 A.W.R. 1229=37 Cr. L. J. 117=1936 A.L.J. 379=159 Ind. Cas. 561,

——S. 33 - Statement by wife in guardianship petition—If evidence at enquiry—Admissibility under S. 33.

Statement made by the wife in a guardianship pet tion filed by her as a result of an arrangement under which she was to get a portion of the husband's property on condition she admitted that the son was born of another person are not adm ssible against the son as evidence of the truth of the statements therein conta ned. A.I.R. 1934 P.C. 49=11 O.W.N. 229=39 M.L.W. 244=1934 M.W.N. 199=66 M.L.J. 288=38 C.W N. 427=1934 A.L.J. 250=36 Bom L.R. 394=59 C.L.J. 126=12 Rang. 243=3 A.W.R. 319=147 Ind. Cas. 891. (P.C.)

——S. 33—Judicial proceedings.

Statement by husband in maintenance proceeding, after dispute as to paternity arose, is not admissible under S. 33 when it was not a statement given in evidence at the maintenance enquiry. A.I.R. 1934 P.C. 49=11 O.W.N. 229=39 M.L.W. 244=1934 M.W.N. 199=66 M.L.J. 288=38 C.W.N. 427=1934 A.L.J 250=3 A.W.R. 319=36 Bom. L.R. 394=59 C.L.J. 126=12 Rang. 243=147 Ind. Cas. 891 (P.C.)

——S. 33—Admissibility of evidence in subsequent suit—'Judicial proceedings' meaning.

Examination of witness—Plaint returned for want of pecuniary jurisdiction—Death of witness:

Held, that the evidence of the witness so examined is not admissible in the subsequent trial before the sub-Judge even though the witness dies in the interval and so could not be examined afersh. No proceeding is a 'judicial proceeding' within the meaning of S. 33, Evidence Act if it is conducted by a Court which has no jurisdiction to undertake it. A.I.R. 1931 Mad. 575=33 M.L.W. 419=61 M.L.J. 120=54 Mad. 561=132 Ind. Cas. 122.

——S. 33.—Ejectment proceedings in revenue Court—Suit or possession in civil Court—Evidence in former is not admissible in latter. 106 Ind. Cas. 313=A.I.R. 1928 Lah. 43.

——S. 33.—Evidence under Fugitive Offenders Act may be admissible in proceedings under Penal Code. 112 Ind. Cas. 673=29 Cr. L.J. 1089=A.I.R. 1928 Sind 161.

——S. 33—Admissibility — Prior deposition—Witness failing to appear.

The fact that a witness did not appear when cited or that he was not examined when present is no ground to make his deposition in previous suit admissible. 93 Ind. Cas. 115=30 C.W.N. 254=A.I.R. 1926 Cal. 705.

——S. 33—Subsequent proceedings—Criminal trial—Admissibility of evidence in prior trial.

Evidence taken in trial for dacoity is not admissible in a trial under the Arms Act. 17 Cr.L.J. 512 =10 Bur. L.T. 121=36 Ind. Cas. 480.

——S. 33—Proviso 2—Proceedings under S. 476, Cr.P. Code—Evidence in—Admissibility at the trial.

As the person against whom proceedings have been instituted under S. 476 of the Cr. P. Code, has no right to cross-examine witnesses during that inquiry, the evidence of witness in that enquiry, who is not forthcoming at the trial started on the result of such inquiry, is not admissible under S. 33. 18 Bom. L.R. 284=17 Cr.L.J. 249=34 Ind. Cas. 969.

——S. 33—Deposition in prior suit — When admissible.

Depositions of deceased witness in a prior litigation are admissible under S. 33 only where not only the questions in issue are substantially the same in the two proceedings but the proceedings have been between the same parties or their representatives in interest. 34 Ind. Cas. 875 (Mad.)

4 (e) Jurisdiction, not existing.

——S. 33—Evidence taken in proceeding coram non judice — Admissibility on re-trial before competent Court.

The proceeding before a Magistrate who holds that he has no jurisdiction to try the offence with which the accused is chraged, becomes coram non judice from the very outset, or, in other words, all evidence recorded by him becomes void ab initio for the purposes of S. 33, Evidence Act, and therefore cannot be used under that section on a retrial before a competent Court. A.I.R. 1949 H.P. 15=51 Cr.L.J. 160.

——S. 33—Jurisdiction.

A proceeding before a Judge or Magistrate who has no jurisdiction is coram non judice and the evidence of witnesses given in such a proceeding cannot be used under S. 33 on a retrial before a competent Court. 97 Ind. Cas. 752=7 Lah. 396=27 Cr.L.J. 1168=27 P.L.R. 447=A.I.R. 1926 Lah. 582.

4 (f) Person not authorised by law to take evidence.

——S. 33—Evidence recorded by Magistrate not authorised—Use of—Permissibility. See Punjab Public Safety Act, S. 37. A.I.R. 1950 Lah. 34.

——S. 33—Depositions recorded by Special Judge under Ordinance II of 1942—Special Judge, if can take evidence in judicial proceedings.

Where depositions are recorded by a Special Judge under Ordinance II of 1942 in his capacity as such Judge, he is not competent to take evidence nor do the witnesses before him depose in a judicial proceeding within the meaning of S. 33, Evidence Act. A.I.R. 1945 Cal. 159=46 Cr.L.J. 692=220 Ind. Cas. 237.

4 (g) Registration proceedings.

——S. 33—Admissibility—Deposition of attestors since deceased in registration proceedings.

The depositions of deceased attestors to the registration before Sub-Registrar are admissible under S. 32 (7) taken with S. 158 and not under S. 33, 1933 M.W.N. 1148.

——S. 33—Enquiry before sub-registrar — Deposition of witnesses—Admissibility of.

The deposition of witnesses (since deceased) made at an enquiry held by a sub-registrar under S. 41, cl. (2) of the Registration Act regarding the genuineness of a Will are admissible in evidence in a subsequent suit between the same parties raising a question as to the genuineness of the Will, provided the witnesses are dead and the parties had an opportunity of cross-examining them at the enquiry before the sub-registrar. The "first proceeding" referred to in S. 33 of the Evidence Act need not be a judicial proceeding. 42 M. 103=35 M.L.J. 657=(1918) M.W.N. 913=9 L.W. 91=49 Ind. Cas. 638.

——S. 33—Deposition in Registration inquiry —If and when admissible.

Where witnesses examined and cross-examined on solemn affirmation in a Registration enquiry under S. 74 of the Registration Act, are dead, their depositions will be admissible in evidence under S. 33 of the Evidence Act in a subsequent suit. 18 C.W.N. 605=20 Ind. Cas. 661.

5. Procedure.

——S. 33—Deposition of witness in enquiry before Coroner—Death of witness prior to enquiry before Magistrate—Admissibility in High Court.

The deposition of a witness given before the Coroner enquiring into the death of a man with whose murder the accused is charged, cannot be taken in evidence under S. 33, Evidence Act, at the trial of the case in the High Court, where the witness has died prior to the enquiry before the Magistrate. A.I.R. 1933 Bom. 479=35 Bom. L.R. 1020=35 Cr.L.J. 106=146 Ind.Cas. 544.

——S. 33—Applicability—Witness at sessions trial, shy and speechless—Proper procedure.

Where evidence was given before a committing Magistrate, but in the Sessions Court the witness proves shy and speechless, S. 33 does not apply to the case and the evidence cannot ipso facto be treated as evidence at the Sessions. The proper procedure would be to give the prosecution the right to put leading questions under S. 154 and obtain the admission or denial of the truth of the evidence. 75 Ind. Cas. 152=24 Cr.L.J. 904.

——S. 33—Evidence taken before a person was added as party to suit—Objection to admissibility, if can be taken in second appeal.

A defendant was newly added during the course of a trial by direction of Court. He raised no objection to the evidence taken at a previous stage of the proceedings going on record nor desired that it should be re-heard; his interests however were fully represented by another defendant and he was fully cognisant of the steps taken by the former to prove their common case. On appeal by both of them jointly against the judgment of the trial Court and the objection as to the admissibility of the evidence against the new defendant, held, that the objection should be disallowed and that S. 33 of the Evidence Act did not apply. 31 M.L.J. 472=35 Ind. Cas. 52.

——S. 33—"Material witness, if possible should be produced before Court."

The deposition of a material witness, which was relied upon by the judge in his summing up to the jury, who resided within the jurisdiction and could be procured without unreasonable expense and delay is not to be admitted under S. 33 as justice requires that such a witness should be examined in the presence of the accused. S. 33 must be very strictly construed. 17 Bom. L.R. 590=16 Cr.L.J. 754=31 Ind. Cas. 354.

6. Revision.

——S. 33—Refusal to apply when ground for revision.

Where the prosecution has not been prejudiced by the trial Court not taking the statement of the witnesses produced by the prosecution in evidence under S. 33 of the Evi. Act, it is no ground for interference in revision. A.I.R. 1942 Oudh 130=1941 O.W.N. 120=43 Cr.L.J. 280=1941 A.W.R. 397=197 Ind. Cas. 839.

7. Scope.

——S. 33 — Proviso—Scope — Warrant case——Accused's right to cross-examine witnesses before charge.

In a warrant case before a charge is framed the accused has certainly the opportunity to cross-examine the witnesses, but at that stage, he has no right to cross-examine them within the meaning of the proviso to S. 33, Evidence Act. 4 A.I.Cr.D. 370=A.I.R. 1950 Cal. 435=86 C.L.J. 21.

——S. 33—Scope—"Expense" contemplated by.

The expense contemplated by S. 33 of the Evidence Act is the expense of obtaining the presence of the witness and not the expense that will be incurred for and during the actual examination of the witness in the box. 53 C.W.N. 569.

——S. 33—Proviso (1)—Scope of.

Section 33, Evidence Act, covers not only cases of privity of estate and succession of title, but also cases where both the following conditions exist, viz., (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding; and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical. What the first proviso aims at securing is that the evidence shall not be admitted unless the person who tested, or had the opportunity of testing, the evidence by cross-examination, either is himself, or represented the interests of the party to the later proceeding against whom the evidence is tendered, i, e., that he was (in the latter case), in effect, fighting that person's battle as well as his own. A.I.R. 1940 Nag. 382=1940 N.L.J. 437=193 Ind. Cas. 41.

——S. 33—Scope of.

The principle embodied in S. 33, Evi. Act, is that the evidence of a witness, which a party had

no right and opportunity to cross-examine, is not legally admissible.

Section 512, Criminal P. C., which empowers a Magistrate to take the depositions of certain witnesses in the absence of the accused, enacts an exception. Before an exception can be availed of, the conditions prescribed by the statute must be strictly complied with. Even under S. 33, Evi. Act, strict proof of the conditions required in that section is insisted on, especially in criminal cases: A.I.R. 1939 Mad. 190=1938 M.W.N. 582=40 Cr.L.J. 437=180 Ind. Cas. 605.

——S. 33—"Person authorised by law"—Statements of witnesses recorded by arbitrator—Admissibility under.

Quaere.—Whether an arbitrator is a person authorised by law to take evidence under S. 4, Oaths Act and whether statements of witnesses recorded by him are admissible under S. 33, Evidence Act. A.I.R. 1934 Mad. 610=40 M.L.W. 356=67 M.L.J. 358=1934 M.W.N. 1015=151 Ind. Cas. 621.

——S. 33—Scope of—Cross-examination by adverse party.

Section 33, Evidence Act, does not require a deposition to be admissible that the adverse party should have actually exercised his right to cross-examine the witness. The fact that he had opportunity to cross-examine is sufficient. A.I.R. 1934 Pat. 413=13 Pat, 735=151 Ind. Cas. 683.

——S. 33 — Proviso—Scope of—"Right and opportunity."

The true reading of S. 33 is that the party had both the right and the opportunity of cross-examining. Mere opportunity to cross-examine is not sufficient. There must also be the right to do so. 122 Ind. Cas. 8=1930 A.L.J. 122=7 O.W.N. 295=34 C.W.N. 369=32 Bom. L.R. 487=51 C.L.J. 230=57 I.A. 14=52 All. 1=A.I.R. 1930 P.C. 79=58 M.L.J. 446 (P.C.).

——S. 33—Scope.

The general provisions of S. 33 of the Evidence Act are in no way affected by S. 350 of the Cr. P. Code. 101 Ind. Cas. 483=8 Lah. 570=28 P.L.R. 199=28 Cr.L.J. 451=8 A.I.Cr.R. 83=A.I.R. 1927 Lah. 332.

——S. 33—Proviso—"Parties", meaning.

"Parties" in the proviso include parties wrongly impleaded. 82 Ind. Cas. 715=25 Cr.L.J. 1355=A.I.R. 1925 Nag. 172.

——S. 33—'Representative', who is.

A purchaser of equity of redemption is a representative in interest of the mortgagor for the purpose of S. 33. 8 Bur. L. T. 104=26 Ind. Cas. 111.

——S. 33—Proviso 1—Scope—Representative—Meaning— Deposition in previous litigation—When admissible.

Where the interests are identical and the object of the litigator is to advance a common claim, depositions in a previous proceedings are admissible in a subsequent one, even against persons not parties to the previous suit. "Representatives in interest" means persons having the same interest in the subject-matter of the suit. It includes all persons whose rights are litigated bona fide by a person virtually on behalf of a class though they themselves are not conominees on the record. 23 W. R. 42; 91 Eng. Rep. 1387 (Pyke v. Crouch) foll. 29 M.L.J. 669=24 Ind. Cas. 519.

——S. 33—Proviso (2)—Scope of.

A deposition is a partial representation of facts as to all persons, who cannot bring out truth by cross-examination. Such deposition ought not to be used against the party to his prejudice. A deposition in a suit by a Hindu widow is admissible in a suit against a Hindu reversioner. **Semble**:—The principle of English Law of Evidence, that when there are several remainders limited by one deed, a judgment for or against one of them is taken as evidence for or against the next in succession applies to the case. View of **Couch C. J.** in 23 W.R. 42 at p. 43; appr. 7 Ind. Cas. 892=12 C.L.J. 434.

8. Witness dead before cross-examination.

——S. 33—Applicability—Witness dying before cross-examination — Evidence admissible — Weight of.

Where a witness dies after examination-in-chief and before cross-examination, his evidence is admissible but the degree of weight to be attached to it depends on the circumstances of the case. Section 33 does not apply in such a case. A.I.R. 1946 Pat. 384=12 B. R. 527=224 Ind. Cas. 402=47 Cr. L. J. 614.

——S. 33—Applicability — Witness dying before cross-examination.

When a witness dies before cross-examination, a Judge is entitled to take his evidence into consideration, and he is not entitled to ignore it although he may, if he chooses, think that it is of little value. A.I.R. 1944 All. 188 (2)=1944 A.L.J. 182=1944 O.W.N. 71=I.L.R. (1944) All. 241=1944 A.W.R. 229.

——S. 33 — Death of witness before cross-examination.

Evidence of a witness, who dies before his cross-examination, is inadmissible. 5 C.W.N. 230, Foll. 107 Ind. Cas. 243=50 All. 113=25 A. L. J. 775=A.I.R. 1928 All. 140.

——S. 33.—A statement of a witness examined in a case in which only one of the the plaintiffs in the subsequent suit was a party, and in which the other plaintiffs were not parties at all, cannot be admitted in evidence against them all. 97 Ind. Cas. 853=1 Luck. 489=3 O.W.N. 645=13 O.L.J. 696=A.I.R. 1926 Oudh 578.

——S. 33—Death of witness after examination-in-chief—Admissibility of evidence.

Evidence of a witness dying after examination-in chief but before cross-examination, should not ordinarily be acted upon, though admissible. 7 M.L.T. 41=11 Cr. L. J. 145=20 M.L.J. 400=5 Ind, Cas 512.

——S. 33 — Approver — Not cross-examined —Sessions trial—Admission of deposition.

At a sessions enquiry an approver was exmined in chief but the accused were not asked to, then and there, to cross-examine him and did not in fact cross examine and he died before trial in the court of Sessions. Held, that it was doubtful whether his evidence was admissible under S. 33 and that in any case its value was small. 17 C.W.N. 230=14 Cr. L. J. 70=18 Ind. Cas. 406.

——S. 33—Incomplete evidence of witness whose cross-examination could not be finished.

Evidence taken in part of the deposition of a witness who died before his cross-examination was closed ought not ordinarily to be acted upon. (1908) 20 M.L.J. 400=5 Ind. Cas. 512=7 M.L.T. 41=11 Cr. L.J. 145.

9. Miscellaneous.

——S. 33—Statement by person not witness.

The statements by person who is not a witness in the case, are not in any way admissible, in the absence of oral evidence to support them. A.I.R. 1942 All. 242=1942 A.L. J. 246=I.L.R. (1942) All. 247=1942 A.W.R. 118=205 Ind. Cas. 261.

——S. 33—Deposition in previous litigation of doctor.

A deposition of a doctor in a previous proceeding between the parties is inadmissible in evidence in a subsequent suit. A.I.R. 1934 Pat. 55 (2)=150 Ind. Cas. 841.

——S. 33—Discretion of Court.

Application is essentially matter of discretion of Court. 33 C.W.N. 918=1929 Cr.C. 477=A.I.R. 1929 Cal. 765.

——S. 33—Thanedar's statement—Use in another case.

Copy of statement of thanedar in one case is inadmissible to prove loss of property in another case. 4 L.L.J. 418=A.I.R. 1921 Lah. 332.

——S. 33 and 132—Deposition of admission in prior trial — Admissible against deponent unless falling under S. 132.

A previous deposition is admissible against the witness on his subsequent trial, unless he has brought himself within the protection of the proviso to S. 132. 39 Cal. 164 and 45 Cal. 720, Rel. on. 112 Ind. Cas. 50=22 S.L.R. 458=29 Cr. L. J. 962=A. I. R. 1929 Sind 15.

——S. 33—Miscellaneous.

——C.P. Code, O. 41, R. 27—Statements of witness in proceedings under Lunacy Act, commenced after dismissal of suit between same parties, were admitted at appellate stage. 101 Ind. Cas. 363= 1927 M.W.N. 456=26 M.L.W. 94=31 C.W.N. 1087 =39 M.L.T. 155=A.I.R. 1927 P.C. 123 (P.C.)

——S. 33—Identity of witness.

To admit certified copy of the deposition of a witness his idendtity must be proved. 93 Ind. Cas. 115=30 C.W.N. 254=A.I.R. 1926 Cal. 705.

——S. 33—Applicability — Admission in prior deposition.

Evidence given by defendant as witness in previous suit is admissible as admission—Section 33 does not apply to such case. 14 B.L.R. (App.) 3, Foll. 64 Ind. Cas. 266=36 C.L.J. 186=A.I.R. 1921 Cal. 781,

——S. 33—Admissibility—Deposition of plaintiff in prior suit—Trial of defendant for forgery —Plaintiff dead.

The deposition of the plaintiff in a prior suit is admissible in the prosecution of the defendant for forgery if the plaintiff is dead at the time of the Criminal trial. 20 Cr.L.J. 625=52 Ind. Cas. 385 (All.).

——S. 33—Prior deposition when admissible—Objection.

Where a previous deposition of witness is sought to be proved in a subsequent suit it is necessary to prove that the person whose deposition is filed in court was the person examined in the previous suit. The objection to the admissibility of that evidence without proof may be made even if it was allowed to go in without objection. 13 C.W.N. 409=1 Ind. Cas. 320.

[But see 43 Mad. 609=38 M.L.J. 532=56 Ind. Cas. 957 (F.B.)]

——S. 34. Synopsis.

Entries in Account Books.

1. Absence of
2. Account stated
3. Admissibility
4. Book
5. Corroboration
6. Evidentiary value
7. Proof
8. "Regularly kept"
9. Reliability.

1. Absence of.

——S. 34—Absence of entry in account books.

Evidence that there is no entry in the account books is not admissible under S. 34. 74 Ind. Cas. 383=36 C.L.J. 389=A.I.R. 1923 Cal. 261.

—Ss. 34, 9 and 11—Absence of entry in account book—Relevancy of.

The absence of an entry in a book of accounts is a relevant fact under Ss. 9 and 11 of the Act, and not under S. 34 to prove the alleged payment, but the weight to be given to such absence depends upon the circumstances of each cases. 19 C.W.N. 611=28 Ind. Cas. 705.

——S. 34—Account books—Absence of entries in.

Though entries in account books are relevant in evidence yet the absence of an entry ought not to be taken to draw any kind of inference. Though there is a covenant in a bond that payments not endorsed on the back of it ought not to be recognised yet such payments may be proved. 3 Ind. Cas. 291 (Cal.).

2. Account stated.

——S. 34—Account books—'Account stated'.

Before a document can be used as an account stated, it must be shown that there were items on both sides of the account. A.I.R. 1938 Nag. 180= I.L.R. (1940) Nag. 441=174 Ind. Cas. 374.

3. Admissibility.

——S. 34—Account books not regularly kept—Entries in—Admissibility.

Entries in account books which are not regularly kept are not relevant under S. 34 of the Evidence Act. I.L.R. (1949) Nag. 307=A.I,R, 1949 Nag. 414 =1949 N.L.J. 398.

——S. 34—Accounts regularly kept in course of business—Admissibility.

Where there is sufficient evidence on the record to prove that certain books of account were regularly kept in the course of business, the entries made therein are relevant under S. 34 of the Evidence Act. A.I.R. 1941 Oudh 230=1941 O.W.N. 214=1941 A.W.R. 58=16 Luck. 302=192 Ind. Cas. 643.

——S. 34—Jama wasil baki papers— Admissibility—Value of.

The land-lord produced a jama wasil baki paper prepared in 1850 in order to rebut the presumption under S. 50 (2), Ben. Ten. Act, claimed by the tenant. The increased rates stated therein were admitted by the tenant to be correct and the bona fides of the paper was not challenged:

Held, that the jama wasil baki paper was admissible in evidence without corrboration. A.I.R. 1940 Cal. 524=44 C.W.N. 993=I.L.R. (1940) 2 Cal. 559=192 Ind. Cas. 685.

——S. 34—Account books—Entries in—Admissibility.

In a suit for rent, the entries in the account books filed by the plaintiff can be used against the defendant and are admissible under S. 34, Evidence Act though, of course, they cannot by themselves make the defendants liable. The Court is not justified in not accepting the plaintiff's accounts on the ground that the counterfoils of receipts given to the defendants for rent were not produced by the plaintiff. A.I.R. 1940 Oudh 385=1940 O. W. N. 555=1940 R. D. 294=1940 A.W.R. 289=16 Luck. 36=189 Ind. Cas. 52.

——S, 34—Zamindari papers—Books of account —Admissible.

Admissions in zamindari papers of proprietor which are books of accounts regularly kept in course of business are admissible under S. 34, Evidence Act. A.I.R. 1940 Pat. 622=19 Pat. 398=7 B.R. 170=191 Ind. Cas. 296.

——S. 34—Accounts—Admissibility.

Account not regularly kept but genuine and not fabricated, is admissible to corroborate the oral evidence. 1936 O.W.N. 582=1936 R.D. 275.

——S.34—Admissibility—Extract from accounts consisting of nakal bahi.

An extract from accounts consisting of four pages, of which the first two contain entries of the nakal bahi of the plaintiff which merely show to whom goods were delivered, and in which the entries are not totalled or balanced and there is no reckoning and no accounting is not admissible in evidence, not being entries in the account-books. It can only be used to refresh the memory of the person who made the entries. ('34) 150 Ind. Cas. 748 (2)=16 N.L.J. 282.

——S. 34—Admissibility—Requisite.

It is only the account books that are properly kept that are admissible in evidence as relevant. 116 Ind. Cas. 285=51 All. 519=1929 A. L.J. 115= A.I.R. 1929 All. 170.

——S. 34—Account book—Entries—Copy of unstamped receipt—Admissibility of.

Where, in an account book kept in the regular course of the business copies of all receipts given by plaintiffs are entered, in the usual course, and one of such entries was that of an unstamped receipt, held, that nevertheless the entry was admissible under S. 34 of the Act. 68 Ind. Cas. 494= A.I.R. 1923 Nag. 32.

——S. 34—Copy of account book—Admissibility of.

An account book, though a copy of another account book, will be admissible in evidence if it is itself copied and kept in the ordinary course of business. 27 C. 118; 4 B. 576, Foll. 42 Ind. Cas. 117 (L.B).

——S. 34—Entries in account books—Admissibility—Objection to.

Where entries in certain books of account are proved to be in the handwriting of a person since deceased any objection to their admissibility on the ground that they were not proved to have been kept in the regular course of business, ought to be taken at the time of the trial. 17 Cr. L.J. 73=32 Ind. Cas. 665 (Mad.)

——S. 34—Books of account—Entry in—Admissibility—Conditions of.

An entry to be admissible under S. 34 of the Evidence Act must be in a book of account regularly kept in the course of business which if not admitted must be formally proved. A collection of sheets of paper bound together with the intention that it should be permanent is a "book" but a book containing entries of items of which no account is made at any time is not a book of account. For purposes of admissibility Cash Books, Ledgers, and day-books are equal though they may differ in the weight to be given to each. 10 N.L.R. 44=23 Ind. Cas. 893.

——S. 34—Account books not written from day to day—Admissibility.

Where accounts are originally written in wrong slips of paper and after an interval are entered in regular books, the latter cannot be rejected in evidence on the mere ground that the entries in them were not made regularly from to day. 11 Ind. Cas. 95 (Oudh).

——S. 34—Account book—Admissibility.

A single account book not otherwise suspicious is admissible particularly when it is supported by reliable witnesses. 51 P.W.R. 1909=4 Ind. Cas. 495.

——S. 34—Admissibility—Original Accounts— 'Copies'.

A person used to enter all his receipts and all the advances he made to his amlahs first in a khata book. The amlahs used to submit funds embodying the expenses incurred by them, and these used to be regularly checked by him, he used to prepare his monthly and other accounts from the khata books and the funds. Held, that these accounts, having been kept regularly in the course of business, were admissible under S. 34 of the Evidence Act, even though the khata book itself was not produced. (1905) 9 C.W.N. 421=32 C. 582.

4. Book.

——S. 34—Accounts—'Book'—What is.

A collective unity of sheets even at the time that the entries came to be made is implied in the conception of a "book". It connotes an intention that it should serve as a permanent record. It is not necessary that it should consist of particular number of sheets or that it should be bound in a particular way. A.I.R. 1936 Mad. 871=44 L.W. 467=1936 M.W.N. 1274=170 Ind. Cas. 749. See also 10 N.L.R. 44.

5. Corroboration.

——S. 34—Corroborative evidence—Sufficiency.

Where, in a suit on a balance of account, the plaintiffs produced their bahis which supported their case and their munib gave evidence to the following effect: "The firm of the defendant used to send goods to the firm of the plaintiffs and also used to purchase goods through the plaintiffs' firm. Whatever goods were purchased or sold, used to be entered in the bahi khata. In this way, the sum of Rs. 1120 is entered in the bahi khata and the claim is for that sum." The witness was not cross-examined as to whether he had personal knowledge of the transactions:

Held, that the evidence was sufficient to corroborate the accounts and the suit could be decreed. A.I.R. 1932 All. 60=1931 A.L.J. 946=133 Ind. Cas. 900.

——S. 34—Corroboration—Necessity of.

Under S. 34 of the Evidence Act, relevant entries in account books unless corroborated are not sufficient to fasten liability on a person. 1930 A.L.J. 987=A.I.R. 1930 All. 710.

——S. 34—Corroboration—Statement in books of account may be corroborated by any evidence.

Section 34 does not limit in any way at all the nature of the material upon which a Court may rely to support the statements in a book of account. Such material may take the shape of contemporary vouchers, receipts or other documentary evidence or of sworn oral testimony. 88 Ind. Cas. 383= 6 L. R. A. Civ. 375=A.I.R. 1925 All. 742.

——S. 34—Corroboration of entries—Evidence of plaintiff.

Plaintiff's own statement on oath in support of entries can be sufficient to support the entries in plaintiff's account books to fix the defendant with liability. 84 Ind. Cas. 909=6 L. L. J. 504= A. I. R. 1925 Lah. 242.

——S. 34—Entries in books of account—Corroboration.

S. 34 of the Evidence Act only lays down that a plaintiff cannot obtain a decree by merely proving the existence of certain entries in his book of accounts even though these books are shown to be kept in the regular course of business. He will have to show further by some independent evidence that the entries represent real and honest transactions and that the moneys were paid in accordance with those entries. No particular forms or kind of evidence in addition to the entries is required. Any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished in the books of accounts, if true. 52 Ind. Cas. 704 (Mad.).

——S. 34—Bahi accounts—Corroboration.

Entries in plaintiff's account book regular in form corroborated by plaintiff's own statement on solemn affirmation, should be held as proved when items are admitted and there is no reason to think that a few fictitious items have been inserted in an otherwise true account. 80 P. R. 1910=147 P.L.R. 1910=117 P.W.R. 1910=7 Ind. Cas. 1011.

6. Evidentiary value.

——S. 34—Account books — Entries in—Evidentiary value.

No doubt entries in the account books maintained by a creditor are not by themselves evidence to attach a liability to the debtor but they can be used to corroborate the evidence given by the creditor that the payments had been made and a decree can be passed on the basis of such corroborated evidence. A. I. R. 1946 All. 127= 1945 A.L.J. 283=I.L.R. (1945) All. 465.

——S. 34—Account books—Entries in—Value.

Under S. 34, Evidence Act, bahi entries are evidence, but mere entries in a book account are in sufficient to charge a person. It is necessary that there should be corroborative evidence to prove the payment of specific sums. A.I.R. 1939 Lah. 455=41 P.L.R. 457=185 Ind. Cas. 858.

——S. 34—Account books — Entries — Value only corroborative.

Entries in account books do not prove themselves. They are at most, when proved, corroborative evidence and unless there is proof that the entries represent real transactions, they will not suffice to charge any person with liability thereunder. 1936 M.W.N. 472.

——S. 34—Day-book — Entries in—Not made then and there—Value of.

The very object of accounts being kept, especially of day-books, is the value that is to be attached to the entries made as each event happened. It is on the likelihood of such entries being made that the value of accounts depends. But if an argument is advanced that though a drawing is made from the partnership account, it is not debited in the day-book at the time when it is drawn but only a lump sum is debited several months afterwards, it is not a proper day-book; it ceases to be such an account book to which Courts are accustomed to attach value. A.I.R. 1935 Mad. 165=1934 M.W.N. 1325=67 M L.J. 880=155 Ind. Cas. 783.

——S. 34—Account books—Entries—Value.

Where in a suit for price of goods taken by defendant from plaintiff's shop, the defendant denies all liability, the plaintiff's books of account do not afford a conclusive proof of the liability. The plaintiff cannot get a decree on his books of account only, unsupported by other evidence. ('35) 157 Ind. Cas. 52.

——Ss. 34, 90—Entries in account books—Evidentiary value.

Under S. 34, entries in old account-books by themselves are not enough to charge a person with liability. A.I.R. 1932 All. 500=1932 A.L.J. 493=142 Ind. Cas. 889.

——S. 34—Accounts — Entries in—Evidentiary value.

An entry in an account book is an admission by the maker thereof in his own favour and it is accepted as evidence only if it strictly complies with the requirements of being kept regularly and

in the ordinary course of business. A.I.R. 1932 Lah. 417=33 P.L.R. 168=137 Ind. Cas. 44.

——S. 34—Accounts—Evidentiary value of.

Where defendant agreed with plaintiff: "You will receive a sum equivalent to 5 per cent, of the net profits (as shown in the books) of the Bombay branch of the Bombay Company Limited as accruing from the sales of all goods for which you were salesman, whether on purchase or joint account,"

Held, a plaintiff, who accepts the defendants' books as deciding his rights to some extent, accepts them to that extent (unless he guards himself by apt words) as statements of the right mode of distributing the results of the recorded transactions, and not as a mere repository of figures like a calendar or price list. On the terms of this agreement the books cannot be divorced from the system of book-keeping of which they are the expression. The thing on which the percentage is to be reckoned is the profit of the branch as shown, and in showing a profit the mode of getting at it is as relevant as the final figure. The profit is the profit of the Bombay branch, not of some selected department of that branch, and it is the company's profit. Profits "shown" can only mean profits, which from time to time are or in the ordinary course of business will be shown. 104 Ind. Cas. 139=46 C.L.J. 214=1927 M.W.N. 600=29 Bom. L.R. 1367=32 C.W. N. 145=39 M.L.T. 294=A.I.R. 1927 P. C. 210=53 M.L.J. 278 (P.C.).

——S. 34—Evidentiary value of entries in account books.

Relevant entries in account books unless corroborated are not sufficient to fasten liability upon a person. 1930 A.L J. 987=A.I.R. 1930 All. 710.

——S. 34—Irregular accounts—Value of.

Accounts prepared at considerable intervals from memory or possibly inadequate materials cannot be treated as proof of the actual income and expenditure of the estate to which they relate although they may be useful in cases where they corroborate other evidence. 109 Ind. Cas. 153=51 Mad. 291=28 M.L.W. 158= A.I.R. 1928 Mad. 180=54 M.L.J. 703.

——S. 34—Accounts—Jama wasil baki papers—Entries in—Value of.

Jama wasil baki papers, in the absence of proof that the writer or the maker of the entries therein at the date of the trial was dead or could not be procured without unreasonable expense or was otherwise such a person as is contemplated by S. 32, merely amount to evidence under S. 34 which in the presence of other substantive evidence may be used as corroborative but which cannot be regarded as proving any fact by itself. 104 Ind. Cas. 733=46 C.L.J. 253=A.I.R. 1927 Cal. 855.

——S. 34—Account books—Evidentiary value.

Where the plaintiff's account books are the only evidence of the defendant's liability to pay any of the particular sums entered against them the evidence is not conclusive under S. 34, and plaintiff's suit must fail. 76 Ind. Cas. 157=A.I.R. 1924 Lah. 540.

——S. 34—Account book—Evidentiary value.

Mere production of books of accounts without proof is not sufficient to charge a defendant with liability although it may have been shown that they had been regularly kept in the course of business. 15 C. L. J. 621 and 47 P.L.R. 1914, **Foll.** 71 Ind. Cas. 259=A.I.R. 1922 Lah. 338.

——S. 34—Books of account—Entries in—Value of.

Books of account are important pieces of evidence and if an entry therein is proved to have been made in the ordinary course of business it is material corroboration of the statement of witnesses. 49 Ind. Cas. 756 (Cal).

——S. 34 — Account book entry in value of—Presumption—Proof.

It is not the necessary or ordinary effect of a credit entry in an account book in favour of a person that the sum so entered thereby is transferred to him; all that it implies is that he is entitled to the amount from the person in whose account the entry occurs. How the former became so entitled has to be proved **aliunde,** the ordinary presumption being that such amount had been paid in by the person to whom it is credited. 42 Ind. Cas. 684 (Mad.).

——S. 34—Accounts — Lekha Bahi—Entries in—Evidentiary value of.

In the absence of corroborative evidence, entries of oral loans appearing in a **Lekha bahi** are not entitled to weight. The account itself is not one kept in the ordinary course of business from day to day. 2 O.L.J. 1=27 Ind. Cas. 581.

——S. 34—Entry in account books—Value of.

A mere entry in an account book without something more is insufficient to charge a person with liability. 82 P.R. 1914=277 P.L.R. 1914=25 Ind. Cas. 560.

——S. 34 — Account books — Corroborative evidence.

Account books regularly kept can be used as corroborative evidence under the Indian Evidence Act. (1902) 4 Bom. L.R. 378=6 C.W.N. 401=29 C. 334= 29 I.A. 43 (P.C.)

7. Proof.

——S. 34—Partnership account books—Proof, if necessary—Suit between partners.

The partnership account books being accessible to all the partners, are **prima facie** evidence against each of them. Hence in a suit by some of the partners against the others, it is not open to the defendants to ask that the partnership account books relied on by the plaintiffs be formally proved or to contend that they were not **prima facie** evidence against them. A. I. R. 1944 Lah. 58=45 P.L.R. 441=212 Ind. Cas. 416.

——S. 34—Accounts—Proof of entries.

Where the **munibs** who wrote the account books are not produced, the accounts cannot be held to be properly proved and admissible. A.I.R. 1942 Oudh 155=1941 O. W. N. 1195=1941 A. W. R. 1010=17 Luck. 327=197 Ind. Cas. 247.

——S. 34—Proof—'Munim' as witness proving entries.

Legislature does not require any particular form of evidence in addition to entries in books of account and any relevant fact which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroborative evidence furnished by the entries in books of account, if true.

Where, in a suit, the plaintiff produces account books in support of his claim and the **'munim'** of the plaintiff is produced as a witness to corroborate the entries in the book and such witness proves the entries and the defendant does not consider it necessary to pursue the matter further and cross-examine this witness with respect to his personal knowledge of the facts he was stating, the evidence given by such witness should be interpreted in the manner most favourable to the plaintiff and should be accepted as sufficient corroboration of the entries in the plaintiffs' account books which, by themselves, would not have been sufficient to charge the defendants with liability. A.I.R. 1938 All. 353= 1938 A.L.J. 449=1938 A.W.R. 294=176 Ind. Cas. 99.

——S. 34—Proof—Evidence sufficient to corroborate entries.

What would amount to independant evidence sufficient to corroborate the entries in the account books depends upon the facts of each case and particularly on the issue between the parties. It is necessary to be seen whether besides the entries in the account books, there is any evidence to prove that the transactions referred to in those entries actually took place. Where the transactions sued upon are numerous and extend over some length of time, the genuineness of the account books, if they are regularly kept in the course of business, will be the determining factor. But mere proof of the correctness of the entries will not be enough. There must be some evidence to corroborate those entries. Such corroboration will be best afforded by the evidence of the person who wrote the account books and in whose presence the transactions took place. He cannot possibly have independent recollection of the various transactions and he may, as provided in S. 159, Evidence Act, refresh his memory by referring to the account books. But it is not necessary for him to prove that "such and such articles valued at such and such amount were supplied on such and such dates." If he proves the entries written by him and states that the transactions referred to in those entries actually took place in his presence or to his knowledge, the effect will substantially be the same. Where, however, the dispute between the parties is confined to some particular items only, specific evidence may be available and should be insisted upon to prove those particular transactions. A.I.R. 1941 Pat. 430=20 Pat. 273=22 P.L.T. 383=7 B.R. 991=196 Ind. Cas. 57.

——S. 34—Accounts books—Proof required to fasten liability.

Under S. 34, Evidence Act, the production of account-books alone is not enough to make a person liable. But it is a question of fact as to how much evidence is required to create the liability when taken together with the books of account. Every case shall have to be decided on its own merits and no ruling can help in doing so. In a case where the witness, who produces the account-books, is reliable and has personal knowledge, the Courts may accept his statement as enough proof combined with the books of account. In cases, however, in which the witness is not reliable at all, the Court would require more proof. A.I.R. 1937 Pesh. 103=172 Ind. Cas. 598.

——S. 34—Accounts—Proof of—Persons writing accounts alive but not examined.

Where certain account-books are filed in Court, but the persons who wrote out the accounts are not examined although they are alive, the books cannot be said to have been duly proved and it is proper to rule them as inadmissible even if they appear to be genuine and have been made use of by the parties. A.I.R. 1935 Oudh 16=11 O.W.N. 1323=152 Ind. Cas. 468.

——S. 34—Account books—Entries in—Necessity for proof of.

In order to obtain a decree on the basis of entries in books of account, it is not sufficient merely to prove that the books are correct and have been regularly kept in the course of the business but the entries must also be proved unless they are admitted by the opposite party and although such entries are relevant under S. 34, they are never alone sufficient to charge any person with liability. A.I.R. 1933 Lah. 384=34 P.L.R. 46=141 Ind. Cas. 655.

——S. 34—Account books—Entries—Mode of proof.

The mere filing of accounts and exhibiting them does not prove the various items in them without some more evidence. But where the plaintiff swears to the truth of the transaction, the items may be held to be proved. A.I.R. 1933 Mad. 756=38 M.L.W. 481=65 M. L. J. 458=57 Mad. 398=1933 M. W. N. 1095=146 Ind. Cas. 608.

——S. 34—Proof—Necessity of formal proof that books are kept in course of business has been dispensed with—Value of entries.

Under the old Evidence Act II of 1855, books to be admissible had to be proved to have been regularly kept in course of business. In the later Act I of 1872 the words "proved to have been" have dropped. This amounts to material alteration in the law. The legislature has dispensed with the necessity of any formal proof that the books were kept up in the regular course of business. It is a matter of intrinsic evidence as to whether the books in question were books of account and regularly kept in the regular course of business. The only limitation imposed by the statute is that the statement contained in the account books "shall not alone be sufficient to charge any one with liability." The value of the entries is corroborative and cannot be used as independant evidence to charge any person with liability. 121 Ind. Cas. 819=1930 Cr. C. 54=51 All. 864=31 Cr. L. J. 356=A. I. R. 1930 All. 38.

——S. 34—Proof of dealings.

Where there were only the account books and the general statement of the plaintiff that there were dealings between him and defendant,

Held, that the dealings were not proved under S. 34, Evidence Act, in absence of evidence of specific sums having been paid. A.I.R. 1924 Lah. 540; A.I.R. 1922 Lah. 338; A.I.R. 1923 Lah. 431 and 82 P. R. 1914, **Foll.** 100 Ind. Cas. 862=A.I.R. 1927 Lah. 903.

——S. 34—Proof—Party producing accounts should prove reliability of each item.

It is for the party who puts forward the accounts to explain them and support them in such a way as to convince the Judge there is such a probability of their accuracy as to make it reasonable for a prudent man to accept them. 26 Bom. 363, **Foll.**

A mere account book without more does not prove anything. 52 Ind. Cas. 704, **Foll.**

The law requires proof not only of accunnt books generally but of each item, that is, in the interest of the person producing the books but with regard to admissions, **i. e.**, entries against the producer's own pecuniary interest, the law dispenses with all proof save that the book has been kept by or under the authority of the producer. 96 Ind. Cas. 429=23 M.L.W. 272=A.I R. 1926 Mad. 955.

——S. 34—Entries in account books must be proved by independent evidence.

Mere entries in books of account are not by themselves sufficient to charge any person with liability. The reason is that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the baek of third parties. There must be independent evidence of the transaction to which the entries relate. 89 Ind. Cas. 371=A. I. R. 1925 Nag. 445.

——S. 34—Bahis—Entries—Proof of—Evidence of past transaction.

In a suit for the recovery of Rs. 53-12 on the allegations that the defendants had irrigated their fields from the plaintiff's well and were liable to pay at the rate of Rs. 4 per **bigha** according to an agreement arrived at between the parties,

Held, that the **bahi** entries in plaintiffs' **bahi** showing that the defendants had been paying the

water-rate in previous years at the rate demanded by the plaintiffs taken along with the oral evidence produced sufficiently prove the plaintiff's claim. A. I. R. 1923 Lah. 595.

——S. 34—Entry in book of account—Evidence necessary for proof—Nature of.

As far as possible it is necessary that independent and trustworthy evidence should be let in, in support of entries in books of accounts. A mere statement of the plaintiff is not sufficient for the purpose. 47 P.L.R. 1914=53 P.W.R. 1914=22 Ind. Cas. 403.

——S. 34—Entries in books of account—Value of—How to be proved.

Where reliance is placed upon books of account it has to be proved that they were regularly kept in the course of business and the entries themselves have to be proved and mere asstertions that this or that page was written by a particular writer will not suffice. 15 C.L. J. 621=13 Ind. Cas. 678.

8. "Regularly kept".

——S. 34—"Regularly kept"—Day-book entered after four months—No rough notes—Ledger from such day book.

A day-book, which has been entered after four months from the happening of an event and the rough notes of which are not available, is not a document which can be said to have been kept in the regular course of business. These remarks apply a **fortiori** to the ledger which is prepared from such a day-book. A.I.R. 1935 Pesh. 44=155 Ind. Cas. 1006.

——S. 34—'Regularly kept', meaning.

The words "regularly kept" in S. 34, are not synonymous with "correctly kept." The words only mean that accounts should be kept in accordance with a certain fixed method or in some customary form. Therefore, the fact that there are incorrect entries and mistakes in an account book will not make it irrelevant, though it may affect its evidentiary value. A.I.R. 1932 Oudh 225=9 O.W.N. 532=138 Ind. Cas. 716.

——S. 34—'Regularly kept.'

A book of account may be said to be regularly kept, although the book is not entered up from day to day or from hour to hour as the transactions take place. 101 Ind. Cas. 289=5 Pat. 777=8 P.L.T. 510=A.I.R. 1927 Pat. 61.

——S. 34—Account book, if "regularly kept"—Admissibility—Value of.

The fact that the entries in an account book are not in chronological order, and that the roznama was written up once a week from memoranda on loose papers, which were destroyed, and that the khataoni was written up once a month, affect the weight of the evidence but not its admissibility.

According to S. 34, regularly or systematically means that the accounts are kept according to a set of rules or a system, whether the accountant has followed the rules or system closely or not. Nor is there anything in the section that says the system must be an elaborate or reliable one. Both those matters, the decree of excellence of the system, and the closeness with which it has been followed, affect the weight of the evidence of an entry, not its admissibility. The roughest memoranda of accounts kept generally according to the most elementary system, though often departing from it, are admissible in evidence, but would of course have no weight. 95 Ind. Cas. 128=A.I.R. 1926 Nag. 407.

——S. 34—"Regularly kept" accounts.

Where the entries are made from day to day but the totalling does not take place every day, this would not make the book any the less an account-book within the meaning of S. 34. 59 Ind. Cas. 121=A.I.R. 1921 Nag. 133.

——S 34—Books "regularly kept in the course of business"—Meaning of.

In order that books may be regularly kept in the course of business they must be kept in accordance with a uniform practice in the current routine of business of the person to whom they belong. The particular method of keeping the books may affect their value as evidence. 6 S.L.R. 195=14 Cr.L.J. 262=19 Ind. Cas. 534.

——S. 34—"Regularly kept" account books—Proof of entries in.

It is essential to establish that accounts have been kept in the regular course of business before they can be acted on. They need not be written up from moment to moment or day to day. 27 C. 118 P.C. Rel. The question goes to the weight due to the evidence. The clerk who has kept the accounts or some person competent to speak to their genuineness must prove that the books have been regularly kept and they are generally accurate. The particular entries upon which the party relies should also be selected and proved. 13 C.L. J. 139=8 Ind. Cas. 81.

——S. 34—Account—'Regularly kept'—Admissibility.

An account to be regularly kept within the meaning of S. 34 of the Evidence Act need not have been written from day to day as the transactions took place, and the time of making the entries, though it may affect the credibility of the accounts, cannot affect its admissibility. (1901) 3 Bom. L.R. 213=25 B. 616.

9. Reliability.

——S. 34—Accounts—Reliability—'Bahis'.

Persumption of correctness does not attach to the entries in the **bahis**. A. I. R. 1939 Lah. 438=41 P.L.R. 373.

——S. 34—Rokar bahi—Blanks in—Not reliable.

If a number of blank spaces have been left in the **rokar bahi** in different places, the conclusion that the **rokar bahi** is unreliable would be fully justified. A.I.R. 1939 Lah. 412=41 P.L.R. 295=184 Ind. Cas. 858.

——S. 34—Reliability of accounts—Strictures by court—Propriety.

It is hardly proper to stigmatise the books of a respectable firm as books which it is not difficult to fabricate without coming to a specific finding that the books produced were, as a matter of fact, fabricated and without giving reasons therefor. A.I.R. 1933 Pat. 145=14 P.L.T. 61=142 Ind. Cas. 463.

——S. 34—Account books — Reliability — Bogus entries.

Account books are sufficiently discredited if a certain number of entries therein are proved to be bogus by independent evidence which precludes the possibility of error or accident. 107 Ind. Cas. 113=24 N.L.R. 40=30 Bom. L.R. 296=47 C.L. J. 222=5 O.W.N. 226=27 M.L.W. 523=A.I.R. 1928 P. C. 39=54 M.L.J. 208 (P.C.).

——S. 34—Admissibility of entries in the face of admission of liabilities by defendant — Not material.

The admissibility or otherwise of the entries does not avail when the defendant admits the debt contracted, to which the entry refers. 158 P.W.R. 1915=31 Ind. Cas. 800.

——Ss. 34 and 114—Reliability—Books of account—Tampered with.

When it is found that the account books have been tampered with deliberately, the very strongest presumption of fabrication arises against the owners of the books. 77 P.L.R. 1914=49 P.W.R. 1914=22 Ind. Cas. 560.

——S. 35. Synopsis.

1. Birth and death registers.
2. Civil Court records.
3. Guardianship certificate.
4. Judgments.
5. Municipal records.
6. Official records.
7. Police records.
8. Public records.
9. Records of custom.
10. Report of officers.
11. Revenue records.
12. School certificate and registers.
13. Scope.
14. Miscellaneous.

1. Birth and death registers.

——S. 35—Admissibility under—Entries in the register of births maintained at the thana—Proof as to who wrote them and what his information was—Necessity.

Entries in the register of births maintained at the thana under para. 322, U.P. Police Regulations, 1942 Edition, are admissible in evidence under S. 35 of the Evidence Act, as such a register is a public document and the entries are made by an employee of the Police Department. It cannot be said that they are not admissible unless it is proved as to who wrote those entries and what his source of information was. 229 Ind. Cas. 546=1947 O.W.N. (H.C.) 32=1947 A. L. W. 75=1947 A. Cr C. 28=1947 A. W. R. (H. C.) 68=1947 A. L. J. 76=48 Cr. L. J. 449=A. I. R. 1947 A. 429.

——S. 35—Admissibility under—Entry as to birth in the register maintained at the Thana—Extract—Admissibility—Value.

In proof of the age of a person, a certified copy of an extract of an entry in the birth register maintained in the **Thana** was produced. On a question as to its admissibility and evidentiary value **held**, that it was admissible under S. 35 of the Evidence Act, being a certified copy of a public document and that though it could not be trusted for the exact date of birth, it was accurate within a few days and was valuable evidence of age. 1947 A.W.R. (C. C.) 56=230 Ind. Cas. 144=1947 O. W. N. 180=48 Cr. L. J. 542=1947 A. Cr. C. 109=1947 O.A. (C.C.) 56=A.I.R. 1948 Oudh 1.

——S. 35—Birth certificate—Age—Mode of proof.

The birth certificate does not prove itself and is no proof of age of any particular person unless the person connected with that entry by making the entry or giving information comes forward and speaks to the entry and connects the entry with the individual concerned. I.L.R. (1949) Cut. 194=A. I. R. 1949 Orissa 22=50 Cr.L.J. 650.

——S. 35—1. Birth and death registers—Age—Medical evidence and municipal register of births.

The medical evidence as to age cannot stand against the evidence of municipal register of births properly kept and property authenticated. A. I. R. 1946 Sind 132=47 Cr. L.J. 971=226 Ind. Cas. 511.

——S. 35—Chaukidar's birth and death register—Entry in—Admissibility—Essentials for.

Under S. 35, it is not enough to prove that the **chaukidar's** register (birth and death) is an official book, but it is also necessary to prove that the entry relied on was either made by a public servant in the discharge of his official duty or made by some other person in performance of a duty specially enjoined by the law of the country. Therefore, for the application of S. 35, one must know who has made the entry and in what circumstances. If the **chaukidar** or some other person makes the entry in the discharge of his official duty, then one of the essential conditions mentioned in S. 35 is fulfilled. If, however, the entry is not made by a public servant in the discharge of his official duty, then the necessity to show that there was any enactment especially enjoining the performance of the duty arises.

Where there was no reliable evidence as to who made an entry (as to the death of a certain person) in the **hathchittas** kept by a **chaukidar** and in what circumstances they were made :

Held, that the conditions laid down in S. 33 were not fulfilled and consequently the entry was not admissible. A.I.R. 1945 Pat. 489=26 P.L.T. 225=11 Cut. L.T. 40.

——S. 35—Birth register—Entry in, value of, in case of proof of child's legitimacy—Mother's name appearing in register but not father's.

The entry in the birth register may be relevant under S. 35, Evidence Act, to show the date of the birth ; but how far would the fact that the name of the mother was given and not that of the father, by the informant, bear on the question of the child's legitimacy depends, even if assumed to be relevant, largely on the means that the informant may be shown to have possessed of the knowledge in connection with the child's birth. If the informant happens to be a stranger, who did not know the father, the statement may be even if relevant, wholly unimportant. The entry becomes of no value when the informant is not examined and no explanation has been given for the omission to do so. A.I.R. 1942 Mad. 129=54 L W. 411=201 Ind. Cas. 39.

——Ss. 35, 79—Entry in death register—Presumption—Admissibility—Copy of entry.

The death register is maintained by the Municipal Board under the Municipalities Act, and a form is prescribed by the Municipal Manual which is adopted with certain modification by different Municipalities in the United Provinces. The registers are kept under S. 298 (2), cl. J (b), U. P. Municipalities Act, and are admissible in evidence under S. 35, Evidence Act. The correctness of the copies has to be presumed under S. 79 Evidence Act, and there is further, a specific provision (S. 330) under the Municipalities Act, which lays down the mode of proof of Municipal records. The copy is admissible in evidence not merely to prove the death of a person but also other relevant matters appearing on the record. A.I.R. 1938 All. 242=1938 A. L. J. 235=1938 A.W.R. 168=175 Ind. Cas. 263.

——S. 35—Entries are not positive proof unless identity is proved.

Entries of the names of persons in a register of births or deaths or marriages cannot be positive evidence of the birth, death or marriage of such person unless their identity is fully proved. A. I. R. 1938 Cal. 120=177 Ind. Cas. 517.

——S. 35—Kotwar book containing births and deaths.

The **Kotwar** book containing the register of birth and deaths is an official book which the **Mukaddam** has to maintain in accordance with the law, as laid down in S. 35 of the Evidence Act. The C. P. Land Revenue Act imposes certain duties on **Mukaddam** and **Kotwars**, and one of them is to report the cases of births and deaths of the villages in their charge. The Central Provinces Police Manual, S. 10, para. 418, also requires a report book to be maintained by village watchmen in connection with the reports of births and deaths they have to make to the Police. A. I. R. 1937 Nag. 264=20 N.L.J. 139=I.L.R. (1937) Nag. 382=172 Ind. Cas. 287.

——Ss. 35, 79—Entries in Municipal Register of Births and Deaths—Admissibility—Copies of entries—Presumption—Defects—U. P. Municipalities Act (II of 1916), S. 298 (2), cl. J. (b).

Under S. 35, Evidence Act, a Municipal Register of Births and Deaths kept under S. 298 (2), cl. J (b), U. P. Municipalities Act, is admissible in evidence as it is kept by a public servant in the discharge of his duty. The correctness of the copies of the entries in the register is to be presumed under S. 79, Evidence Act, and a copy is therefore admissible. The fact that the copy shows that the entry is not exactly in the prescribed form inasmuch as the name of the reporter and the signature of the recording officer are not given, is immaterial and because of this defect, the entry does not become inadmissible. A.I.R. 1936 All. 218=1936 A.L.J. 404=1935 A.W.R. 1248=159 Ind. Cas. 190.

——S. 35—Certificate of birth.

A certificate of birth of a person is the conclusive evidence of his age as long as it is not disproved by evidence of the party denying its correctness. A.I.R. 1935 Pat. 474=16 P. L. T. 629=37 Cr. L. J. 227=160 Ind. Cas. 116.

——S. 35—Birth and death registers—Copy of entry in Municipal register of births and deaths—Admissibility—Interference in second appeal.

Under S. 35, Evidence Act, a copy of an entry in the Municipal register in which births and deaths are recorded is admissible in evidence. Where the trial Court and the lower Appellate Court have attached weight to such a document the Court of second appeal will not take a different view. A. I. R. 1934 Oudh 167=11 O.W.N. 416=148 Ind. Cas. 418.

——S. 35—Birth and death registers—Statement in, if evidence of religion of parties.

It is safe to rely upon statements in death registers only with reference to the fact of death and the date of death. As for the description therein of the religion of the deceased, it is doubtful if that statement is admissible A.I.R. 1934 Mad. 630=67 M.L.J. 389=40 M. L. W. 502=1934 M.W.N. 1197=155 Ind. Cas. 708.

——S. 35—Evidence of hathchita of daffadar—Admissibility.

The **hathchita** of the **chaukidar** containing the date of birth of a person is admissible in evidence even when it is written by the **daffadar**. A.I.R. 1933 Pat. 473=14 P.L.T. 441=149 Ind. Cas. 129.

——S. 35—Birth and death registers.

Entry in death register may be rejected when used to prove or disprove death on particular day, if register is prepared in casual way. A. I. R. 1930 Cal. 636=128 Ind. Cas. 804.

——S. 35—Date of death—Inference of.

Where the date of death of a person was in question, and a report of death in the kotwal's diary, dated 6th January, 1913, was produced but it did not mention the date of death but the lower Court inferred that the death was within a week of the date of the report.

Held, that the inference drawn by the lower Court was not altogether erroneous or one which could not have been reasonably drawn from facts proved. 103 Ind. Cas. 883=A.I.R. 1927 Nag. 326.

——S. 35—Copy of birth register is admissible to prove age.

Where the original birth register of a particular year was found to have been lost, but a copy thereof, prepared by the public servant whose duty it was to maintain such a register, was found and it was relied upon to show that certain A was born in that year and it was also found that the public servant who prepared that copy had died shortly after, copy was admissible. 95 Ind. Cas. 1005=23 M.L.W. 688=A.I.R. 1926 Mad. 985.

——S. 35—Death Register kept in police station is official book.

The Death Register kept at the police station is an official book and the entries in it are legally admissible. Such a register is an official book, register or record made by a public servant in the discharge of his official duty within the meaning of S. 33 of the Evidence Act, and an entry made therein would, therefore, be itself a relevant fact. 46 Cal. 152 and 22 O.C. 124, Foll. 87 Ind. Cas. 938=46 All. 637=22 A. L. J. 690=A. I. R. 1925 All. 79.

——S. 35—Birth and death registers.

Death register is public document and is ordinarily conclusive of dates of deaths recorded. 88 Ind. Cas. 249=1925 M.W.N. 232=A.I.R. 1925 Mad. 1005.

——S. 35—Birth and death registers.

Death Register—Entries during epidemic season appearing to have been made at one time and not from day to day—Informant not examined—Register is not of much value. 82 Ind. Cas. 618=24 Bom. L.R. 1162=47 Bom. 110=A.I.R. 1923 Bom. 17.

——S. 35—Register of births ond deaths—Entry not proved to be in handwriting of choukidar is inadmissible. 77 Ind. Cas. 52=20 A. L. J. 601=A. I. R. 1922 All. 510.

——S. 35—Death Register—Prepared during times of epidemic—Not of much value to prove order of death. 77 Ind. Cas. 117=24 Bom. L. R. 836=47 Bom. 37=A.I.R. 1922 Bom. 347.

——S. 35—Birth and Vaccination Register entry in.

An entry in a birth register kept by competent authority is relevant to prove the age of a person provided it is not suspicious. But an entry in a Vaccination Register showing the age of the person vaccinated is in itself of no value because the age of a child is likely to be very cursorily recorded as it is not a matter of importance for the operation but it can be relevant to corroborate the vaccinator's evidence as to the age. 86 P. W. R. 1910=213 P. L. R. 1910=7 Ind. Cas. 505.

S. 35—See also EVIDENCE ACT, S. 74.

——S. 35—Administration report.

An entry of a ward's age in an administration report of Court of Wards is evidence under S. 35 of the Evidence Act. 9 M.L.T. 214=9 Ind. Cas. 567.

——S, 35—Register of deaths—Municipal Register—Whether admissible.

Municipal Register entries which cannot be definitely proved to be written or directed to be written by a particular person are inadmissible to prove the date of death of a particular individual. 19 Ind. Cas. 528 (All.).

——S. 35—Register of deaths—Chaukidar's Death and Birth Registers, entries in—Value of.

Entries in Chaukidar's Death and Birth Registers are valuable evidence of the facts mentioned therein. 51 P. R. 1913=283 P. L. R. 1913=200 P. W. R, 1913=20 Ind. Cas. 462.

——S. 35—Registers of Deaths and Births—Entries in village Registers—Admissibility.

When birth and death Registers are kept by a Village Official under the directions of the Board of Revenue as agents of Government an entry therein is admissible in evidence under the section. It is not necessary that the public servant should be compellable by legislative enactment to discharge such a duty. 7 W.R. 726, Foll. Entry in such a register is proof of the actual date of death. 41 Mad. 26=22 M. L. J. 17=33 M. L. J. 60=(1917) M.W.N. 558=6 L.W. 246=41 Ind. Cas. 286.

——S. 35—Register of deaths and births—Chowkidhar's register—Entries in.

An entry made in a choukidar's register of births and deaths is not admissible in evidence if it neither purports nor is proved to be signed by the station writer, the register not being one directed to be kept by any law. 22 O.C. 250=6 O.L.J. 577=21 Cr. L.J. 22=54 Ind. Cas. 166.

——S. 35—Register of deaths.

An entry of deaths and births in a register which was not kept up by a Public authority or by a public servant is not admissible under S. 35. 14 O. C. 68=10 Ind. Cas. 713.

——S. 35—Register of deaths—Police Regulations.

The register of deaths maintained under Para. 367 of the Police regulations is an official register and entries are made in it by a public servant in the discharge of his official duty and are admissible under S. 35. 1 U.P.L.R. (J.C.) 1=22 O.C. 124=52 Ind. Cas. 162.

——S. 35—Chaukidar's birth and death register.

A Chaukidar's register of births and deaths is not a public document. No importance can be attached to it in view of S. 35. 19 O. C. 221=4 O. L. J. 49=36 Ind. Cas. 941.

2. Civil Courts Records.

——S. 35—Civil Court records—Entry in order sheet, recording service.

The entry in the order sheet by the certificate officer would be admissible under S. 35, Evidence Act, if the statement made therein be of a fact in issue or of a relevant fact. A.I.R. 1943 Cal. 114=I.L.R. (1943) 1 Cal. 22=46 C. W. N. 967=76 C. L. J. 17=205 Ind. Cas. 523.

——Ss. 35, 21 (1)—Certified copy from register of rent suits—Statement in it made by darpatnidar in connection with rent suit subsequent to sale of darpatni interest—Admissibility.

A certified copy from the register of rent suits containing various entries in a tabular form, would be admissible under S.35, Evidence Act' as written by a public servant in the discharge of his official duty. However, the entry in it of the statement made in connection with rent suit instiuted by the **darpatnidars** and others against the tenants, subsequent to the auction-sale of the **darpatni** interest cannot be treated as relevant admission and proved against the **zemindar** who has purchased the **darpatni** interest under S. 21 (1). A.I.R. 1940 Cal. 539=71 C.L.J. 504=191 Ind. Cas. 824.

——S. 35—Civil Court records—Duty of process server to deliver possession and record his act—Report—Admissibility—Ownership.

Where the duty of the process-server is to deliver possession and to record what he has done, his record is the public record of an official act and is admissible in evidence even though the process-server is not called as a witness. The document affords the clearest evidence of the act of ownership. A. I. R. 1940 Lah. 312=42 P.L.R. 288=192 Ind. Cas. 45.

——S. 35—Civil Court records—Statements in a decree that certain pedigrees were filed is evidence under S. 35 as an entry in a public record. A. I. R. 1934 P.C. 157=11 O. W. N. 889=61 I. A. 286=1934 A.L.J. 779=40 L. W. 217=67 M.L.J. 274=15 P. L. T. 531=60 C.L.J. 67=1934 M. W. N. 751=36 Bom. L.R. 867=56 All. 468=38 C.W.N. 1101=150 Ind. Cas. 545 (P.C.).

——Ss. 35, 74—Order sheet of Court—Formal proof.

Order sheets of Courts, being public documents, require no formal proof and each successive execution proceeding being a continuation of the previous one, it is not necessary to mark the order sheets of a previous proceeding as exhibits. A. I. R. 1933 Pat. 658=15 P.L.T. 407=13 Pat. 86=147 Ind. Cas. 101.

——S. 35—Civil Court records.

Where a paper book of Calcutta High Court relating to another case was tried to be put in evidence in a case in a Patna Court:

Held, in the absence of proof that the papers printed in that book were the true copies of the original. documents it could not be admitted. 114 Ind. Cas. 469=7 Pat. 187=11 P.L.T. 12=A. I. R. 1929 Pat. 41.

——S. 35—Civil Court records—A sale certificate is not a public or other official book, register or record. 110 Ind. Cas. 521=A. I. R. 1928 Cal. 893.

——S. 35—Civil Court records—Description of property given in a sale proclamation or a sale-certificate does not amount to a statement within the meaning of Ss. 32 and 35. A. I. R. 1922 Mad. 71 (F. B.), Foll. 110 Ind. Cas. 521=A.I.R. 1928 Cal. 893.

——S. 35—Civil Court records — Process-server's report is inadmissible if he is not examined. 96 Ind. Cas. 825=A.I.R. 1926 Lah. 629.

——S. 35—Civil Court records—Register of Civil suits—Entry as to disposol of suit is relevant. 79 Ind. Cas. 257=27 C.W.N. 897=A.I.R. 1924 Cal. 135.

——S. 35—Civil Court records—An extract from Register of Applications in respect of minors and lunatics is inadmissible in evidence on the question of age. 86 Ind. Cas. 681=5 P.L.T. 403=A.I.R. 1924 Pat. 796.

3. Guardianship Certificates.

——S. 35 — Guardianship certificates — Admissibility—Proof of minority of person.

A certificate of guardianship issued by the Court is not admissible in evidence under S. 35, Evidence Act, to prove the minority of a person. Such certificate is neither a book nor a register nor a record kept by any officer in accordance with any law. It is a certificate, as it professes to be, and is a document issued to a person, giving that person and only to him a particular kind of authority. A.I.R. 1950 Cal. 533.

——S. 35—Certificate of guardianship—If admissible to prove birth of minor in subsequent proceeding.

As the certificate of guardianship is neither a book nor a register nor a record kept by an officer in the discharge of his duties, it is not admissible under S. 35 of the Evidence Act to prove the date of birth of the minor in a subsequent suit where the question of age is at issue. A.I.R. 1942 Cal. 438=76 C. L. J. 61=199 Ind. Cas. 10.

——S. 35—Guardianship certificate—Guardianship certificate cannot fall under S. 35 because it does not contain any entry in any public or other official book, register or record, inasmuch as there is no rule requiring the District Judge to maintain any such official book, register or record. A.I.R. 1934 All. 406=56 All. 766=3 A. W. R. 529=1934 A. L. J. 318=149 Ind. Cas. 781 (F.B.).

——S. 35—Guardianship certificates—In spite of the fact certificates of guardianship are now issued under the authorities of the Rules framed by the various High Courts, they are nevertheless inadmissible in evidence because they are not 'public or official book, register or record in which an entry is made by a public servant in the discharge of his official duty' within the meaning of S. 35, Evidence Act. A. I. R. 1931 All. 307=1931 A. L. J. 170=53 All. 428=130 Ind. Cas. 201.

——35—Guardianship certificates.

Entry in guardianship certificate is sufficient to prove age of persons. A.I.R. 1926 Oudh 88 and A. I. R. 1929 Oudh 134, Foll. 121 Ind. Cas. 277=7 O. W. N. 25=AI.R. 1930 Oudh 97.

——S. 35—Guardianship certificate—In the province of Oudh a certificate of guardianship issued by a District Judge to a guardian appointed by him of a particular minor is a record made by a public servant in the discharge of his official duties and an entry in such record is therefore admissible under S. 35. 117 Ind. Cas. 456=6 O.W.N. 51=A.I.R. 1929 Oudh 134.

——S. 35—Guardianship certificate—In the Province of Oudh a District Judge is bound by law to prepare a certificate of guardianship.

Where the guardianship certificate was prepared in the office of the District Judge and signed by the incumbent of the office as required by the rules framed by the Oudh J. C.'s Court under S. 50 (j) of the Guardians and Wards Act:

Held, that it was a public document made by a public servant in the discharge of his official duty and was therefore a record such as is mentioned under S. 35 of the Evidence Act and an entry therein as to the birth of a minor was relevant fact. 89 Ind. Cas. 69=12 O. L. J. 453=2 O. W. N. 601=A. I. R. 1926 Oudh 88.

——S. 35—Guardianship certificate—The certificate of guardianship cannot be regarded as evidence of minority under S. 35. 71 Ind. Cas. 336=38 C. L. J. 186=A.I.R. 1924 Cal. 526.

4. Judgments.

——S. 35—Judgment not inter partes—**Admission as to age of predecessor-in-title—Whether can be relied on.**

A previous judgment though not **inter partes** is admissible under S. 35 of the Evidence Act to prove a statement made by a predecessor-in-title of the party against whom the document is sought to be used. Thus an admission contained in such judgment as to the date of the death of the father of the predecessor-in-title is admissible to prove the date of death of such person 61 L.W. 193=1948 M.W.N. 201=A.I.R 1948 Mad. 388.=(1948) 1 M.L.J. 215.

——S. 35—Judgments.—Suit to eject defendants on ground that they were under-**raiyats** of plaintiffs—In **Khanapuri** proceedings which preceded finally published Record of Rights, one of plaintiffs **M**, on behalf of all, was stated in decision of Khanapuri Officer to have admitted that predecessors-in-interest of defendants were co-sharers:

Held, that the admission contained in the decision of the Khanapuri Officer was admissible. Furthermore, even if the decision of the Khanapuri Officer were inadmissible for proving the truth of the admission made by **M** before the Khanapuri Officer, it would still be admissible for the purpose of proving that **M** made such a statement. A. I. R. 1939 Pat. 591=20 P. L. T. 929=185 Ind. Cas. 254.

——S. 35—Judgment—A statement in a judgment that one of the parties to it had made an admission as a witness is not admissible under S. 21, Evidence Act, as it is only secondary evidence of such admission. Such a statement is also not admissible under S.35, Evidence Act. A.I.R. 1935 Mad. 268=40 L.W. 810=154 Ind. Cas. 753.

——S. 35—Judgments—Oral admission recorded in judgment—Admissibility.

Although where a deposition of a witness had been recorded in the ordinary way, that record and not an abstract of the evidence in the judgment is the proper evidence to give of the statement, yet if the Court acts upon an oral admission and records it in its judgment, which constitutes the only official record of it, it will be admissible in evidence under S. 35, Evidence Act. A.I.R. 1933 Mad. 184=142 Ind. Cas. 548.

——S. 35—Judgments—A recital in a judgment not **inter partes**, of a relevant fact, is not admissible to prove the fact in another case. A.I.R. 1932 Lah. 50=32 P.L.R. 763=135 Ind. Cas. 202.

——S. 35—Judgments.

Recitals in judgment not **inter partes** of relevant fact are not admissible in evidence. 121 Ind. Cas. 509=11 L.L.J. 526=A. I. R. 1930 Lah. 237.

——S. 35—Judgments—Judgments **inter partes** are admissible under S. 35 inasmuch as they form a record of facts in issue made by public servant in the discharge

of his official duty. 97 Ind. Cas. 694=9 N.L.J. 215= A.I.R. 1927 Nag. 19.

——S. 35—Judgment—Section 35 has no application to judgments. It would be straining the language of S. 35 to hold that a Judge, when he writes a judgment, is making entries in a public or official book, register or record and that every statement made in a judgment is an entry in such book, register or record. 66 Ind. Cas. 280=45 Mad. 332=15 M. L. W. 316=1922 M. W. N. 147=30 M. L. T. 160=A. I. R. 1222 Mad. 71=42 M.L.J. 324 (F.B.).

——Ss. 35 and 165—Judgments—Confidential enquiry—Ex parte proceedings.

A suit was dismissed by the judge relying upon a confidential inquiry by an assistant settlement officer at the time of revised settlement for ascertaining to whom the holding belonged. **Held,** that the judgment could not be maintained as the proceeding of the confidential inquiry contained an opinion on an **ex parte** investigation inadmissible in evidence under S. 35 and that the judge must record a finding on the evidence adduced before him. In deciding a suit for possession of a holding the court must record a finding on the evidence adduced before it but cannot base its jugment on matters not properly admissible in evidence. 2 U. P. L. R. (Pat.) 135=56 Ind. Cas. 807 (Pat).

5. Municipal records.

——S. 35—Municipal records—Copies of shajra and khasra of Municipal Committee, if admissible—Presumption.

The copies of shajra and khasra of the Municipal Committee, fall under S. 35, Evidence Act, having been prepared by the employees of the Municipal Committee in the discharge of their official duties and it is well-known that under S. 19, Municipal Act, every officer or servant employed by the Committee is deemed to be a public servant within the meaning of S. 21, I.P.C. It is true that no presumption of correctness attaches to these documents; but this is a different matter altogether from holding them inadmissible n evidence. A. I. R. 1938 Lah. 440=40 P.L.R. 693=181 Ind. Cas. 52.

——S. 35—Municipal record—A map prepared by a Municipality, to which the Calcutta Survey Act, is made applicable under S. 223-A, Bengal Municipal Act is one prepared under the authority of the Government and a presumption of correctness attaches to it under S. 83, Evidence Act, even if the Calcutta Survey Act contains no provision for such presumption. A.I.R. 1937 Pat. 567=18 P.L.T. 464=171 Ind. Cas. 732.

——S. 35—Municipal record—Municipal Registers of tharas and khanasumari—No statutory obligation to enquire about ownership of " wells "—Admissibility for proving ownership.

Where it has not been shown that there was any statutory obligation on the officials who had prepared the Municipal Registers of tharas and khanasumari to make enquiries as to the ownership of " wells ", these entries are not admissible under S. 35, Evidence Act, or any other provision of law for the purpose of proving the ownership of wells. A.I.R. 1936 Lah. 965=163 Ind. Cas. 817.

——S. 35—Municipal records—Assessment list prepared by Municipality.

Although an assessment list prepared by a Municipality is not the final or sole test of the liability of the assessee to pay the particular taxes, there is a presumption that the assessment list was duly published at the time the assessment was made and that after due publication it became final, and if an assessee alleges the fact of an entry in such a list that an alleged tax was never paid by him or his predecessor-in-interest but by third persons, the burden is on him to prove that it was so realized. A.I.R. 1930 Pat. 370=126 Ind. Cas. 908.

——S. 35—Municipal record—Entry in Register that a well is public is no evidence against owner when owner had no notice of the entry. 75 Ind. Cas. 896=A. I. R. 1924 Lah. 511.

6. Official records.

——S. 35—Official document—Extract from list prepared by Maharaja for assisting in preparation of lists under Oudh Estates Act—Admissibility.

An extract from a list prepared by or under the directions of a Maharaja for the purpose of assisting in the preparation of the lists under the Oudh Estates Act, though kept as a separate file with the official records by the Board of Revenue, cannot be treated as an official paper and consequently is not admissible under S. 35 of the Evidence Act. There was no duty imposed upon the Maharaja to prepare such a list and he could not be expected to have personal knowledge of the claims of all the taluqdars in Oudh. 22 Luck. 522=1947 O.W.N. 421=A. I. R. 1948 Oudh 307=1947 A. W. R. (C.C.) 301=1947 O.A. (C.C.) 301.

——S. 35—Applicability—Official record—Entry made by public officer under misconception but in the discharge of his duties.

The mere fact that a public servant when making an entry in an official record acts under a misconception about his official duty, is not sufficient to take such entry by such an official out of the class referred to in S. 35 of the Evidence Act. 21 Luck. 1=223=Ind. Cas. 373=1946 O.W.N. 26=1946 A.W.R. (C.C.) 32= A.I.R. 1946 Oudh 163.

——S. 35—Official records—Marking book showing trees marked, if admissible official records.

The entries in marking book (showing the trees marked under the Forest Act) made by the forest guard and checked and initialled by the officer responsible for the correctness of the marking are entries in an official record which are admissible in evidence under S. 35 o the Evidence Act, even though there is no rule or statut showing that it is the duty of the forest officials to mak these entries. A.I.R. 1943 Nag. 139=1943 N.L.J. 130= 44 Cr.L. J. 421=I. L. R. (1943) Nag. 358=205 Ind. Cas. 564.

——S. 35—Official records — Jail Registers—Admissibility of.

Jail Registers are official records kept by public servants in the discharge of their officials duties and when there is no suggestion that the entries are not genuine or that they have been tampered with in any way or that the officials who made them did not make them on the dates noted therein they are admissible in evidence as a whole under S. 35. A. I. R. 1943 Oudh 1=1942 O. W. N. 530=44 Cr. L. J. 33=1943 A. W. R. 333= 203 Ind. Cas. 143.

——S. 35—Official record—General power-of-attorney printed through and through purporting to have been executed in presence of Government Notary Public—Reliance, in absence of register and evidence of Notary Public.

In a general power-of-attorney A, B and C were described as owners of a firm and they appointed D as a general attorney. The power-of-attorney was not an original document but was a printed paper through and through and it purported to have been executed and signed in the presence of the Government Notary Public. The document was sought to be relied upon for proving that C was a partner of the firm. The document, however, was not printed for the purpose of showing that C had also a share in the firm:

Held, that no reliance could be placed on the document in the absence of the register of the Notary Public and in the absence of the Notary Public. A.I.R. 1942 All. 201=1942 A.L.J. 289=1942 A. W. R. 133 =I. L. R. (1942) All. 759=202 Ind. Cas. 350 (F.B.).

——Ss. 35 and 74—Official record—Book maintained in Collector's office containing copies of communications sent by Collector to subordinate officers—Registered copy—Admissibility.

A book maintained in the Collector's office according to the official practice and containing the copies of the communications sent by the Collector to various subordinate officers, is itself an official register within the meaning of S. 35 and a public document within the meaning of S. S. 74. A certified copy produced from such a book is admissible. A. I. R. 1940 Mad. 273= 1939 M.W.N. 841.

——S. 35—Official records—Endorsement by Sub-Registrar—Relevancy.

An endorsement by the Sub-Registrar showing that the executant presented the will for registration and acknowledged execution is a relevant fact under S. 35, Evidence Act. A.I.R. 1940 Nag. 382=1940 N.L.J. 437=193 Ind. Cas. 41.

——S. 35—Official record.

Every entry in the register of powers-of-attorney is 'a public document', within meaning of S. 74, Evidence Act, and a true original entry is admissible as proof of the original entry by virtue of S. 65 (e), Evidence Act. The Court is entitled to presume the correctness of the abstract in accordance with the usual presumption that official acts are regularly performed, and hence the original entry itself is good evidence of the contents of the power-of-attorney and is relevant under S. 35, Evidence Act. A.I.R. 1939 Cal. 569=70 C.L.J. 5=43 C.W.N. 907=185 Ind. Cas. 691.

——S. 35—Official records—Documents containing mere opinions of Government Officers who have held personal inquiries—Admissibility.

The documents consisting of mere opinions expressed in Secretariat correspondence which passed between various officers of the Government who had held no personal inquiries in the matter are admissible in evidence. A.I.R. 1936 Lah. 37=38 P. L. R. 748=165 Ind. Cas. 626.

——S. 35—Official record—Butwara record.

The butwara record is not conclusive evidence but merely evidence under S. 35, Evidence Act, as an official record. As an evidence of title it is very weak. A.I.R. 1934 Cal. 488=38 C.W.N. 268=61 Cal. 302= 151 Ind. Cas. 749.

——S. 35—Official records.

The summary of the evidence recorded by the Sub-Registrar under S. 41(2) of the Registration Act is admissible **quantum valeant** under S. 35, Evidence Act. 1933 M.W.N. 1148.

——S. 35—Official record—Endorsement by public servant—Presumption.

An endorsement on an official record signed by a public servant in the performance of his duties should, in the absence of any evidence to throw doubts upon it, be presumed to be correct. 6 O.L.J. 431=53 Ind. Cas. 725.

——S. 35—Official records—Register of Minhaidari Villages.

A register of Minhaidari villages being an official document, in the absence of anything to show that any particular part of it was in excess of the official duty by reason of which it came into existence and that in consequence that part being not admissible is admissible in evidence under S. 35 of the Evidence Act. 22 C. W. N. 439=(1918) M.W.N. 305=23 M.L.T. 382= 20 Bom. L. R. 712=28 C. L. J. 1=12 Bur. L. T. 88 =47 Ind. Cas. 1 (P.C.).

——S. 35—Official records—Registration—Administration of execution by some of the executants.

Where a document contemplates that four persons should execute it but only two of them executed it and present it for registration, the document if registered is binding as between them. 23 M. L. T. 307=(1918) M.W.N. 703=45 Ind. Cas. 535.

——S. 35—Official records—Letter in register of official correspondence—Copy of.

Under S. 35 copies of letters made in registers or official correspondence kept for reference and record are admissible. 40 Mad. 871=(1917) M. W. N. 201=33 M.L.J. 277=39 Ind. Cas. 263.

——S. 35—Official records—Registering officer's endorsement—Value of.

The registering officer's endorsement on a registered document is evidence, though not conclusive, of the truth of the facts set forth therein. 17 Bom. L.R. 49 =27 Ind. Cas. 478.

——S. 35—Official records.

Circuit Committee Records—Evidence, how far. 16 M.L.J. 1=29 M. 52=33 I.A. 46 (P.C.).

7. Police Records.

——S. 35—Police records—Village Crime Note Book.

The Village Crime Note Book is one of the registers prescribed for station houses under S. 621 of the Police Manual and according to S. 636, every cognizable crime committed in a village should be entered in it. Where there is an official duty cast upon any officer to make an entry and in pursuance of such a duty, he makes an entry in his register, such entries are admissible in evidence under S. 35, Evidence Act. Entries in the Village Crime Note Book are, therefore, admissible to prove that certain crimes were reported and registered but, of course, they are no proof against persons named as suspects in them. A.I.R. 1937 Nag. 17=38 Cr. L.J. 251=I.L.R. (1937) Nag. 315=166 Ind. Cas. 587 (F.B.).

——Ss. 35, 114—Report to Police, if public document.

A report made to the Police relating to the commission of an offence, being an entry in a public record made by a public servant in the discharge of his official duties, is admissible under S. 35, Evidence Act, even if the person who made it is alive and not called as a witness.

Under the provisions of S. 114, Evidence Act, the Court is entitled to presume that such an entry was properly made. A.I.R. 1932 Oudh 137=8 O.W.N. 1228=135 Ind. Cas. 387.

——S. 35—Police records.

Record of First Information Report is corroborative and not substantive evidence. 85 Ind. Cas. 647=26 Cr. L.J. 551=6 L.R.A. Cr. 49=A.I.R. 1925 All. 413.

——S. 35—Police records—List of suspects drawn up by Police is not admissible.

Where the question is whether the accused were present at an unlawful meeting, a list of suspects drawn up by the Police at the time is not admissible in evidence and if admissible it proves nothing beyond the fact that the Police expected to find the accused amongst those present. 88 Ind. Cas. 22=7 L.L.J. 264 =26 P.L.R. 566=26 Cr. L. J. 1078=A. I. R. 1925 Lah. 299.

——S. 35—Police records.

Police report is admissible under S. 35. 110 Ind. Cas. 657=26 A.L.J. 1001=A.I.R. 1928 All. 710.

——S. 35—Record—Statement of witness to Police officer:

Statement made by a witness to a Police officer under S. 162, Cr. P. C. is not a **record** within S. 25 of the Evidence Act and is not admissible in evidence under the section. 5 C.W.N. 65=28 C. 348.

8. Public records.

——S. 35—Public documents—Extracts from the khewat khasra and Register of immoveable property kept by the Municipality—Admissibility.

An extract from the khewat khasra of 1921 and an extract from the Register of immoveable property of 1931, kept by the Municipal Board under the orders of Government are admissible in evidence as extracts from public documents. I. L. R. (1948) All. 215= A. I. R. 1948 A. 309=1948 A. L. J. 87=1948 A.L.W. 109.

——S. 35—Public records—Canal papers.

In proof of possession, canal papers are admissible but the value of that evidence is entirely a matter for the Court of fact. A. I. R. 1945 Pat. 453=24 Pat. 379.

——S. 35—Public records.

The orders of detention passed under R. 26 (1) (b) of Defence of India Rules, are not public records and therefore, S. 35, Evidence Act, has no application. A.I.R. 1944 Lah. 33=I. L. R. (1944) Lah. 245=212 Ind. Cas. 321=45 Cr. L.J. 580 (FB.).

——Ss. 35, 13—Public records.

The printed copy of the index register is itself a public document. It is relevant under S. 13 as well as S. 35, and hence admissible in evidence. A. I. R. 1942 Bom. 161=44 Bom. L.R. 295=I.L.R. (1942) Bom. 357=201 Ind. Cas. 420.

——S. 35—Public records.

Every entry in the register of powers-of-attorney is a public document within the meaning of S. 74 (1) (**iii**), Evidence Act. The true copy of the entry is admissible as proof of original entry by virtue of S. 65 (**e**), Evidence Act. The Court is entitled to presume the correctness of the abstract in accordance with the usual presumption that official acts are regularly performed, and hence the original entry itself is good evidence of the contents of the power-of-attorney and is relevant under S. 35, Evidence Act. A.I.R. 1939 Cal. 569=70 C. L. J. 5=43 C. W. N. 907=185 Ind. Cas. 691.

——S. 35—Public records.

The register of information compiled by the Assistant Collector, regarding the **pargana watandars** under directions given by Collector under the orders of the Inam Committee, is a public document, and is relevant under S. 35, or, at any rate, under S. 13, Evidence Act for proving the date of the grant contained therein. A.I.R. 1937 Bom. 307=39 Bom. L.R. 288=I. L. R. (1937) Bom. 464=170 Ind. Cas. 801.

——S. 35—Public records.

Khasra girdawaris are public documents and are properly proved by the production of certified copies as is allowed by S. 77, Evidence Act. They are also made relevant by S. 35, Evidence Act. A. I. R. 1934 Lah. 698=35 P.L.R. 405=151 Ind. Cas. 786.

——S. 35—Public record.

Per **Bhide, J.**—It is true that the Punjab Land Revenue Act (XVII of 1887) or the rules framed thereunder do not require any reason for their non-payment of rent or adverse title set up by the tenants to be recorded in the Record of Rights. But though the presumption under S. 44 of the Punjab Land Revenue Act may not, strictly speaking, apply to such an entry, there is no good reason why an entry of this kind in a public record made by a public servant in the discharge of his official duties should not be held to be relevant under S. 35, Evidence Act. A.I.R. 1932 Lah. 586=33 P.L.R. 771=13 Lah. 432=140 Ind. Cas. 474.

——S. 35—Public records—Index of register.

The index of the register is a public document and is admissible in evidence under S. 35, Evidence Act. A.I.R. 1931 Bom. 436=33 Bom. L. R. 828=134 Ind. Cas. 721.

——Ss. 35, 76—Public record—Punjab Land Revenue Act, 1887, S. 151—Fards bachh, whether public document.

The question whether the presumption arising from an entry in the revenue papers in favour of a particular person has been rebutted or not is a question of fact which cannot be challenged in second appeal.

Fards bachh are records of the acts of public officers, as under S. 151 of the Punjab Land Revenue Act, a **patwari**, shall be deemed, for the purposes of the Evidence Act, to be a public officer having the custody of a public document which any person has a right to inspect and they can be proved under S. 76, Evidence Act, by production of a certified copy. At any rate, if they have been admitted in the trial Court without any objection, their reception in evidence cannot be objected to in appeal. A.I.R. 1931 Lah. 605=[illegible] I.R. 508=131 Ind. Cas. 638.

——S. 35—Public records—Statements in, should be presumed as true.

Evidence regarding the tribe of a person taken from public records for a series of years (here since 1852) and recorded in accordance with the requirements of the law, cannot in a pedigree case be disregarded for the reason that a particular link in the chain is not found, especially when there is no suggestion that entries in the records were false or that there was an existing reason why deliberately false entries should have been made. Statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorised agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community. In many cases, indeed, in nearly all cases, after a lapse of years it would be impossible to give evidence that the statements contained in such documents were in fact true, and it is for this reason that such an exception is made to the rule of hearsay evidence. 86 Ind. Cas. 654=23 A.L.J. 639=52 I.A. 201=2 O.W.N. 646=22 M.L.W. 299=30 C.W.N. 101=26 P.L.R. 390=6 Lah. 269=A.I.R. 1925 P.C. 170=50 M.L.J. 120 (P.C.).

——Ss. 35 and 48—Statement of public servant—Recital in public record.

A recital in public record as to a statement made by a public servant with reference to a particular statement of the grant by the Government may be admitted under S. 35 of the Evidence Act as proving that the public servant made the statement that he is stated to have made, if the fact that he made such a statement is a relevant fact. But such a recital would not be admissible under S. 40 where a specific right claimed by a particular individual and not a general right is in question. 51 Ind. Cas. 876 (Mad.).

——S. 35—Public record—Medical certificate—Proof of age.

An age certificate given by a medical man to a private patient is not public record under S. 35. 33 Ind. Cas. 142 (Mad.).

——S. 35—Public records.

Effect, if any, of omission of an entry from public document:—See PRE-EMPTION. 1902 A.W.N. 207=25 A. 90. (F.B.).

——S. 35—Public record—Statement to Police officer.

Statement of a witness to Police officers under S. 162, Cr. P.C., though reduced to writing is not a public or official document, and the writing is not admissible in evidence either in connection with the charge then under investigation or in any other proceeding such as prosecution of the witness for giving false evidence. 5 C.W.N. 65=28 C. 348.

——Ss. 35, 61, 62 and 63—Public record—Statement of Sub-Judge.

A statement made by a Subordinate Judge contained in the Judgment is a relevant fact under S. 35. Such statement may be proved by primary or secondary evidence under S. 61 of the Act. A translation of a Judgment written in English under S. 185 of Act VIII of 1859 and signed by the Judge, is primary evidence of the contents of the judgment but a certified copy of the translation could not be regarded under S. 63 as secondary evidence of the plaint filed in the suit when the judgment was delivered. 4 Ind. Cas. 579 (All.)

9. Record of custom.

——Ss. 35 and 48.

Statements contained in Riwajiam—Admissibility and value of. 52 P.L.R. 369.

——S. 35—Record of custom—Entries in wazib-ul-arz relating to custom are admissible even if made under misconception of official duty.

Entries relating to custom in wajib-ul-araiz are admissible in evidence under S. 35 of the Evidence Act when the entries are made by a public servant in discharge of his official duty. The mere fact that the public servant acts under a misconception about his official duty is not sufficient to take away the entries made by him out of the class referred to in S. 35. A. I. R. 1946 Oudh 163=1946 O.W.N. 26=21 Luck. 1=223 Ind. Cas. 373.

——S. 35—Records of custom.

Entry in the wajib-ul-arz is admissible in proof of the custom under S. 35 and it validity does not depend upon the question whether the wajib-ul-arz has been verified by the proprietors of the village or not. 101 Ind. Cas. 820=1 L.C. 73=A.I.R. 1927 Oudh 608.

——S. 35—Records of custom—Officer specially deputed to record customs prevailing in a locality—Record by such officer is evidence and is admissible without further proof. 86 Ind. Cas. 729=49 All. 848=6 L. R. A. Civ. 186=A.I.R. 1925 All. 648.

——S. 35—Records of custom attested only by zamindars.

A custom according to which tenants upon ejectment from tenancy land, lose their rights in the groves is not unreasonable and a wajib-ul-arz recording such a custom, though attested by the zamindars only, is admissible in evidence under S. 35 and is conclusive proof of custom. A.I.R. 1943 Oudh 29=1242 O.W.N. 574=1942 A.W.R. 328 (2)=202 Ind. Cas. 743.

——S. 35—Records of custom—Riwaj-i-am.

Answer contained in a Manual of Customary Law of a district (e.g., Wilson's Manual on Questions of Customary Law in the Punjab) are admissible as entries relating to a relevant fact contained in what may be regarded as a public record, made by a public servant in discharge of his official duty. A. I. R. 1941 P. C. 21=43 Bom. L. R. 432=I. L. R. (1941) Lah. 154=43 P. L. R. 318=68 I. A. 1=I. L.R. (1941) Kar. (P.C.) 22 Sup=1941 A. L. J. 530=1941 A. W. R. 314=193 Ind. Cas. 436 (P.C.).

——S. 35—Records of custom — Riwaj-i-am—The entries in the Riwaj-i-am owe their weight to the principle of English law which has received statutory recognition in S. 35. The principle is that the statements made by a public officer should be receivable in evidence because it is his duty to satisfy himself of the truth of the statements made. If the officer himself is not satisfied of the truth of the statements made the weight attachable to them is greatly lessened. A.I.R. 1935 Lah. 434.

——S. 35—Record of custom—Riwaj-i-am—Entries in—Value of.

The Riwaj-i-am of a district is a public record prepared by a public officer in discharge of his duties and under Government rules and is clearly admissible to prove the facts stated therein.

The Rewaj-i-am, though subject to rebuttalis strong evidence of the custom recited. 44 Cal. 749=12 P.W.R. 1917=21 M.L.T. 310=32 M.L.J. 615=19 Bom. L. R. 388=45 P.R. 1917=15 A.L.J. 525=21 C. W. N. 842=26 C.L.J. 175=44 I.A. 89=38 Ind. Cas. 354 (P. C.). [Reversing. 48 P.R. 1909=122 P.L.R. 1909=72 P.W.R. 1909=2 Ind. Cas. 79.]

10. Reports of Officers.

——S. 35 — Applicability — Reports of public officials—Admissibility in evidence—Extent of—Statements of relevant facts or facts in issue and opinions—Distinction.

There can be no doubt that reports of public officials made in the discharge of their official duties are admissible in evidence under S. 35 of the Evidence Act, with reference to statements therein of relevant facts or facts in issue. It is not the law than the report of a public official which has been merely submitted to higher authorities for the latter's information or guidance and which itself does not bear the stamp of finality on it is not admissible in evidence at all. Nor can it be said that the report of a public official is inadmissible in evidence, merely because it was made in compliance with the orders of higher authorities and was submitted to them in pursuance of orders. On the other hand official reports are valuable and in many cases, they are the best evidence and the only evidence available of facts therein stated, although the opinions therein expressed should not be treated as conclusive in respect of matters requiring judicial determination, however eminent the authors of such reports may be. A distinction has to be made between the statements of facts contained therein and the opinions expressed therein as to such relevant facts. So far as mere opinions are conerned, though they are admissible the value to be attached to them is comparatively less than in the case of the facts stated. 36 All. 282=A..I.R. 1934 Lah. 890=A.I.R. 1936 Lah. 37=35 Mad, 21 dist., ; I.A. 209=35 All. 161=55 Cal. 403 (P.C.), foll. I.L.R. (1949) Cut. 312.

——Ss. 35 and 108 and U.P.—Reports of officers—Land Records Manual, Para. 176 (vii)—Copies of statements of village officers as to disappearance of parties—Admissibility.

In view of the provisions of para. 176 (vii) of the U.P. Land Records Manual, the statement of the patwari, the report of the Tahsildar and the order of the S. D. O. in regard to the entries relating to the disappearance of parties whose names are enters in the Revenue records, are all acts prescribed by the rules as part of the official duties of the officers concerned and would thus be admissible in evidence, where the disappearance of the party is in question. 22 Luck. 164=230 Ind. Cas. 50=A.I.R. 1947 Oudh 174=1947 A.W.R. (C.C.) 23=1947 O.W.N. 242.

——S. 35—Reports of officers.

Sale of land by Revenue Officer in execution of money decree—Report by him to the executing Court as to the conduct of sale is admissible in evidence. 39 P.L.R. 187.

——S. 35—Reports of officers.

Commissioner's report does not fall under purview of S. 35 of Evidence Act. A.I.R. 1936 Oudh 192=1935 C.W.N. 1388.

——S. 35—Reports of officers regarding character of institution.

Where, at a time when there was no dispute as to he character of an institution, the officials were attempting to ascertain what the institution was, how it had been founded and what was due at it, the reports prepared in the inquiry are relevant under S. 35, Evidence Act, when a dispute arises and are entitled to considerable weight. A.I.R. 1934 Lah. 39=15 Lah. 270 =36 P.L.R. 442=151 Ind. Cas. 738.

—S. 35—Chari, income from—Settlement Officer's report.

Where in the estimate of the income from chari, the amounts calculated by the Assistant Collector and a Settlement Officer differed and the lower Court held the Settlement Officer's report to be inadmissible being vague:

Held, that the report being a relevant, though not a conclusive fact, was admissible under S. 35 of the Evidence Act. A.I.R. 1932 All. 196=1932 A. L. J. 1=54 All. 125=137 Ind. Cas. 255.

——S. 35—Report of facts of officer whose duty is to investigate and report facts.

It must always be a question of drawing a line between records and correspondence which do, and those which do not fall within the scope of S. 35, Evidence Act. Where there is a statutory duty laid upon public officers to investigate and report facts a report of the facts elicited by their investigation is an official record within the meaning of the section. A,I.R. 1932 Mad. 198=35 L.W. 73=1932 M.W.N. 31=62 M.L.J. 116=55 Mad. 40=139 Ind. Cas. 684.

——S. 35—Reports of officers.

Official reports regarding the nature of any estate are valuable and in many cases the best evidence of facts stated therein, but opinions therein expressed should not be treated as conclussve in respect of matters requiring judicial determination, however eminent the authors of such reports may be. 107 Ind. Cas. 7=55 Cal. 403=24 N.L.R. 25=55 I.A. 45=47 C.L.J. 150=30 Bom. L.R. 251=27 M.L.W 350=32 C.W.N. 621=11 N.L.J. 26=1928 M.W.N. 942=A.I.R. 1928 P.C. 10 =54 M.L.J. 397 (P.C.).

——S. 35—Reports of officers—Correctness of entry on a copy indicating the date on which it was completely chaallenged—Report of the copyist in an inquiry about its correctness made departmentally is not relevant without the copyist being cited as a witness. 108 Ind. Cas. 619=A. I. R. 1928 Lah. 643.

——S. 35—Report of officers—The result of an inquiry by a kanungo under S. 202, C. P. Code, embodied in the report. is an entry in a public record stating a fact in issue and made by a public servant in the discharge of his official duty and the report is, as such, admissible in evidence under S. 35, Evidence Act. 104 Ind. Cas. 287=1 L.C. 259=A.I.R. 1927 Oudh 323.

——S. 35—Report of officers—Mr. Taylor's report about the resumability of mokhasas in the Madras Presidency and the Government order thereon are entitled to great weight. 98 Ind. Cas. 65=A.I.R. 1926 Mad. 1089=51 M.L.J. 394.

——S. 35—Report of officers—The crop cutting report of the Deputy Collector made under S. 40, Bengal Tenancy Act, should be considered a public document and is evidence of the amount of crops produced by the land. 95 Ind. Cas. 966=7 P. L. T. 671=A.I.R. 1926 Pat. 436.

——S. 35—Report of officers—Government reports have no judicial authority where they express opinions on private rights of parties but they are entitled to great

weight so far as they supply information of official proceedings and historical facts. 84 Ind. Cas. 405=3 Pat. 673=A.I.R. 1924 Pat. 616.

——S. 35—Report of officers—Reports made in obedience to order of superior officer comes within S. 35.

The Tahsildar made reports in obedience to an order passed by his superior officer and in discharge of his official duty; whether it is a duty enjoined on him by the law of the country to send up these reports or not, he was bound as an officer subordinate to the Deputy Collector to make the report when he was called upon to do so and the report was made as an official report after such enquiries as the Tahsildar could make, and his report was kept on the record of the land acquisi tion case in the Collector's office:

Held, it comes expressly within the words of S. 35. 72 Ind. Cas. 214=17 M.L.W. 415=32 M. L. T. 279= A.I.R. 1923 Mad. 332=44 M.L.J. 132.

——S. 35—Reports of officers.

Though reports and books are not strictly speaking evidence or do not at all come within the scope of S. 35 of the Evidence Act, there may be no objection to their being read for what they may be worth. 60 Ind. Cas. 984=25 C.W.N. 857=A.I.R. 1921 Cal. 474.

——S. 35—Report by an official of a Native State admissible as evidence.

In the case of the appointment of a Mahant of a temple in a Native State, the report of the Kotwal of the State in regard to the history of the mahantship of the temple is a public record and as such admissible in evidence. 36 All. 161=12 A.L.J. 179=23 Ind. Cas. 18.

——S. 35—Report by Court peon in execution proceedings.

The peon's return in execution proceedings being an official record made by a pubiic servant in the discharge of his official duty, is admissible in evidence. (1919) P.H.C.C. 465=53 Ind. Cas. 20.

——S. 35—Rsport of Municipal overseer—Admissibility of, in evidence.

The report of a Municipal overseer as to when the construction of Chajja took place is admissible in evidence. 12 A.L.J. 740=16 Cr. L. J. 78=26 Ind. Cas. 670.

——S. 35—Report of Tahsildar—When evidence.

The report of the Tahsildar when acting as a commissary to the Court is good evidence. 39 P.L.R. 1915=226 P.W.R. 1915=28 Ind. Cas. 87.

——S. 35—Report of process server.

Report of a process server is admissible in evidence to prove the facts reported by him. 35 Mad. 670= 22 M.L.J. 35=10M.L.T. 413=(1911)2 M.W.N. 434=12 Ind. Cas. 679.

——S. 35—Report by Tahsildar to Collector—Public Record—Admissibility.

A report by a Tahsildar to the Collector to the effect that a village Munsif reports that certain charities had not commenced is inadmissible to prove the fact that the charities had not commenced on a particular date because though a single document may be a public Record under S. 35 of the Act, every statement made by a public servant is not admissible to prove the fact which it relates. 11 M.L.J. 315=21 B. 695=31 A. 457= 1 I. A. 209, Dist, 7 M.L.J. 117, relied upon. 35 Mad. 21=14 Ind. Cas. 401.

11. Revenue Records.

——S. 35—Entries in old revenue records—Correctness—Presumption.

Even if there is no statutory Presumption regarding the entrier of **Ford Hissa Kassi or parat Mal Gujari,** document prepared by revenue authorities it can be presumed, where they are old, that in the absence of anything proved to the contrary the entries contained therein were correct. A.I.R. 1950 Pepsu. 55.

——S. 35—Revenue records—Entries in Deara Survey Records—Evidentiary vale.

It may be, that the Deara Survey Records do not raise the same presumption that attaches to the C. S. Records under S. 103 (B), Bengal Tenancy Act. but the entries in the record of rights prepared for Deara purposes are a valuable piece of evidence under S. 35 Evidence Act. A.I.R. 1946 Cal. 326=50 Cal. W. N. 382=228 Ind. Cas. 67=I.L.R. (1946) 1 Cal. 325.

——S. 35—Revenue records—Entries in public records—Chowkidari Assessment Register, entries in—Genuineness.

Where the entries in a Chowkidari Assessment Register are found to be otherwise genuine, the mere fact that the name of a person appear. in the Register even after his death. does not necessarily prove that the Assessment Register is not genuine. A.I.R. 1946 Pat. 231=25 Pat. 1=221 Ind. Cas. 683.

——S. 35—Revenue Records—Sanadas granted by City Survey Officer are not documents of title as between the holder and a party other than the Government. A I.R. 1944 Bom. 245=46 Bom. L.R. 441.

——S. 35—Revenue records.

Nazarana entries in Fahrist tabdilat, made in remarks column, instead of in jamabandi—Entrant not called as witness—Reliability.

When an official act has been regularly performed and all the safeguards which the law imposes have been correctly followed, the mere flaw that the entry has been made in a different column or place is not sufficient so as to vitiate it. The rule is sufficiently observed if its spirit and substance are complied with even if there be any unessential defect.

A Patwari, instead of making the nazarana entry in the remarks column of jamabandi, made it in the Fahrist tabdilat, and submitted to the same authority at the same time:

Held, that there was a mere irregularity in making the entry in a particular place rather than another, and does not invalidate it, Hence it can be relied upon, though the Patwari may not have been called as a witness. A.I.R. 1944 Nag. 314=1944 N.L.J. 339= I. L. R. Nag. 331.

——S. 35—Entries in revenue papers.

The entries in the revenue papers must, in the absence of any evidence to the contrary, be deemed to be correct. A.I.R. 1942 Oudh 70=1941 O. W. N. 1057=1941 A.W.R. 819=196 Ind. Cas. 421.

——S. 35—Revenue records.

The entries in the Revenue Records cannot be regarded as anything more than prima face proof of the matters to which they relate. A.I.R. 1936 Oudh 65 =1935 O. W. N. 1183=1935 R. D. 520=158 Ind. C 2.

——S. 35—Revenue records—General Land Register of Rawalpindi Cantonment.

Held, that it was not possible to place implicit reliance upon General Land Register of Rawalpindi Cantonment without corroborative evidence from other records of the Cantonment Board or other testimony of an unimpeachable character. A.I.R. 1935 Lah. 588=37 P.L.R. 236=36 Cr. L. J. 1475=158 Ind. Cas. 858.

——S. 35—Revenue records—Entries in village papers.

The person in possession with his name recorded in the village papers is a representative of the deceased only for the purposes of realisation of land revenue and for no other purpose. Consequently, a decree obtained against a person who is not the rightful heir but whose name is recorded, is not bindiug on a person claiming adversely to the person whose name is recorded in the khewat. A.I.R. 1934 All. 474=150 Ind. Cas. 323.

——S. 35—Revenue record—Relevancy to show land was used as thoroughfare.

Entries in the Revenue Record made by a public officer in discharge of his duty are relevant for the purpose of showing that the land was found to be used as a road or a thoroughfare when the entries were made. A. I. R. 1936 Lah. 921=38 P. L. R. 1169=167 Ind. Cas. 524.

——S. 35—Revenue records.

The entries in the Revenue Surveyor's Register are of evidentiary value in themselves. A.I.R. 1934 Rang. 139=150 Ind. Cas. 898.

——S. 35—Revenue record—Entries as to valuation.

Where the law does not require valuation to be given in the register of Record of Rights, the entries in the Record of Rights as to valuation are irrelevant and hence inadmissible under S. 35, Evidence Act. A. I. R. 1933 Nag. 310=146 Ind. Cas. 152.

——S. 35—Revenue records—Admissibility of.

The facts which it is the duty of the Revenue officer to record, are admissible in evidence under S. 35 of the Act. 9 S.L.R. 143=32 Ind. Cas. 548.

——S. 35—Revenue records—Entries about rent.

It seems clear from Bengal Regulation (7 of 1822) that the recording of the rates which appear in the **rubkars** of the Collectors is a duty imposed upon them by the regulation itself and the matters so recorded are evidence which the Court is entitled to take into consideration in settling the question of enhancement of rent. 109 Ind. Cas. 136=9 P. L. T. 679=A.I.R. 1928 Pat. 429.

——S. 35—Revenue records.

Certified copy of a paper in Collectorate not strictly fulfilling the test of S. 35, Evidence Act is not sufficient to rebut presumption under S. 50 (2), B. T. Act. 78 Ind. Cas. 719=28 C.W.N. 679=39 C. L. J. 389=A.I.R. 1924 Cal. 654.

——S. 35—Revenue records.—The collection papers which have not been proved by persons who make the collections should not be treated as independent evidence of the amount of rent realised. 71 Ind. Cas. 300=A.I.R. 1924 Cal. 370.

——S. 35—Revenue records.—Entries in.

Bombay Land Revenue (Amendment) Act (1913). S. 7—Entries under are not conclusive but are evidence of fact—Evidence Act, S. 35. 123 Ind. Cas. 166=32 Bom. L. R. 368=57 I. A. 61=51 C. L. J. 592=32 M.L.W. 34=A.I.R. 1930 P.C. 93=58 M.L.J. 322 (P.C.).

——S. 35—Revenue records.

Extracts from supplementary revenue records are not sufficient to prove mortgage. (2 U. B. R. (1907-1909) Evidence 19, Foll.). 1 Rang. 562=77 Ind. Cas. 380=A.I.R. 1924 Rang. 135.

——S. 35—Revenue records.—Under S. 35 of the Evidence Act, the entry in Revenue Register No. VII is a relevant fact. 76 Ind. Cas. 449=1 Rang. 135=A.I.R. 1923 Rang. 196.

——S. 35—Revenue records.—Revenue records as made in Burma are relevant evidence ueder S. 35. 74 Ind. Cas. 47=1 Bur. L. J. 111=A.I.R. 1923 Rang. 57.

——S. 35—Revenue records—Entry in road cess return.

The fact that certain lands were entered in a road cess return filed by a person in respect of lands held by him under the zamindar is **prima facie** evidence that they were not held adversely to the zemindar and the presumption cannot be got over unless, it is estahlished that the lands were erroneously included. 61 Ind. Cas. 469=25 C.W.N. 106=A.I.R. 1921 Cal. 754.

——S. 35—Revenue papers—Admissibility.

In order that rent collection papers produced by an officer of the landlord who deposed that they were in his custody may be admissible. Evidence must be let in as to who wrote the papers and who collected the rents. (10 C. L. R. 545, Foll. 16 C. L. J. 328=17 C.W.N. 774=17 Ind. Cas. 266.

——S. 35—Revenue records—Entry in Government register.

An entry in a Government register that a certain person is paying revenue under a settlement does not necessarily imply that he has an independent title by virtue of the settlement where he got that property as heir of a certain person. 1 Pat. L.T. 602.

——S. 35—Revenue papers—Entries in—Value of.

Where a person is entered in the revenue papers as an under proprietor but it appears from other evidence that he does not hold such a status, the entry in the revenue papers is of no avail to him for the purpose of establishing his title as an under proprietor. 5 O.L. J. 513=47 Ind. Cas. 754.

——S. 35—Revenue papers—Entries in—Value of.

Old entries in revenue papers as to the plots held by ordinary tenants and as to the rate of rent payable by them are not by themselves evidence as to the fixing of rent by a competent authority or by action of parties nor do they raise a presumption to that effect. 3 O.L. J. 468=37 Ind. Cas. 27.

——S. 35—Revenue records.

In the absence of any evidence to the contrary entries in the revenue papers must be deemed to be correct. 8 O C. 145, Foll. 65 Ind. Cas. 749=8 O.L. J. 495.

——S. 35—Revenue Records—Entry in—Proof of title.

The proceedings of a Revenue Court demarcating the boundaries of villages are not the only tests of title to any land included in the village. 240 P.L.R. 1914 =26 Ind. Cas. 341.

——S. 35—Revenue records.

Even if the entries do not come under the Local Tenancy Act, they are relevant under S. 35 of the Evidence Act, being made by a public officer in the discharge of his duties. 5 Cal. 744, Foll. 82 Ind. Cas. 886=40 C.L.J. 331=A.I.R. 1925 Cal. 116.

——S. 35—Reve ue register—Entries in—Value of.

An entry made in a revenue register, without any explanation as to how it originated or was brought into existence is, if it is inconsistent with other known facts, not entitled to any weight. It is not open to a partition officer of the Revenue Court to convert private property into Debutter, by giving it a particular designation. His proceedings are not conclusive as between a party to the partition and strangers. 2 O.L. J. 259=30 Ind. Cas. 240.

——S. 35—Revenue records—Land records—Entry —Effect of.

The fact that a man's name appears in the Revenue records is not conclusive evidence either of title or possession. 35 Bom. 487=13 Bom. L. R. 879=12 Ind. Cas. 356.

——S. 35—Revenue records—Land Records Register No. IX.

Entry in the register means a report or note of a transaction which is already effected; the entry itself does not effect the transaction. A pyat paing or the outer foil of Land Records Register IX, not signed by the person making report of the transaction to which it refers, is not admissible in evidence to prove the report. The pyat-paing does not become a written report unless signed by the person reporting. 5 L.B.R. 40=2 Ind. Cas. 535.

——S. 35—Revenue records—Batwara papers.

A Batwara signed by the partition Deputy Collector and containing entries required by the provisions of Ch. 7, is a record made in the course of official duty within the purview of S. 35, Evidence Act. 38 Ind. Cas. 20,5 Ref. 114 Ind. Cas. 479=7 Pat. 85=10 P.L.T. 399=A.I.R. 1929 Pat. 32.

——S. 35—Revenue records—Batwara papers.

Batwara papers relating to partition proceeding between landlords can be used as evidence to show that certain lands were rent free. 86 Ind. Cas. 835=29 C.W.N. 333=A.I.R. 1925 Cal. 635.

——S. 35—Revenue records—A Batwara Khasra is not a "record" within the meaning of S. 35 of the Evidence Act, 1872, and an entry made therein of the name of a tenant in possession is not admissible in evidence. 68 Ind. Cas. 676=A.I:R. 1923 Pat. 163.

——S. 35—Revenue records—A Batwara Khasra is admissible in evidence. 38 I.C. 491, **Foll.** 72 Ind. Cas. 634=A.I.R. 1922 Pat. 447.

——S. 35—Batwara papers.

In a suit for enhancement of rent Batwara papers are not evidence againts the tenants. 1 Pat. L.J. 409=35 Ind. Cas. 678.

——S. 35—"Batwara Khasra"—Bengal Estates Partition Act (VIII B.C. of 1876)

A "Batwara Khara" prepared under Act VIII of 1876 is not a record within S. 35 of the Evidence Act and cannot be relied upon for rebuting the presumption raised by the "Record of Rights". 17 C. L. J. 462= 17 C.W.N. 779=18 Ind. Cas. 143.

——S. 35—Batwara Khasra—Public record.

Public record does not include **Batwara Khasra** prepared under S. 54, Beng. Estates Partition Act, (1896.) 8 Ind. Cas. 890 (Cal.).

——S. 35—Butwara papers—Admissibility.

Butwara papers can be admitted in evidence against parties to the Butwara proceedings in order to rebut the presumption raised by record of rights. 17 C.W.N. 779, Dist. 38 Ind. Cas. 205. (Pat.).

——S. 35—Batwara papers—Third parties.

In the batwara proceedings, the evidence of the **Batwara** papers is altogether inadmissible against those that are not parties to the proceedings. 37 Ind. Cas. 829 (Pat).

——S. 35—Revenue records—Chittas.

Chittas are admissible in evidence, though what their value should be is a matter to be determined by the Court in the particular circumstances of the case. 105 Ind. Cas. 61=A.I.R. 1928 Cal. 63.

——S. 35—Chittas—Bengal Estates Partition Act— Admissibility in evidence against landlord.

The map and chitta prepared by the partition Amin under the provision of S. 54 of the Bengal Estates Partition Act and proved to have been accurately prepared or to have been accepted and acted upon by the landlord are, independently of S. 35 of the evidence Act admissible in evidence against the landlord for the purpose of proving what lands were held by what tenants. 49 Ind. Cas. 984 (Cal.).

——Ss. 35 and 13—Chittas—Assessment proceedings—When admissible.

Proceedings taken for assessment of rent upon rent free lands, the petition originating the proceedings, reports of the Collector and orders of the Board of Revenue, altogether furnished a valuable evidence as to the recognition by the Govt. of the right of the plffs. predecessors in title to hold the land rent-free. Chittas prepared by Govt. for explaining and as part of proceedings taken for assessment of rent upon lands said to be improperly held rent free are admissible in evidence when coupled with resumption proceedings. An entry in a public register kept for the public benefit under the sanction of official duty is relevant under S. 35 whether the clerk making the entry had personal knowledge or not or whether the register was a copy of a previous register which had become untidy. 19 C. W. N. 1938=31 Ind. Cas. 41.

——S. 35—Chittas—Admissibility.

Chittas are **per se** admissible in evidence but must be strictly proved. 8 Ind. Cas. 715 (Cal).

——S. 35—Chittas.

A Butwara Chitta is not admissible in evidence under S. 35 of the Evidence Act. 1 Ind. Cas. 807 (Cal.).

——S. 35—Choukidari chakran lands register.

Entries in a register of Choukidhari Chakran Lands are not admissible under S. 35. 13 C.W.N. 71=1 Ind. Cas. 376.

——S. 35—Collector's certificate—Value of.

A certificate issued by the Collector in respect of immoveable property in Madras is only evidence of revenue registry and does not afford any title or security as to ownership. 1 L. W. 649=27 Ind. Cas. 14.

——S. 35—Revenue records—Entry in Collector's book, effect of, on title, evidence of.

Per Chandavarkar and Jacob JJ. The facts that certain lands are entered in the Government records in the name of a particularperson is not sufficient by itself to prove that person's ownership in those lands. It can only be evidence of that person's title as owner, when taken with something else. Per **Aston J.**, diss:—The fact that certain lands are entered in the Government records in the name of a particular person is material though not conclusive evidence of his title to those lands. (1903) 5 Bom. L.R. 956.

——S. 35—Revenue records—"Faid Rewaj Bhaoli" —Admissibility in evidence.

Whether or not the **"Faid Rewaj Bhaoli"** is a part of the Record of Rights to which a presumption of correctness is attached under S. 103 (b) of the Bengal Tenancy Act, it is admissible under S. 35 of the Evidence Act being a public record prepared by the revenue officers as part of the Record of Rights. 1 Pat. L.W. 677=Ind. Cas. 505.

——S. 35—Revenue records—Hissawari.

A **hissawari** prepared in consequence of a demand by the Collector under S. 30, Bengal Land Registration Act, is not admissible under S. 36 of the Evidence Act as it is not a public or other official book, register or record. 59 Ind. Cas. 8=1919 P.H.C.C. 323.

——S. 35—Revenue records—Inam register.

The Inam Register is a great act of state and is entitled to very great weight. In particular cases some reasons may be given why the inam register might be discounted. But the absence of any proof that the Inam Commissioner made some actual enquiry is no such reason as could depreciate the authenticity of the Inam Register. 88 Ind. Cas. 646=22 M. L. W. 73= 1925 M.W.N. 117=A.I.R. 1925 Mad. 823=48 M.L.J. 467.

——S. 35—Revenue records—Inam Register— Entries in—Value of—Tenure of land.

The preparation of the Inam Register (1864) was a great act of state and the result of elaborate inquiries and though the statements as to the character of tenure set forth in the Register cannot displace actual and authentic evidence in individual cases, they are entitled in the absence of such evidence, to very great weight. 43 Mad. 253=24 C.W.N. 249=37 M. L. J. 460=26 M.L.T. 479=(1919) M.W.N. 850=10 L. W. 642=17 A.L.J. 1097=46 I.A. 204=22 Bom. L.R. 457=53 Ind. Cas. 288 (P.C.) [Reversing (1915) M. W. N. 650=33 Ind. Cas. 216.]

——S. 35—Jamabandi.

Enries in jamabandi made in due course of law are presumed to be correct. A.I.R. 1938 Lah. 479=40 P.L.R. 209=176 Ind. Cas. 252.

——S. 35—Revenue record.

Entries in Khatauni jamabandi that have come into existence consequent upon a decree are admissible under S. 35, Evidence Act, but the entries to be made under U.P. Land Revenue Act, 1901, are intended to be based upon the facts as to possession under S. 40, and when it is plain that the party was not in possession on their merits as evidence, these entries add nothing. Apart from the particular provisions of the Act, entries is such Government records are evidence of title mainly because they are good evidence of possession, but if contrarty to the facts as to possession at the time they were made, they carry little, if any, weight. A.I.R. 1937 P.C. 69=18 P.L.T. 257=3 B.R. 368=1937 A.W.R. 459=1937 O.W.N. 396=45 L. W. 580=41 C.W.N. 577=16 Pat. 258=1937 M.W.N. 593 =1937 A.L.J. 638=39 Bom. L.R. 731=31 S.L.R. 242 =(1937) 2 M.L.J. 631=65 C.L.J. 241=167 Ind. Cas. 329 (P.C.).

——S. 35—Revenue records—Jamabandi papers.

Where the question is as to whether a certain land is or is not parjaut land, an entry in the jamabandi is admissible and is of great value. 87 Ind. Cas. 368= A.I. R. 1926 All. 83.

——S. 35—Revenue records.

Jamabandi prepared by landlord is admissible to show basis of assessment. 25 C. W. N. 204, Foll. 90 Ind. Cas. 862=5 Pat. 157=7 P.L.T. 375=1926 P.H. C.C. 19=A.I.R. 1916 Pat. 197.

——S. 35—Revenue records—Jamabandi is not a record of customary cess. 71 Ind. Cas. 432=A. I. R. 1923 All. 378.

——Ss. 35 and 74—Revenue Records and Jamabandies—Entries in—value of.

Where Revenue Records and Jamabandis were in favour of the defts. and plff's. predecessor in title agreed to the mutation in deft's. name:

Held, that title having passed to the defts.' plaintiff's possession was only permissive and in the capacity of co-shareres could not ripen into ownership. 48 P.W.R. 1915=124 P.L.R. 1915=26 Ind. Cas. 481.

——S. 35—Revenue records—Katardhar papers.

The katardhar papers drawn up under the Punjab Land Reservation Act are public documents provable by certified copies thereof; 63 P.R. 1913. Fol. 117 Ind. Cas. 80=11 L.L.J. 188=A.I.R. 1929 Lah. 328.

——S. 35—Revenue records—Jamawasil Baki papers—Admissibility of.

Jamawasil Baki papers prior to the fresh patnti but after the original patni are admissible against the patnidar. 2 Ind. Cas. 998 (Cal.).

——S. 35—Khasra pamaish.

Khasra Pamaish is a document prepared under the orders of the Government and it should be held to be relevent under S. 35, Evidence Act, and admissible though the weight to be attached to it is a different matter. A.I.R. 1938 Lah. 751=40 P. L. R. 298=179 Ind. Cas. 262.

——S. 35—Revenue records—Khatauni and khasras.

Entries in khatauni and khasras cannot be regarded as instruments of title but are mere items of evidence. A.I.R. 1937 Oudh 370=1937 O.W.N. 544=168 Ind. Cas. 302.

——S. 35—Revenue records—Khasra.

Survey Khasra and the map are not merely "historical materials" but are within the phrase "instruments of title or otherwise" he direct foundation of rights. A.I.R

1936 P.C. 83=1936 O. W. N. 153=38 P. L. R. 182=40 C. W. N. 449=13 P. L. T. 177=70 M. L. J. 455=1936 A.L.J. 480=1936 A. W. R. 317=43 L. W. 685=160 Ind. Cas. 579 (P.C.).

——S. 35—Revenue records—Abadi khasra.

In order that a document be admissible under S. 35 of the Evidence Act, it is not necessary that a public servant should be compellable by legislative enactment to discharge the duty of preparing or keeping it. An abadi khasra prepared by the Amin when the Sub-Divisional Officer ordered a survey of the cultivated area of the village at the instance of the Nazul Officer, is admissible under S. 35, Evidence Act, and can be relied upon. A.I.R. 1935 Oudh 268=1935 O.W.N 230=. 479=10 Luck 659=154 Ind. Cas. 570.

——S. 35—Entries in khasra.

The entries made in the khasra being entries made in an official record by public officers in the discharge of their duties, are themselves relevant facts and may be considered by the Courts as evidence of possession from which the Courts may, if they think fit, draw an inference as to title. A.I.R. 1937 Pat. 567=18 P.L.T. 464=4 B.R. 71=171 Ind. Cas. 732.

——S. 35—Revenue records.

Where the khasra is not in conflict with the Record of Rights but is more explanation of it in the sense of giving greater detail, it is admissible for such purpose only. A.I.R. 1937 Pat. 333=170 Ind. Cas. 187.

——S. 35—Revenue records.

The entries in the khewat are inadmissible in evidence for the purpose of showing that a person is a cosharer. A. I. R. 1937 All. 529=1937 A. L. J. 751=1937 A.W.R. 500=170 Ind. Cas. 769.

——S. 35—Wajib-ul-arz—Khewat register—Entries in—Evidentiary value of.

Entries in the Khewat register of a village and the wajib-ul-arz are evidence of facts stated therein and their importance may vary with circumstances. They are not by themselves conclusive evidence of the facts recorded. It may turn out that they are in accordance with the general bulk of the evidence in the case they may supply gaps in it; and they may in short, form a not unimportant part of the testimony in case. They should not however be given any greater weight. 42 All. 368=7 O. L. J. 48=2 U. P. L. R. (P.C.) 37=38 M.L.J. 521=23 O. C. 1=18 A. L. J. 532=22 Bom. L.R. 596=28 M. L. T. 5=56 Ind. Cas. 306 (P.C.). [On appeal from 3 O.L.J. 454=36 Ind. Cas. 780.]

——S. 35—Revenue records—Khewat.

Khewat entry—Origin of entry known—Entry alone should not be relied upon. 94 Ind. Cas. 188=13 O.L.J. 126=A.I.R. 1926 Oudh 427.

——Ss. 35 and 112—Entry in Khewat—If relevant to prove legitimacy—Defts. not parties to it.

An entry in a Khewat founded on a mutation proceedings showing the plaintiffs to be the reputed sons of a certain person is relevant in proving their legitimacy though, the defendants were not parties to such proceeding. 1 O.L.J. 89=23 Ind. Cas. 972.

——S. 35—Entries in Khewat.

Entries in Khewat as to certain persons (defendants) being in possession of certain land as mortgagees which have been attested by those persons amount to an admission by those persons that they are in possession as mortgagees. 34 Ind. Cas. 165 (All.).

——S. 35—Entries in Khewat—Regulation (VII of 1832), S. 9.

Entries in Khewat and Khataunis are admissible in proof of mortgage as the words "the real nature and extent of interests" apply to the case of a mortgage. 31 All. 247=6 A. L .J. 197=2 Ind. Cas. 215.

——S. 35—Revenue records—Maps and surveys.

Though the maps and surveys made in India for revenue purposes are official documents prepared by competent persons, and with such publicity and notice to persons intended as to be admissible and valuable evidence of the state of things at the time they are made, still, are not conclusive, and may be shown to be wrong. But in the absence of evidence to the contrary, they may be properly judically received in evidence as correct when made. A.I.R. 1939 Cal. 148=68 C.L.J. 293.

——Ss. 35, 83—Revenue records—Discrepancy between Gangetic survey map and later cadastral survey map.

The Gangetic survey map cannot be very strong evidence of possession and cannot have the same value as evidence of title as the revenue map. Where there is conflict between Gangetic survey map and a later cadastral survey map, the latter map must be given preference.

The cadastral survey entry has a peesumptive value against a landlord of a neighbouring village.

Where the lands are culturable and definite acts of possession, such as tilling, sowing and reaping the crop, etc., be exercise over them, the presumption of actual possession raised by the suevey entry would be stronger than where the land is wholly unfit for cultivation. But it does not necessarily follow that the land which is covered which sand or water is wholly incapable of possession or such lands must in all cases be regarded as no man's land. A.I.R. 1933 Pat. 671=15 P.L.T. 28=13 Pat. 51=149 Ind. Cas. 1095.

——S. 35—Revenue records—Maps.

No inference can be drawn from thak map whether a particular river was included in the grant of permanent settlement. Thak authorities having nothing to do with title or possersion: 30 Cal. 291 and 22 Cal. 252, Rel. on. 103 Ind. Cas. 13=31 C.W.N. 473=46 C.L.J. 322=A.I.R. 1927 Cal. 403.

——S. 35—Revenue records.

Agreement to be bound by survey map—Is binding on parties. A.I.R. 1922 Pat. 87.

——S. 35—Revenue records—Thak and survey maps are not conclusive proof.

It cannot be maintained as a matter of law that thak and survey maps constitute sufficient proof that what was part of the bed of the river at that time was included in the Permanent Settlement of 1793; and, no Court can properly act, on the assumption that in 1793 a state of things existed different from what apears from any evidence before the Court. 71 Ind. Cas. 849=36 C.L.J. 336=A.I.R. 1923 Cal. 247.

——S. 35—Revenue records—Settlement map is more reliable than khasra.

Inasmuch as the Settlement map forms the original record of area of a field and the entry in the khasra is no more than its copy, the former is more reliable in case of conflict between the two in respect of the area. 99 Ind. Cas. 628=A.I.R. 1928 Nag. 204.

——S. 35—Perganah register—Konungo Register—Thak Map and statement—Admissibility of.

The Perganah and Konungo Registers are not punctually kept and are not admissible in evidence to prove an omission of an entry therein as to lekheraj. The konungo account and the General and Mauzawar Registers being intended to facilitate the collection of the Government dues, there was no authority to enter therein lekheraj nor the subject matter of resumption procedings. The Thak officers not being empowered to measure and record lekherajs of less than 50 bighas in area, the ommission of lekherajs in the Thak statement is not of any probative value. 45 Cal. 574=22 C.W.N. 396=47 Ind. Cas. 49.

——S. 35—Boundaries—Thak and survey map settlement.

It cannot be presumed as a matter of law that the boundaries of an estate as shown in the thak or Survey Map are identical with the boundaries as they stood at the time of Permanant Settlement, but it is open to the Court to presume, in the circumstances of a particular case that the condition of the locality has not changed materially between the date of the Permanent Settlement and the time of the Revenue survey. 12 C.L.J. 216=7 Ind. Cas. 140.

——S. 35—Revenue and Survey maps—Evidentiary value of.

Revenue Survey maps are evidence of title and possession. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary they may be properly and judicially received in evidence as correct when made. 12 C.W.N. 273=7 C.L.J. 414.

——S. 35—Maps—Thak and survey maps—Relative value of.

As ageneral rule the thak and the servey maps should agree. Where they differ the one that more clearly agrees with the local land-marks is the one which should be followed. There is no general or definite rule making it incumbent upon the court to follow either; the court may, if it considers the **thak** map more reliable, follow that in preference to the survey map. 6 C.W.N. 629.

——S. 35—Mahalwar register.

Copies of entries in Mahalwar Register kept under S. 4 of (VII of 1876) are admissible in evidence but mere signature of the Supdt. of Survey on a corner does not make the document one kept by him. 19 C.W.N. 764=34 Ind. Cas. 283 (P. C.).

——S. 35—Revenue records—Entry in mauzawari register.

An entry in a mauzawari register is admissible for what it is worsh, under S. 35, Evidence Act, Cantonment Committee. A. I. R.. 1931 P.C. 1=60 M. L. J. 142=33 L.W. 41=35 C.W.N. 173=53C.L.J.1=33 Bom. L. R. 175=1931 A. L. J, 249=1931 M. W. N. 41=58 Cal. 858=57 I. A. 339=34 P. L. R. 455=130 Ind. Cas. 616 (P.C.).

——S. 35—Revenue records.

An entry in the mouzawari register is admissible, for what itis worth, under S. 32. 57 I.A. 339=35 C.W.N. 173=A.I.R. 1931 P. C. 1=1931 M.W.N. 41=33 Bom. L. R. 175=53 C. L. J. 1=33 M. L. W. 41=130 Ind. Cas. 616=1931 A.L.J, 249=58 Cal. 858=60 M. L. J. 142 (P. C.).

——S. 35—Revenue records—Mutation Register—Entries in Evidence.

Where a gift of land is followed by possession as well as mutation of names in the Revenue Registers there can be no doubt as to the factum of the gift. 149 P. W. R. 1942=159 P. L. R. 1912=16 Ind. Cas. 889.

——S. 35—Revenue reeords—Mutation Proceedings.

A regular enquiry made by a Revenue Officer in the matter of succession at the time of effecting mutation of names is relevant. 120 P. W. R. 1909=4 Ind. Cas. 965.

——S. 35—Revenue records—Partition proceedings—Regulation (XIX of 1814).

Certified copies of the papers in the Collectorate which **Prima facie** appear to be the record of a partition made in a proceednig under Regulation 19 of 1814 between the predecessor of the parties to a suit are good and admissible in evidence apart from S. 35 of the Evidence Act. 23 C. W. N. 48=45 Ind. Cas. 921,

——S. 35—Parwana or grant, transaction of.

As Ss. 65 and 91 make it clear that when a written grant is lost secondary evidence can be given of it only as defined by law, a translation of parwana or grant forming the enclosure to the report of a public officer is not admissible as secondary evidence of the contents of the grant under any of the Ss. 63, 32 (2) or 35. 4 L.W. 331=35 Ind. Cas. 201.

——S. 35—Patwari papers—Presumption as to correctness.

There may be a presumption that what is entered in the patwari's papers is correct but that presumption is rebuttable. 10 Ind. Cas. 280. (All).

——S. 35—Revenue record—Pedigree table—Admissibility.

A pedigree table prepared for purposes of settlement. which is the basis of the entries in khewat, is relevant under S. 35, Evidence Act, if prepared in discharge of public duty. 1926 Oudh 101, referred to. A.I.R. 1949 H. P. 11.

——S. 35 and 74—Remove record—Pedigree contained in estate notebook maintained under Court of Wards Manual—Evidentiary value.

A pedigree contained in an estate notebook maintained under S. 332 of the Court of Wards Manual prepared under the U. P. Court of Wards Act, is an official document prepared by a public authority in pursuance of a statutory duty, and is admissible in evidence, though it is not conclusive evidence of the fact stated therein. A criticism against this document that it does not show the sources on which the Court of Wards based its findings, is not a criticism of weight against a public document. The Court must assume that the Court of Wards did its duty to the best of its ability, and bassed the pedigree on material of the accuracy of which it was satisfied. 225 Ind. Cas. 188=1946 M.W.N. 497=1946 A.L.J. 280=50 C.W.N. 729=59 L.W. 483=1946 O.A. (P.C.) 135=1946 A. W. R. (P.C.) 135=A.I.R. 1946 P. C. 103=I.L.R. (1946) Kar. (P.C.) 111=1947 A.L.W. 5=1947 O.W.N. (P.C.) 5=(1946) 2 M.L.J. 235 (P.C.).

——S. 35—Revenue records—Pedigree.

Settlement pedigree amounting to statement of deceased with special knowledge before controversy or prepared

in discharge of public duty is admissible under Evidence Act, S. 35. 3 O.L.J. 327 ; 1 O. L. J. 447 : 19 O. C. 321 and A.I.R. 1926 Oudh 101, Appl. 112 Ind. Cas. 834=4 Luck. 39=6 O.W.N. 1285=A.I.R. 1929 Oudh 129.

——S. 35—Revenue records—Perepatraks.

Perepatraks are admissible in evidence to show actual area under crop. 90 Ind. Cas. 38=A. I. R. 1926 Nag. 161.

——S. 35—Revenue record—Pyatpaing.

A pyatpaing (Foil of Register VII) is admissible in evidence, though it has not been signed by the transferor and transferees, where it was proved by the Surveyor who recorded it. 98 Ind. Cas. 166=5 Bur. L. J. 116=A. I. R. 1926 Rang. 204.

——S. 35—Revenue records—Quinquennial papers.

The Quinquennial Register of 1795 kept under the Bengal Regulation 48 of 1793 is admissible in evidence to rebut the presumption under the B. T. Act, S. 50 (2). 86 Ind. Cas. 538=A.I.R. 1925 Cal. 1037.

——S. 35—Revenue Records.

The registers prepared under Regulation 48 of 1793 (Bengal) and now maintained under Act, VII of 1876, **e. g.**, Mutation, Quinquennial and Settlement Registers, are public documents.

The entries in these registers are receivable in evidence **quantum valeat** for what they are worth. They are, however, not conclusive and may be shown to be inaccurate. 75 Ind. Cas. 955=2 Pat. 839=A.I.R. 1924 Pat. 213.

——S. 35—Revenue records—Quinquennial papers prepared by the Revenue authorities from 1795 to 1799 under the provisione of Regulation 48 of 1793 containing information as to the lands comprised in revenue-paying estates in the district of Mymensingh are admissible in evidence. 20 Cal. 940, **Foll.** 65 Ind. Cas. 866=34 C. L. J. 141= A.I.R. 1921 Cal. 687.

——S. 35—Revenue records—Rasadbandi.

The rasadbandi or the chowkidara papers are not admissible in evidence as public documents. 94 Ind. Cas. 125=27 P.L.R. 198=A.I.R. 1926 Lah. 452.

——S. 35—Draft record-of-rights—Entries in—Admissibility and value of—B. T. Act, S. 103-B (5).

Although the entries in the draft record-of-rights do not carry any presumption of correctness as in the case of those in the finally published record-of-rights, such entries are admissible in evidence under S. 35 of the Evidence Act, and their evidentiary value depends on the facts and circumstances of each particular case. I.L.R. (1949) 1 Cal. 433.

——S. 35—Entries in Record of Rights prepared for deara purposes 50 C.W.N. 382.=A.I.R. 1946 Cal. 326.

——S. 35—Revene—records—Record of rights.

Mutation proceedings are not "judicial proceedings", in which title to and proprietary right in immovable property are determined They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid. A.I.R. 1934 All. 300=1934 A.L.J. 92 =18 R. D. 181=3 A.W.R. 362=151 Ind. Cas. 793.

——S. 35—Revenue records.

Where a narrow strip of land adjoining two contiguous plots is claimed by the parties as included in heir respective plots, the question cannot be determined on the basis of the entry in the Record of Rights alone. The other evidence in the case also has to be taken into consideration. A. I. R. 1934 Cal. 294=58 C.L,J. 478=149 Ind. Cas. 1109 (2).

——S. 35—Revenue records—The value of the Record of Rights as evidence in proof of severance or separation is slight. A.I.R. 1938 Pat. 603=5 B. R. 5=177 Ind. Cas. 682.

——S. 35—Revenue records.—No entry in the village-Record of Rights can supply the place of a title deed and a transferee who acts on such an entry as evidence of the title of his transferor, cannot be held to have acted in good faith. A.I.R. 1934 Oudh 165=11 O.W.N. 421=9 Luck. 571=148 Ind. Cas. 422.

——S. 35—Revenue records—Record of Rights.

Records-of-Rights—The draft record is admissible only or the purpose of showing what was the entry made in the earlier proceedings before the final publication. 108 Ind. Cas. 417=A.I.R. 1928 Pat. 353.

——S. 35—Revenue records.

The Record-of-Rights is a public record prepared by public officers appointed under the statutory authority of the Local Government and, therefore, is admissible under S. 35. 96 Ind. Cas. 959=30 C.W.N. 689=A.I.R. 1926 Cal. 862.

——S. 35—Revenue records—Record-of-rights. cadastral map and revenue survey map are prima facie correct.

Revenue Survey map should be properly judicially received in evidence as correct when made. 30 Cal. 291 (P. C.). A Cadastral Survey Map is a map of very great importance. The entry in the Record-of-rights operates in the same way between landlord and tenants, as between landlords of the same or of the neighbouring estates, or between tenant and tenant. The entry must be presumed to be correct until it is shown by evidence to be incorrect. 84 Ind. Cas. 488 =1924 P.H.C.C. 213=A.I.R. 1924 Pat. 719.

——S. 35—Draft record-of-rights—Entry in.

An entry in a draft record-of-rights that a certain tank is known by a certain name is not admisible in evidence. 45 Cal 159=21 C.W.N. 996=25 C.L.J. 619 =41 Ind. Cas 116.

——S. 35—Revenue records—Govt. Records—Dispute as to ownership of land.

The plaintiff claimed a large tract of land formerly under the river Ganges as forming part of the permanently settled Zemindari. Three sets of documents were relied on, **viz.**, firstly, a plan of survey conducted by Major Rennel between the years 1773, secondly the hakikhat chowhuddibandi (boundary) papers which were returns submitted to the Government in a Government form in pursuance Government request for the year 1799 and made by the owners of the zemindari and sent in to the Government, thirdly the Government Survey map made in 1859, **held,** that they were all admissible in evidence as they were in the custody and the possession of the Government, by whom they were carefully kept and certainly regarded as documents of great importance, that as between the zemindars and Government they must be accepted as **prima facie** accurate and that the evidence established the plaintiff's claim except that the bed of the river was the property of the Government. 26 C.L.J. 590=1918 M. W. N. 28=22 M. L. T. 438=20 Bom. L. R. 49=43 Ind. Cas. 361 (P. C.).

——S. 35—Revenue record—Settlement record.

The entry in the current settlement record carries with it a strong presumption of correctness unless it is rebutted. A.I.R. 1941 Pat. 260=22 P. L. T. 699=195 Ind. Cas. 313.

——Ss. 35, 36—Remarks of Settlement Officer during enquiry into title not inter partes.

Statements made at a time when the title to a portion of a taluqa was under enquiry are not admissible when not inter partes in a suit in which the title to the taluqa is in question. A. I. R. 1936 Oudh 340=163 Ind. Cas. 770.

——S. 35—Revenue records—Douie's Settlement Manual, Appendix VII, para. 12.

Directions in Douie's Settlement Manual, para. 12 of Appendix VII, merely refer to settlement operations and are not applicable to the preparation of jamabandi papers. A.I.R. 1934 Lah. 309=151 Ind. Cas. 407.

——S. 35—Revenue records—Extra Assistant Settlement Officer preparing history of particular sect.

A history of a particular sect prepared by an Extra Assistant Settlement Officer does not form part of the settlement record and has no presumption of truth attached to it but may be of some value if at the time it was prepared, there was no dispute. A.I.R. 1934 Lah. 1=154 Ind. Cas. 375.

——S. 35—Revenue records—Settlement register.

Where Settlement Register of 1876 was signed by Acting Director of Revenue Settlement and was dated from the Revenue Settlement office:

Held, it cannot be too clearly premised, that any such record would not be held to be conclusive evidence of ownership; but upon the other hand one cannot be blind to the importance of such a document which appears, de facto, to have settled the bounds of the possession of certain plots for a period of thirty-five years (that is to say, from 1876 to 1910). 68 Ind. Cas. 1=45 Mad. 565=16 M.L.W. 247=31 M.L T. 1=49 I.A. 237=24 Bom. L.R. 1214=21 A.L.J. 250=27 C.W.N. 317=36 C.L.J. 524=A.I.R. 1922 P.C. 325=43 M.L.J. 586 (P.C.).

——S. 35—Revenue records—Village notes.

Stuart, C.J.—Where a Settlement Officer inspected a village and recorded in respect of it certain remarks, they are admissible in evidence under S. 35, being entries in a public record made by a public servant in discharge of his official duty. 99 Ind. Cas. 876=2 Luck. 4=4 O. W. N. 15=8 L. R. A. Rev. 48=A. I. R. 1927 Oudh 74.

——S. 35—Revenue Records—A village note prepared by a Settlement Officer is only a piece of evidence and no presumption of correctness is attached to it. 90 Ind. Cas. 579=3 Pat. L.R. 225=A.I.R. 1925 Pat. 754.

——S. 35—Settlement Khatian—Entries in.

Entries in the Settlement Khatian afford prima facie evidence by the truth of the statements. 29 C.L.J. 607=52 Ind. Cas. 650.

——S. 35—Entry by settlement officer as to custom—Admissibility.

In making an entry of village customs in the village note the settlement officer is acting as a public servant in the discharge of his official duty and as such the entry is admissible in evidence. 1 Pat. L. W. 344=(1918) P.H.C.C. 36=39 Ind. Cas. 222.

——S. 35—Paimash and settlement registers—Entry in.

Mere entry in Paimash and settlement registers that a certain in tank in Government Poramboke, does not prove that the tank is Government property. 33 Mad. 362=7 M.L.T. 139=20 M.L.J. 74=5 Ind. Cas. 118.

——S. 35 — Settlement records — Jarad Rewaj Bhaoli.

A Jarad Rewaj Bhaoli prepared by a Settlement Officer in discharge of his official duty is admissible under the section. 1 Pat. L.W. 238=2 Pat. L.J. 187=38 Ind. Cas. 176.

——S. 35—Settlement records—Entry—Value of.

An entry, in a previous settlement, if charged by another in a latter settlement without there being any reason or record for such a charge, makes the latter entry unauthorised without any evidentiary value. 133 P.W.R. 1915=31 Ind. Cas. 287.

——S. 35—Settlement Records and Jamabandis—Correctness of.

In the absence of satisfactory evidence to the contrary, entries in the Settlement Records and the annual jamabandis must he accepted as correct. 79 P. W. R. 1915=154 P.L.R. 1915=29 Ind. Cas. 893.

——S. 35—Settlement Records of recent settlements—Evidentiary Value.

The records of the recent settlements are more reliable than those of the old ones. 180 P.L.R. 1914=81 P.W.R. 1914=24 Ind. Cas. 908.

——S. 35—Settlement record—Entries in.

There is a presumption until the contrary is proved that the entries in a settlement record are correct. 34 All. 612=10 A.L.J. 190=17 Ind. Cas. 94.

——S. 35—Settlement records.

The settlement Records prepared under Reg. VII of 1882 are relevant under S. 35. 39 Cal. 304=12 Ind. Cas. 147.

——S. 35—Revenue records—Hunter's Statistical Survey—Private rights.

Reference cannot be legitimately made to statements in Hunter's statistical account of Bengal for establishing private rights. 17 C.W.N. 1173=18 C. L. J. 399=21 Ind. Cas. 233.

——S. 35—Revenue records—Survey Khatian—Road cess returns—Evidentiary value of.

A cadastral survey Katian must be taken to be correct unless there is evidence to the contrary. Road cess returns filed by a landlord are no evidence against the tenants. 55 Ind. Cas. 645 (Cal.).

——S. 35—Survey papers.

Entries in supplementary survey maps and registers supported by no reliable evidence do not prove a claim for redemption in the absence of other reliable evidence. 4 Ind. Cas. 1084.

——S. 35—Survey records, admissibility of.

Entries of the extents of survey fields made in survey registers are admissible under S. 35 to prove an encroachment though insufficient to prove title to the extent encroached upon. 2 L.W. 413=29 Ind. Cas. 154.

——S. 35—Thakbast proceedings—Proceedings before revenue officers—Value of.

Though decisions in proceedings before the court of the Thakbast Deputy Collector and those under Reg.

11 of 1819 do not estop the parties to the same extent as those in regular proceedings in courts of law, such determinations are obviously of high authority and when acquiesced in by all the parties interested for a length of time and made the basis of important transactions, should not be disturbed unless upon the clearest proof that they are erroneous. 18 C.W.N. 1281 =16 M.L.T. 290=27 M.L.J. 356=1.L.W. 807=(1914) M.W.N. 757=16 Bom.L. R. 925 =20 C.L.J. 563=25 Ind. Cas. 309 (P.C.).

——S. 35—Revenue records—Village papers.

A definition of "shares" in revenue and village papers affords by itself but a very slight indication of an actual separation. A.I.R. 1920 P.C. 46, Foll. 113 Ind. Cas. 773=A.I.R. 1929 Lah. 74.

——S. 35—Village records—Entries in—Admissibility.

Declarations such as those of Kanungoes, entries in the village records by the officer charged by Govt. with that duty, and answers given to official inquiries made under Govt. direction, as to the rules of succession prevailing in particular families are prima facie admissible in evidence as purporting to be made by the proper officer in performance of a special duty and presumably with due regard to the rules laid down for his guidance. 31 All. 457=36 I.A. 125=10 C.L.J. 216=13 C.W.N. 1073=6 A.L.J. 767=11 Bom. L. R. 890=12 O.C. 304=19 M. L. J. 605=4 Ind. Cas. 25 (P.C.).

——S. 35—Revenue records—Writs of attachment.

Where writs of attachment issued in 1792 and 1797 must have been prepared when the Collector took possession of the Zemindari upon default in payment of revenue by the proprietor and the documents might be relevant in connection with the history of the estate and might be used to show that the proprietor defaulted and the Collector went into possession, but there was nothing to indicate that the duty was cast upon the Collector to prepare a complete record of all the tenures then in existence:

Held, that in view of the scope of the two attachment writs no inference favourable to the landlord can be drawn therefrom and they cannot be treated as relevant under S. 11. 71 Ind. Cas. 383=36 C.L.J. 389=A.I.R. 1923 Cal. 261.

(12) School Certificates and Registers.

——S. 35—School register—Entry as to age—Value of.

Entries in school registers are of little value as evidence of age, when there is no evidence to show on what materials the entries were made. A. I. R. 1941 Cal. 41 and A.I.R. 1936 Lah. 598, Foll. 52 P. L. R. 324.

——S. 35—School register.

Where there is no evidence to show on what materials the entry in the school register about the age of a person was made, the statement in the register about his age has no evidentiary value. A.I.R. 1941 Cal. 41 =72 C.L.J. 208=45 C.W.N. 141=I.L.R. (1941) 1 Cal. 234=193 Ind. Cas. 419.

——S. 35—School register—Entry—Admissibility.

The entry regarding the age of the boy in the school register is admissible. A.I.R. 1941 Pesh. 38=194 Ind. Cas. 824.

——Ss. 35, 32 (5)—Entry regarding date of birth of boy.

In accordance with the instructions in the Educational Manual, the date of birth of a boy attending school for the first time has to be ascertained from his parent or guardian and entered in the register, and the date of birth in any school that he attends later is merely copied from the transfer certificate of the previous school. The entries regarding date of birth made in the registers of later schools are admissible under S. 35 of the Evidence Act as entries made by a public servant in a public or official register in the discharge of his official duty. Whether he had any special means of knowledge so as to make the entry relevant under S. 32 (5) of the Evidence Act, does not affect the admissibility of the entry under S. 35, though it may affect its value. Section 35 stands by itself independently of S. 32 (5). A.I.R. 1940 Nag. 217=1940 N.L.J. 150=186 Ind. Cas. 613.

——S. 35—Registers of schools other than Government or State schools.

According to the definition of 'public servant' in S. 21 (9), I.P.C., the employees only of a Government or State school are public servants. Hence an entry made in a school register by an employee of a school other than a Government or State school is not one made in a public or official register by a "public servant' in the discharge of his official duty. The entries, therefore, in registers of schools, other than Government or State schools are not admissible in evidence under S. 35, Evidence Act. A.I.R. 1940 Rang. 191=1940 Rang. L.R. 481=191 Ind. Cas. 21.

——S. 35—School certificates and registers.

Held, that the entries in school register were of little value as evidence of age. A.I.R. 1936 Lah. 598=38 P.L.R. 69 (1)=164 Ind. Cas. 751.

——S. 35—Entry made by teacher in admission register of private elementary school is not admissible in evidence.

1936 M.W.N. 111.

——Ss. 35, 32 (5)—School certificates and registers—Date of birth.

Where the question is as to the age of a person, the entry of the date of his birth in the school register based upon the statements of his deceased father is admissible in evidence under sub.s—S. (5) of S. 32 and also under S. 35 of the Evidence Act, the entry being in a public register stating the fact in issue and made by a public servant in the discharge of his official duties. A.I.R. 1935 Oudh 41=11 O.W.N. 1589=10 Luck. 423=152 Ind. Cas. 1042.

——S. 35—Admissibility prove to age.

A school register being duly prepared according to authority, is admissible to prove the age of a person whose date of birth is entered therein. A.I.R. 1934 Nag. 44=16 N.L.J. 232=149 Ind. Cas. 660.

——S. 35—School certificates and registers—Entries by Educational Department.

Entries in the conduct book maintained by primary school authorities, application for admission in the High School monthly progress reports maintained under the rules of the Education Department in which plaintiff is described as the son of a person are relevant as evidence of the conduct of parties, proving the fact of adoption. A.I.R. 1934 Nag. 1=16 N. L. J. 319=30 Nag. L.R. 62=150 Ind. Cas. 1007.

——S. 35—Age of pupil.

Where there is an official duty cast upon any officer or minister to make an entry, and in pursuance of such a duty, he duly makes entries in his register, such entries are admissible in evidence.

Under the standing orders, there is a duty imposed upon the school master to enter the age of all pupils whom he admits in his registers and such entries, therefore, are admissible in evidence to prove the age of the persons concerned. A.I.R. 1932=28 Nag. L.R. 127=140 Ind. Cas. 66 (2).

——S. 35—School certificate and registers.

An extract from school register is admissible to prove age. A. I. R. 1931 Bom. 178=33 Bom. L.R. 111=130 Ind. Cas. 598.

——S. 35—Age.

A school admission register is good evidence as to age. A.I.R. 1931 Mad. 707=34 L. W. 262=61 M.L.J. 430=54 Mad. 883=135 Ind. Cas. 9.

——S. 35—School certificate and registers.

Where the question is as to the age of a person, the entry of his date of birth in the school register based upon the statements of his deceased father is admissible under S. 35, the entry being in a public register stating a fact in issue and made by a public servant in discharge of his official duty. 114 Ind. Cas. 801=5 C.W.N. 1111=A.I.R. 1929 Oudh 113.

——S. 35—School certificate and registers—Copy of a school leaving certificate given by a school masters in a Native State wherein the age of the pupil is recorded and certified, as required by S. 78, Cl. (6), by the Political Agent assigned to that State by the Government of India, is admissible in evidence under S. 35. 99 Ind. Cas. 307=50 Bom. 716=28 Bom. L.R. 1225=A.I.R. 1927 Bom. 11.

——S. 35—School certificate and registers—Entries in School Register as to age are relevant. 83 Ind. Cas. 840=11 O.L.J. 164=A.I.R. 1924 Oudh 353.

——S. 35—School certificate and registers—Certain entries from a School Register at Bikaner, which were not proved, are not sufficient to show that the defendant was actually at Bikaner at the time of the entries. 80 Ind. Cas. 177=A.I.R. 1923 Lah. 607.

(13) Scope.

——S. 35—Scope—Official reports—Statements and narrative in—Admissibility.

The narrative and statements in official reports are admissible in evidence under S. 35 of the Evidence Act and even a statement in a judgment may be brought in under S. 35. I. L. R. (1949) Cut. 465=A. I. R. 1950 Orissa 19.

——S. 35—Scope—Officer directing manner in which notification is to be published—Notification published in Gazette and signed by same officer—Presumption.

Where an officer, who has directed the manner in which a notification is to be published, has himself signed the notification which is published, in the Gazette, it must be presumed that the publication is in the manner in which the officer has directed it to be. A.I.R. 1946 Mad. 449=47 Cr. L.J. 948=226 Ind. Cas. 423=1946 M.W.N. 474 (1)=(1946) 1 M.L.J. 397.

——Ss. 35, 74—Scope — Applicability of Ss. 35 and 74.

Sections 35 and 74, Evidence Act presuppose that the document which has been produced is really an extract from an official register. A.I.R. 1942 Cal. 309=74 C.L.J. 574=46 C.W.N. 309=200 Ind. Cas. 749.

——Ss. 35, 32—Scope—Statement to Village Munsif by wife of murdered describing events resulting in killing of her husband—Wife committing suicide same evening—The trial of accused for murder—Statement of wife, held was not admissible either under S. 32 or S. 35 Evidence Act. A.I.R. 1942 Mad. 450=1942 M.W.N. 291=(1942) 1 M.L.J. 503=43 Cr. L. J. 810=202 Ind. Cas. 290.

——S. 35—Scope—Requirements.

The very wording of S. 35, Evidence Act, conveys the idea of a duty imposed upon the maker of the entry by law or his official position to record the information he possesses or has gathered in an official document of the nature described therein. It further imports that the entry will be of a permanent nature and thus excludes all such writings as are merely of an ephemeral character and in so far as they do not incorporate the result of personal inquiries, are not intended to be used for reference in future. Further, the person making the entry should be such as is invested with authority to record a decision which, so far as the matter before him is concerned, will be final. It thus excludes all views expressed before the final stage is reached and makes only those decicions relevant which constitute the final word in the matter.

Held, that the letters which passed between the various officials cannot be admitted under S. 35 so as to make the remarks made therein as legal evidence in the case. Where the final conclusions arrived at were recorded in the settlement papers, those are the only documents which can be consulted in the decision of the cases. A. I. R. 1936 Lah. 37=38 P. L. R. 748=165 Ind. Cas. 626.

——Ss. 35, 36—Scope—Chitta produced by zaminda in prior suit and found to be genuine and corroborated by other evidencd does not come under Ss. 35 or 36, Evidence Act, but it will be admissible under S. 11 or 13, Evidence Act. 164 Ind. Cas. 603=39 C.W.N. 330.

——S. 35—Scope—Opinion of public officer from allegations made before him in inquiry under S. 202, Criminal P. C., or under O. 26, Civil P. C.

The words "an entry" in S. 35, Evidence Act, are not intended to apply to the opinions of public officers based on or inferences drawn from the allegations made before them in the course of inquiries conducted under S. 202. Criminal P. C., or under O. 26, Civil P. C., but are confined only to such statements of facts in issue or relevant facts as are made by the public officers concerned, in the course of their official duty, and are required to be entered in any book, register or record intended for the purpose. This section is apparently an exception. Such opinions cannot be considered sufficient to prove the truth of the assertions made therein without the test of cross-examination. A.I.R. 1934 Lah. 890=37 P. L. R. 519=16 Lah. 377=155 Ind. Cas. 1040.

——S. 35—Scope—Entries in maintenance register of estate-holders by Manager, Encumbered Estates, Sind—Admissibility.

Where certain entries in the maintenance register of estate-holders kept by the Manager, Encumbered Estates, Sind, showing that a person was treated by the family and the Manager as the widow of the deceased estate-holder and that her maintenance allowance was stopped as she contracted a second marriage, were offered in evidence :

Held, that the entries were admissible and that S. 35, Evidence Act, is not restricted to the class of cases where public officer has to enter in a register or other book some actual fact which is known to him. A.I.R. 1933 Sind 317=27 Sind L. R. 101=150 Ind. Cas. 279.

——S. 35—Scope—Record of Rights.

Where, under a given rule of law, extreme evidential value is to be assigned to a given piece of evidence, the probative force of such piece of evidence cannot be extended to collateral matters. A.I.R. 1932 All. 35=1931=A.L.J. 360=131 Ind. Cas. 555.

——S. 35—Scope.

A recital in the order of President of a Union Board is not admissible under S. 13 or 35, Evidence Act unless such president has been examined with regard to that recitation. A.I.R. 1931 Mad. 487=1931 M.W.N. 366=32 Cr. L. J. 367=131 Ind. Cas. 654.

——S. 35—Basis and scope.

S. 35 covers public documents of Native States or foreign countries. 99 Ind. Cas. 307=50 Bom. 716=28 Bom. L. R. 1225=A.I.R. 1927 Bom. 11.

——S. 35—Basis and Scope.

The section is based upon the circumstance that in the case of official documents entries are made in the discharge of public duty by an officer who is authorised and accredited agent appointed for the purpose. The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity. 78 Ind. Cas. 719=39 C.L. J. 389=28 C.W.N. 679=A.I.R. 1924 Cal. 654.

——S. 35—Scope—Letter of Govt. of India.

A letter of the Govt. of India in which Anaesthesine is included in the list of recognised preparations is not admissible in evidence. 32 P.W.R. 1917 (Cr.)=18 Cr. L. J. 934=42. Ind. Cas. 166.

——S. 35—Scope—Correspondence between officials.

The entry mentioned in S. 35 must be in some book or register or record. Mere correspondence conducted between officials is not the thing meant. 7 M.L.T. 117=(1910) M.W.N. 547=5 Ind. Cas. 827.

(14) Miscellaneous.

——S. 35—Miscellaneous.

Document neither shown to be prepared by public servant nor shown as forming the act or record of public officer is inadmissible. 120 Ind. Cas. 547=1930 A.L.J. 244=1930 Cr. C. 42=31 Cr. L. J. 133=A.I.R. 1930 All. 26.

——S. 35—Missellaneous—Entry in vaccination register regarding father's name of illegitimate child made three years after child's birth is inadmissible in evidence. 1930 Cr. C. 88=1929 M.W.N. 696=2 M. Cr. C. 275=A.I.R. 1930 Mad. 194=126 Iud, Cas. 13.

——S. 35—Miscellaneous—House registers.

House registers not prepared by any Covernment Officer, or by any pubtic servant whose duty it was to prepare them, though kept in the record room of the Deputy Commirsioner, are inadmissible in evidence. The mere fact that they are kept in public office does not lead to the inference that they are pub.ic documents : 107 Ind. Cas. 1618=A.I.R. 1928 Lah. 640.

——S. 35—Miscellaneous.

Prescription register in Government dispensary is admissible though handwriting is not proved. 103 Ind. Cas. 512=1 L.C. 203=A.I.R. 1927 Oudh 310.

——S. 35—Miscellaneous—A cersificate of theManchester Chamber of Commerce stating that there was a national strike in England resulting in the shortage of coal supplies and in difficulty of manufacture by the mills of the contracted goods is not a public record within S. 35.

93. Ind. Cas. 622=28 Bom. L. R. 232=A.I.R. 1926 Bom. 253.

——S. 35—Miscellaneous—Attendance register of association—Oral testimony to prove its being such necessary. 88 Ind. Cas. 22=7 L. L.J. 264=26 Cr. L.J. 1078=26 P.L.R. 566=A.I.R. 1925 Lah. 299.

——S. 35—Miscellaneous—District Gazetteer, if evidence.

A passage in a District Gazetteer describing the lineage of one of the leading families of the district cannot supply the want of a pedigree showing the family and the members of it. 6 O.L.J. 337=52 Ind. Cas. 851.

——Ss. 35 and 65—Entry in—Register of previous conviction—Admissibility of.

An entry in a register of previous convictions, where the convictions is relevant, is admissible under S. 65 and can be proved by a certified copy under S. 65 of the Act and upon it accused might be asked if he admitted the conviction. 19 Cr. L.J. 11=42 Ind. Cas. 923.

——S 35—Miscellaneous— Postal endorsements — Proof.

An endorsement on the cover of a letter by a postal peon is at best a record of a statement of the peon and must be proved by calling him as a witness unless the statement becomes admissible under S. 32 (2) or S. 33. Such an endorsement is not admissible even as a statement made by a public officer in the discharge of his duty. 20 C.L.J. 455=19 C.W.N. 489=26 Ind. Cas. 962.

——Ss. 35 and 157 — Miscellaneous — Tambol Register.

A Tambol register or paper is relevant to corroborate the testimony of a witness who proves the happening or hot happening of a certain event at or about the time of the wedding when he is shown to have paid the Tambol personally. 86 P.W.R. 1910=213 P.L.R. 1910 =7 Ind. Cas. 505.

——S. 36.

Synopsis.

1. Burden of proof.
2. Maps prepared under Government's authority.
3. Survey and Thak maps.
(a) Evidentiary value.
(b) Prefercnce.
4. Miscellaneous.

(1) Burden of proof.

——S. 36—Burden of proof.

An entry in a thakbast map is not sufficient to enable a Court of fact to hold that the disputed lands were really included in an estate at the time of the Permanent Settlement. They may be good evidence as to what the boundary of a particular plot was at the time of the Permanent Settlement. The revenue survey maps are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary they may properly be judicially received as correct when made. It may also be clearly presumed that the boundaries mentioned in the maps were the boundaries which existed at the time of the Permanent Settlement but they do not go further and do not show that the lands measured and included in a particular mauza were settled, at the time of the Permanent Sattlement, with a particular man. This has to be proved by evidence aliunde. The onas of proving that the lands

shown in the survey map as belonging to a particular mauza were included in the Permanent Settlement of 1793, is upon the plaintiffs who affirm that such was the case. 30 Cal. 297=30 I. A. 44, Foll. 75 Ind. Cas. 955=2 Pat. 839=A.I.R. 1924 Pat. 213.

——S. 36—Burden of proof—Permanent Settlement—Onus of proving that certain lands were included in the settlement is on party affirming same—Production of thak and survey maps does not necessarily shift onus. 65 Ind. Cas. 866=34 C.L.J. 141=A. I. R. 1921 Cal. 687.

——S. 36—Thak and Survey Maps—Burden of proof—Evidentiary value.

The state of things described in the thak and survey maps cannot be presumed to have existed at the time of the Permanent Settlement. The question what lands were included in the Permanent Settlement is a question of fact and not of law, which may not be satisfactorily proved by subsequent survey maps. The onus of proving that any particular lands were included in the Permanent Settlement of 1793 is clearly on those who affirm that such was the case, and the burden of proof is not necessarily shifted by the production of the thak and survey maps, showing that specific lands are included in a particular estate. The thak and survey maps are valuable evidence of the state of things at the time they were made, but it does not follow that they show conclusively what was the state of things at the time of the Permanent Settlement. 30 C. 291, foll. (1906) 3 C.L.J. 316.

——S. 36—Thak map—Value of—Onus of proof—Suit for declaration of title.

In a suit for recovery of possession of cetrain lands and declaration of title, defendants said that the lands belonged to them as their lakhiraj and that the burden of proving that the lands were mol lay on the plaintiff, and further contended that the thak maps of the village (which showed no such lakhiraj lands) was no evidence in the case. **Held,** that the thak map was evidence in the case as at the time the thak map was made tn the paesent case, it was necessary to show in such maps lakhiraj lands as might be claimed, and that there was no ground for interfering with the lower appellate Court's judgment with regard to the objection as to onus. (1902) 7 C.W.N. 612.

——S. 36—Burden of proof—Thakbust and Survey maps—Act IX of 1847, Ss. 3, 5 and 6.

In a suit for wrongful assessment, the onus is on the person asserting that the lands were included in the Permanent Settlement. Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive. The onus is on the person affirming that the lands were included in the Permanent Settlement. Assuming lands not to be within the Permanent Settlement of 1793, the last survey made under S. 3 of Act 9 of 1847 is to be taken as the starting point for deciding, when the next survey is made, whether lands are within Ss. 5 and 6 of that Act. But when the question is whether lands shown on a particular thak or survey map made after 1793 were or were not included in the Permanent Settlement, the last map cannot be acted upon in the absence of evidence to the contrary. It by itself does not shift the onus on the defendant. (1902) 5 Bom. L.R. 1=7 C.W.N. 193=30 C. 291=30 I. A. 44 (P.C.).

(2) Maps prepared under Government's authority.

——S. 36—Printed maps.

Printed maps showing different wards of a city are admissible not only under S. 83, but also under Ss. 36 and 87, Evidence Act. A. I. R. 1942 Bom. 161=44 Bom. L. R. 295=I. L. R. (1942) Bom. 357=201 Ind. Cas. 430.

——S. 36—Sale stopped—Copy sold by mistake.

Where the sale of copies of maps printed by Government is stopped and a copy is sold to a party by mistake, the copy is inadmissible. Section 36, Evidence Act is applicable to such a copy. A.I.R 1941 Cal. 193 =44 C.W.N. 935=72 C. L. J. 320=195 Ind. Cas. 412.

——S. 36—Map prepared under Government's authority.

A plan which is signed by the Executive Engineer and Sub-Divisional Officer of P. W. D. when land was transferred to the District Board must be presumed to be accurate under S. 83, Evidence Act, and the measurements thereon are admissible under S. 36 of the Act. A. I. R. 1937 Lah. 155=17 Lah. 843=39 P.L.R. 143=38 Cr. L.J. 438=167 Ind. Cas. 573.

——S. 36—Maps prepared under Government's authority—Map prepared for partition affecting public revenue is admissible though for limited purpose. 90 Ind. Cas. 643=A.I.R. 1926 Cal. 290.

——S. 36—Batwara map at partition proceedings—Admissibility against tenants.

A Batwara map prepared in a partition proceedings between the proprietors of an estate is not admissible against tenants of the estate, if it was prepared after their tenancy was created. But where a commissioner is appointed to make an enquiry with reference to the map and no objection is taken to if admissibility, it is admissible. 56 Ind. Cas. 138 (Cal.).

——Ss. 36 and 83—Maps and plans prepared under authority of Government—Admissibility—Standing by, when amounts to abandonment of one's rights—Government and private owner, difference between.

Maps and plans and statement prepared under the authority of Government for a public purpose must be presumed to be accurate under S. 83 and that the statements contained in them are relevant facts under Ss. 35 and 33 of the said Act. When such documents prepared in 1871 show that a certain piece of land belonged to Government the onus is on the person who sets up acquisition of title to it to prove it. 35 All. 197=11 A.L.J. 233=18 Ind. Cas. 797.

(3) Survey and Thak maps.

(a) Evidentiary value.

——S. 36—Evidentiary value—Survey map—Ex parte statements.

Ex parte statements in survey maps should be regarded not as primary proof but merely corroborative proof—But if they relate to distant times and no direct evidence is available, their value assumes greater proportion. 113 Ind. Cas. 703=A.I.R. 1928 Pat. 284.

——S. 36—Evidentiary value.

The revenue survey map is no doubt evidence of title and possession, but where there is no satisfactory direct evidence of acts of possession on the part of either of the parties, the evidence of possession of the

cadastral survey entry must prevail until it is rebutted. 104 Ind. Cas. 514=8 P.L.T. 817=A.I.R. 1928 Pat. 36.

——S. 36—Evidentiary value—Survey maps prepared under Calcutta Survey Act are admissible as evidence of possession. (C. C. **Ghose, J.**)—Survey map is admissible evidence of state of things at the time it was made. 102 Ind. Cas. 370=31 C. W. N. 419=45 C. L. J. 474= A.I.R. 1927 Cal. 345.

——S. 36—' Thak ' meaning.

Per Mullick, J.—The words "as per Thak" mean as per thak pillars. 96 Ind. Cas. 1027=1926 P. H. C. C. 210=A.I.R. 1926 Pat. 385.

——S. 36—Evidentiary value.

Thak maps are good evidence of possession at the time they were made, but they are no evidence of title acquired by prescription or adverse possession. 72 Ind. Cas. 648=1 P. L. R. 322=4 P.L.T. 487=A. I. R. 1923 Pat. 558.

——S. 36—Evidentiary value—A Survey map presumably prepared in the presence and to the kuowledge of the parties is evidence between the parties quantum valeat. Primarily it is evidence of possession which is always evidence of title. 10 W. R. 300, Foll. 64 Ind. Cas. 326=3 Pat. L.T. 140=1 Pat. 65=A. I. R. 1922 Pat. 58.

——S. 36—Evidentiary value—Maps and Surveys in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible as valuable evidence of the state of things at the time they are made. 30 Cal. 291 (P. C.), Foll. 59 Ind. Cas. 298=2 P.L.T. 81=A.I.R. 1921 Pat. 268.

——S. 36—Evidentiary value—Thak map is valuable evidence in suit between successors of parties to the thak proceedings who were present. 66 Ind. Cas. 923= 34 C.L.J. 465=A.I.R. 1921 Cal. 277.

——S. 36 — Thak or survey maps — Value in evidence.

The maps are not evidence, strong enough to shift the burden of proof, nor do they raise a strong presumption that the state of things as shown in the maps did actually exist at the time of settlement. The question is one of fact and must be determined on the facts and circumstances of each case. 24 C.W.N. 639=31 C.L.J. 320= 57 Ind. Cas. 29.

——S. 36—Evidentiary value—Thak and Survey maps—Entries in—Presumption—Rebuttal.

The presumption of genuineness of Thak and Survey maps furnishing valuable evidence of possession and title at the time they were made, is rebuttable. 21 C. L. J. 157=19 C.W.N. 1280=27 Ind. Cas. 954.

——S. 36—Thak and Survey maps—Evidentiary value of—State of things at permanent settlement.

An entry in a Thakbust map is sufficient evidence to entitle a court to hold that the disputed lands were really included in the estate at the time of the Permanent Settlement. 15 C.W N. 706, Foll. 17 C. W. N. 151= 15 Ind. Cas. 341.

——S. 36—Thak map—Entries in value of.

A decree, which was awarded to the plaintiff Zamindar in an action in ejectment and which rested on an entry in the remark column to the thakbust map made during the survey proceedings on an ex parte statement of the Zamindar's agent which was immediately contradicted by the defendant, could not be sustained. 15 C.W.N. 887=(1911) 2 M. W. N. 101= 10 M.L.T. 157=13 Bom. L. R. 806=14 C. L. J. 319= 8 A.L.J. 1176=11 Ind. Cas. 542 (P.C.).

——S. 36—Thakbust Map—Value of that Map.

In a suit for possession between a proprietor based on a Thakbust Map. The Thak Map is unquestionably a correct record of the boundary of a village and estates and where it is relaid with substantial accuracy, it proves plaintiff's title. 24 Ind. Cas. 618 (Cal.).

——S. 36—Evidentiary value—Thak and Survey maps—Presumption—Boundaries identical with those as they stood at time of Permanent Settlement.

It cannot be presumed that the boundaries of an estate shown by the thak or survey map are identical with the actual boundaries at the time of the Permanent Settlement but the court in the circumstances of a particular case may hold that the condition of the locality has not changed materially between the date of the Permanent Settlement and the time of the Revenue Survey. 12 C.L.J. 216=7 Ind. Cas. 140.

——S. 36—Thak maps—Evidentiary value—Entry in.

An entry in a thak map, that it was prepared in the presence of the representatives of certain parties, is admissible in evidence. (1903) 7 C.W.N. 849, foll. (1909) 10 C.L.J. 527=4 Ind. Cas. 442.

——S. 36—Evidentiary value—Revenue and Survey Map—How for evidence of title and possession.

The Revenue Survey Maps are evidence of title and possession, and till that evidence is rebutted by other evidence of title, effect should be given to the state of things as indicated by the Revenue Survey maps. (1907) 7 C.L.J. 414=2 C. W. N. 273.

——S. 36—Evidentiary value — Topographical Survey Maps.

Topographical Survey Maps are admissible in evidence to prove boundaries, even though they were not prepared under any statutory authority. They are prepared by competent officers of Government on the best information available to them, and in the absence of better evidence may be relied upon to prove boundaries. 30 C. 291 foll. (1906) 9 C.L J. 415=11 C. W. N. 430.

——S. 36—Thakbust and Survey Maps.

Evidentiary value. (1906) 35 C. 621.

——S. 36—Evidentiary value—Thak maps not conclusive evidence.

Thak maps are not conclusive evidence that the lands shown therein as comprised in a certain estate are a part of that estate. (1904) 9 C.W.N. 383.

——S. 36—Evidentiary value—Thak maps—Presumption of continuance of the same state of things.

The object of the thak map being to delineate the various estates borne on the Revenue roll of the District, the entry in a thak map, that certain lands formed part of a certain estate becomes a relevant fact under S. 36, Evidence Act, and such entries in thak map are evidence on which a court may act. It is open to a court to hold that the same state of thing existed at the time of the permanent settlement. (1903) 7 C.W.N. 849.

——S. 36 and 83—Thak Map—Successive maps—Which is reliable.

It is not right in point of law to direct the Court that in all cases it ought to act on the last thak or survey maps and treat it as decisive in the absence of evidence to the contrary. 2 Ind. Cas. 513 (Cal.).

(b) Preference.

——S. 36—Preference.

When the Thak map and the survey map do not agree, the one that more nearly agrees with local land marks should be followed. 73 Cal. L. J. 47.

——S. 36—Survey and Thak maps—Preference.

Although the Thakbust map is a part of the thak survey, it is not meant to be and is not in fact a scientifically prepared plan, but merely a rough sketch, or at most, an unscientifically prepared plan showing the number and approximate position of the thak marks or dhuis for the guidance of the revenue surveyor who followed after, and who, having picked up and verified the thak marks indicated roughly in the Thakbust map prepared the revenue map by accurate observations made by expert surveyors with scientific instruments. Where it appears that he had the Thakbust map before him when he made his survey and prepared the revenue map then the revenue map must be accepted as shewing the result of the thak survey even more accurately than the Thakbust which was not intended to be scientifically accurate.

The signature of the Revenue Surveyor on a thak map means merely that he has satisfied himself that the boundary accepted and intended by the demarcation staff had been correctly picked up on the ground and correctly surveyed on the revenue survey map. 96 Ind. Cas. 1027=1926 P. H. C. C. 210=A. I. R. 1926 Pat. 385.

——S. 36—"Thak" map—Preference.

In fixing the boundary line between two estates greater weight need not be attached to the Thak map than to the Revenue Survey map. 79 Ind. Cas. 1038=A.I.R. 1924 Cal. 977.

——S. 36—Preference Thak map—Survey maps—Admissibility and respective value.

The rights of property as between two parties cannot be affected by a map drawn for a different purpose not relevant to the subject of the dispute between them. Although the survey officers have at their disposal means of more accurate measurement than the Thak officers, yet no hand and fast rule can be laid down that a survey map is more reliable than a Thak map. The true principle is that the map which more clearly agrees with the local landmarks is the one that should be followed. 19 C.W.N. 565=29 Ind. Cas. 156.

——S. 36—Preference Thak Map—Binding effect.

Thak and Survey Maps afford important evidence of possession at the time they were made and also of title and if made in the presence of the parties or their agents is evidence binding on them. It cannot be definitely said whether a survey map is more reliable than a Thak map; the one which agrees more correctly with the local landmarks is more reliable. 13 C.L.J. 625=6 Ind. Cas. 392.

——S. 36—Preference.

There is no inflexible rule that a survey map must have preference over a thak map. The thak and the survey maps should, as a rule agree. Where the differ, the one that more nearly agrees with the local landmarks is the one which should be followed. There is no general or definite rule-making it incumbent upon the Court to follow either the one or the other. The Court may, if it considers the thak map more reliable, follow that in preference to the survey map. 66 Ind. Cas. 923=34 C.L.J. 465=A.I.R. 1921 Cal. 277.

(4) Miscellaneous.

——S. 36—Hudabandi or boundary papers.

Hudabandi papers are to be accepted as prima facie accurate between Government and the zamindars and the boundaries given therein, unless shown to be erroneous, ought to be regarded as the boundaries of the grant at the time of the Permanent Settlement. A.I.R. 1941 Cal. 223=I.L.R. (1940) 2 Cal. 393=44 C.W.N. 1079 =197 Ind. Cas. 147.

——S. 36—Scope.

The question of limits of a particular revenue mahal is not a matter of public right or public or general interest so as to be within S. 32 (4), nor is a map which is not a published map generally offered for public sale or a map made under the authority of Government within S. 36, Evidence Act. A.I.R. 1937 P.C. 69=18 P.L.T. 257=1937 A.W.R 459=1937 O.W.N. 396=1937 A.L.J. 638=(1937) 2 M.L.J. 631=31 Sind L.R. 242= 16 Pat. 258=1937 M.W.N. 593=39 Bom. L.R. 731= 45 L.W. 580=41 C.W.N. 577=65 C.L.J. 241=167 Ind. Cas. 329 (P.C.).

——S. 36—Map index.

With regard to maps there are certain kinds of indexes which are regarded as inadmissible, but if the index it of a legitimate nature there is no reason why it should not be exhibited along with the map. A.I.R. 1936 Pat 11=16 P. L. T. 730=37 Cr. L. J. 235=160 Ind. Cas. 181.

——S. 36—Site plan.

Site plan prepared for a case has very little probative value on question of title. 120 Ind. Cas. 547=1930 A.L.J. 244=1930 Cr. C. 42=31 Cr. L.J. 133=A.I.R. 1930 All. 26.

——S. 36—Maps in criminal cases.

Maps prepared in criminal cases—Statements of witnesses or information received should not be recorded thereon 92 Ind. Cas. 174=30 C.W.N. 142=27 Cr. L.J. 222=A.I.R. 1926 Cal. 550.

——S. 36—Report referring to map.

Map referred to in Commissioner's report not produced—Commissioner, neither examined nor cross-examined—Statements were admitted in evidence. 77 Ind. Cas. 1048=32 M.L.T. 162=1923 M.W.N. 511=50 Cal. 446=50 I. A. 121=28 C. W. N. 453=4 L. R. P. C. 50=A. I. R. 1923=P. C. 1=45 M. L. J. 444 (P. C.).

——Ss. 36 and 35—Kanungo's map—Value of.

In an enquiry before the Collector, where the question arose whether the property was of the owners of certain Mouzah or whether it was land which formed part of no settled estate and to which the Govt. was entitled, a map prepared by a Kanungo was used. **Held**, that the map did not fall within S. 35 or 36 of the Evidence Act and was inadmissible. 15 Ind. Cas. 459. (Cal.).

——S 37—'Matter of public History'.

The question of title between the trustee and of a mosque and a private person, cannot be deemed to be

a matter of public history with S. 37, I.E.A. 134 P.W.R. 1918=46 Ind. Cas. 119.

——S. 38—Ceylon Insolvency ordinances can be looked into.

Under S. 38 of the Evidence Act, the Ceylon Insolvency Ordinances may be looked into decide question of the deft.'s liability under the Ceylon Law. 14 Ind Cas. 560. (Mad.).

——S. 38—Foreign law—Judicial notice—Zanzibar—Treaty—Order in Council—Court in Zanzibar established by Britain, character of.

Where the Sultan of Zanzibar has retained sovereignty within his territory and permitted Great Britain to establish courts within his territory to deal with specified classes of cases, the courts so established by Great Britain .are Zanzibar law and cannot insist on evidence in proof of it as if it were foreign law. (1900) 26 B. 1 =28 I.A. 121 (P.C.).

——S. 39—Admissibility of recitals.

Because a document is admissible for a certain purpose all recitals, statements and references therein cannot be used as proof of the facts to which they relate. 1930 A.L.J. 564=A.I.R. 1930 All. 299.

——S. 39—Admissibility—Section 27 governs S. 39.

But if the accused wishes to challenge the veracity of the statement that it was on his information that the thing was discovered he may ask the deponent to dopose to the exact words used by him. Then under S. 39 so much of the statement made by him can be given in evidence as the Court considers necessary in that particular case to full understanding of the nature and effect of the statement. 115 Ind. Cas. 1=30 Cr. L. J. 386=A.I.R. 1929 Lah. 338.

——S. 39—Scope.

Section 39 cannot be invoked for the purpose of letting in a confession in respect of which the bar created by Ss. 24, 25 and 26, Evidence Act, has not been removed by S. 27. 115 Ind. Cas. 6=10 Lah. 233=30 P.L.R. 197= 11 L. L. J. 159=30 Cr. L. J. 414=12 A.I. Cr. R. 382= A.I.R. 1929 Lah. 344 (F. B.).

——S. 40—Applicability.

Section 40 applies to a case in which the Court has jurisdiction to decide a matter and one party says it should not do so because that matter has been decided before. 6 Cal. 171, **held no good law in view of.** 23 Cal. 533 (P.C.); 19 All. 277 (P.C.) and 25 Cal. 522, (P.C.). 118 Ind. Cas 857=33 C.WN. 795=49 C.L.J. 441=A.I.R. 1929 Cal. 374 (F.B.).

——Ss. 40, 43, 32 (2)—"British Indian Association." judgment of.

A judgment passed by the British Indian Association on September 22, 1859, which was not filed in the Court of the Financial Commissioner within six months after the passing of the Oudh Estates Act cannot be treated as the decree of a competent Court or as having any legal effect as a decision on a question of title and is not relevant under Ss. 40 to 43 of the Evidence Act.

The fact that such a jndgment is signed by the President of the British Indian Association, who is dead cannot make the judgment admissible under cl. (2) of S. 32 of the Evidence Act. as a statement made by a person in the ordinary course of business if there is no such statement in the judgment upon the point in issue as could have been made by the President in the ordinary course of business. A. I. R. 1943 Oudh 91=1942 O.W.N. 657=18 Luck. 346=205 Ind. Cas. 433.

——Ss. 40 to 43—Findings by Civil Court, whether relevant before Criminal Courts.

The finding on certain facts by a Civil Court is not relevant before a Criminal Court when it is called upon to give a finding on the same facts or **vice versa** in respect of actions **in personam**. A.I.R. 1945 Lah. 23= I.L.R. (1944) Lah. 408=46 Cr. L. J. 296=217 Ind. Cas. 284.

——Ss. 40 to 43—Judgment of Civil Court.

In a criminal trial, it is for the Court to determine the question of the guilt of the accused and it must do this upon the evidence bofore it, and not basing its conclusions on judgments of Civil Courts. The law of evidence does not make a judgment or a decree admissible as a matter of course. Generally speaking, a judgment is only admissible to show its date and legal consequences. A.I.R. 1932 Cal. 293=59 Cal. 137=33 Cr. L. J. 441=137 Ind. Cas. 163.

——S. 40—Findings of Cr. Court.

Findings of a Cr. Court arc not relevant in Civil Court but the Cr. Proceeding may be referred, to test the evidence offered in the civil suit. 8 P. L. R. 1912= 123 P.W.R. 1912=16 Ind. Cas. 491.

——Ss. 40 to 43—Conflicting decisions—Judgment—Admissibility.

The petitioner charged the respondent with having defamed him and the latter was convicted. Thereupon, the petitioner brought a suit for damage for defamation against the respondent but the Civil Court dismissed the suit. The High Court ordered a retrial setting aside the conviction. and the question arose whether a copy of the judgmeut of the Civil Court was admissible in the criminal proceedings:

Held, that the matter was governed by Ss. 40 to 43, Evidence Act, and the judgment was not admissible under any of those sections. A.I.R. 1932 Mad. 254= 35 L.W. 176=55 Mad. 346=1931 M.W.N. 1305=62 M.L.J. 230=32 Cr.L.J .307=136 Ind. Cas. 348.

——Ss. 40 to 43—Decree for possession—Admissibility of Judgment to show its date and legal consequences—Criminal P.C., Ss. 145, 146.

The decree for confirmation of possession and for declaration of title cannot be regarded as conclusive proof that the decree-holder was in possession on the date of the decree.

A judgment is, generally speaking, only admisible to show its date and its legal consequences.

Quaere:—If the decree had been for delivery of possession followed by execution, the proof of formal delivery of possession might well be treated as conclusive proof in favour of the successful complainant; but where there has been no execution and all that exists is a simple declaratory decree, whether the opinion of the Munsif on this matter of possession should have any weight at all with a Criminal Court which has to decide the question of possession on the evidence before it, is doubtful. A. I. R. 1936 Pat. 537=15 Pat. 336=17 P.L.T. 526=37 Cr.L.J. 1126=165 Ind. Cas. 289.

——Ss. 40, 42. 43, 11—Judgments not inter partes, relevancy of.

A judgment other than a judgment referred to in Ss. 40 to 42 may be admissible to prove that a right was asserted or denied under S. 43, Evidence Act or to explain or introduce facts in issue or to explain the

history of the case. But unless a judgment is relevant under Ss. 40 to 42, Evidence Act, it is not evidence at all so far as regards the matter which it decides. A.I.R. 1932 Pat. 105=11 Pat. 50=12 P.L.T. 582=136 Ind. Cas. 577.

——S. 40—Judgment not inter partes.

Observations in a judgment relating to a different matter though connected cannot bind a third party and the judgment itself cannot be evidence against him. 1930 M.W.N. 396=A. I. R. 1930 Mad. 751=32 M.L.W. 850=129 Ind. Cas. 650=59 M.L.J. 321.

——S. 40—Judgment not inter partes.

A judgment not evidence against persons not parties to it—It is admissible only in so far as it shows assertion of title made therein. 97 Ind. Cas. 282=A.I.R. 1926 Pat. 577.

——Ss. 40, 41, 42 and 43—Judgment when operates as estoppel.

A judgment operates as estoppel as regards all findings which are essential to sustain the judgment. 1 Ind. Cas. 808 (Cal.).

——S. 40—Judgment not res judicata.

Judgments not operating as **res judicata** may yet be admissible in evidence. 79 Ind. Cas. 621=A.I.R. 1924 Nag. 422.

——S. 40—Foreign judgment.

Where the subject-matter is a **res** so situated as to be within the lawful control of the State under the authority of which a Court sits, and that authority has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within that jurisdiction, that decision is conclusive, whether, according to the law of another country, it might seem right or wrong. L. R. 4 H. L. 414, Rel. on. 107 Ind. Cas. 352=47 C. L. J. 263=30 Bom. L. R. 753=A. I. R. 1928 P.C. 83.

——Ss. 40, 41 and 42—Lunacy proceedings.

When the question is whether proceedings in lunacy held under Lunacy Act are admissible in evidence in a subsequent suit to show the lunacy of the deft. at a particular time. **Held**, that the orders and reports made under the Act by the Judge before whom the lunacy proceedings were held were admissible. 24 C.W.N. 378=56 Ind. Cas.566.

——Ss. 40, 42—Previous judgment.

The actual decision and the findings arrived at in a previous judgment cannot be used as evidence to decide the point which are at issue in a different case except in cases coming under Ss. 40 to 42, Evidence Act. A.I.R. 1933 Pat. 690=149 Ind. Cas. 1158.

——Ss. 40 to 44—Scope.

The application of S. 13 cannot be extended to allow judgments to be used which are definitely excluded by Ss. 40 to 44, Evidence Act. A. I. R. 1938 Pat. 103 =3 B. R. 206=166 Ind. Cas. 664.

—Ss. 40, 44—Scope—Suit by mother acting as guardian of minor son—Suit for setting aside sale in original side of High Court when property is outside its jurisdiction —Subsequent suit for possession :

Held, that the decision of the suit on the original side of the High Court did not, in any way, bind the parties, and under Ss. 40 and 44, the transferee from the mother could prove that the decision was passed without jurisdiction. A. I. R. 1933 Bom. 398=35 Bom. L. R. 630=57 Bom. 456=148 Ind. Cas. 116.

——S. 41.

See also EVIDENCE ACT, SS. 40, 44.

Synopsis.

1. **Judgment in rem.**
2. **Judgment not in rem.**
3. **Decision of Insolvency Court.**
4. **Decision of Probate Court.**
5. **Grant of letters.**

1. Judgment in rem.

——S. 41—Judgment in rem—Foreign Judgment.

A declaration by a Court affecting the status of a person domiciled within its territory is treated by the comity of nations as being analogous to a judgment **in rem**, and governs succession to movable property. The same principle applies in a matter of succession to immovable property where the law requires the personal law to be followed. Hence, although the judgement of the foreign Court declaring a person to be a validity adopted son of another person cannot be regarded as a judgment **in rem** within the meaning of S. 41, Evidence Act, it is binding on the Courts in British India in matters relating to immovable property situated in British India. A.I.R. 1939 Mad. 693=1939 M.W.N. 180=49 L. W. 287=(1939) 1. M. L. J. 499= I.L.R. (1939) Mad. 507=185 Ind. Cas. 677.

——S. 41—Judgment in rem, when not conclusive.

A judgment **in rem** is not conclusive if it relates to a matter which need not have been controverted or which was not material or which one only came collaterally into question or which was only incidentally cognizable. In order to be a judgment **in rem** binding on the world, there must be a finding on status which is not only the foundation of the judgment but is necessary for it. A. I. R. 1938 Bom. 394=40 Bom. L. R. 571 =I.L.R. (1938) Bom. 529=177 Ind. Cas. 836.

——S. 41—Word 'Court'—Scope of—Judgment of foreign Court creating status of administrator in favour of person in respect of estate of deceased not domiciled within its jurisdiction—Whether binding on Court of other country.

The word 'Court' in S. 41, Evidence Act, does not only mean a Court of British India. Although the expression is not used, the section is clearly dealing with what are known as judgments **in rem**, and, "competent Court" means the Court of any country which is competent to pass such judgment as is referred to in the section, that is to say, a judgment **in rem**. No Court can pronounce a judgment **in rem** binding outside the State in which the Court exercises jurisdiction unless such judgment affects either a thing situate, or a person domiciled with in such state. The only judgment **in rem** as to status absolutely is the judgment pronounced not only according to the law of the domicile, but by the Court of domicile. The judgment of any other Court as to such status would have no extra-territorial force or validity.

The judgment, therefore, of the Alexandria Court declaring a will to be invalid and creating a status of an administrator in favour of a certain person in respect of the estate of the deceased domiciled in Aden has no effect as judgment **in rem** in respect of the properties outside the jurisdiction of the Alexandria Court, that is, outside Egypt and is not, therefore, binding on Bombay Court. A.I.R. 1938 Bom. 394=40 Bom. L.R. 571= I.L.R. (1938) Bom. 529=177 Ind. Cas. 836.

——**S. 41—Judgments in rem.**

Decisions referred to in S. 41 are binding on all parties (**obiter**). 94 Ind. Cas. 235=44 C.L.J. 399=30 C.W.N. 415=A.I.R. 1926 Cal. 568.

——**S. 41—Judgment in rem—Exhaustive nature of section.**

The section is exhaustive as to judgments **in rem** 14 P.R. 1912=157 P.L.R. 1912=96 P.W.R. 1912=14 Ind. Cas. 486.

——**S 41—Judgment in rem and in personam—Judgment in rem is conclusive only as to status and not grounds for deciding the status though adjudicated.**

There is a broad distinction between the effect of a judgment **in rem** and a judgment **inpersonam**. The point adjudicated upon in a judgment **in rem** is always as to the status of the **res** and is conclusive against the world as to that status, whereas, in a judgment in **personam** the point, whatever it may be, which is adjudicated upon (it being as to the status of the), **res** is conclusive only between parties or privies: 110 Ind. Cas. 730=22 S.L.R. 105=.A.I.R. 1928 Sind 21.

——**S. 41—Judgment in rem—Legal character.**

The legal characters that can be conferred or taken away in the exercise of the jurisdiction mentioned in S. 41 do not include the state of being a partner. 110 Ind. Cas. 730=22 S. L. R. 105=A. I. R. 1928 Sind 121.

2. Judgment not in rem.

——**S. 41—Judgments not in rem—Guardianship proceedings—Orders passed in—Admisssibility—Proof of age of minor.**

Orders passed in the guardianship proceedings cannot be treated as a judgment **in rem** as in the case of a grant made under the Succession Act. Even though an order is not a judgment **in rem** or **inter partes** it may be admissible only to prove that such an order had in fact been made but not to prove its contents. The certified copies of the orders passed by the Court in the guardianship proceedings are not, therefore, available even as being judgments to prove the age of the minor. A.I.R. 1950 Cal. 533.

——**S. 41—Judgments not in rem.**

When the father was not made a party to the guardianship proceedings for the custody of his child, the orders passed in those proceedings which were not proceedings **in rem** are inadmissible under S. 41, in subsequent suit involving the issue of the parentage of the child. A.I.R. 1942 Mad. 129=54 L. W. 411=20 Ind. Cas. 39.

——**S. 41—Decision held, not judgment in rem.**

Where, on the death of **R** who was adopted by the widow of **V**, his son brings a suit laying claim to the properties of **V** and the brothers **K** and **G** on the footing that they had all been joint and that the two latter had died without leaving issue and the suit is dismissed on the ground that as **V** was joint with his brother **K**, his widow could not validly adopt a son to him unless she had either his permission or the consent of **K.**, the decision is not a judgment **in rem** according to S. 41 Evidence Act. A.I.R. 1941 P.C. 85=8 B. R. 90=1941 A.W.R. 86=54 L.W. 534=(1941) 2 M. L. J. 733=74 C.L.J. 471=I.L.R. (1941) Kar. (P.C.) 134 Sup.=I.L.R. (1942) Bom. 75=60 I. A. 64=196 Ind. Cas. 518 (P.C.).

——**S. 41—Judgment not in rem.**

Although an order in lunacy is not a judgment which is conclusive against the world as one of the judgments enumerated in S. 41, Evidence Act, it is still relevent and binding upon the parties thereto and those who claim under them just like any other judgment of a civil Court. A.I.R. 1933 Mad. 624=1933 M.W.N. 514=38 L.W. 135=65 M.L.J. 279=56 Mad. 904=147. Ind. Cas. 479.

——**S. 41—Judgment not in rem—Suit for restitution of conjugal rights.**

A suit for restitution of conjugal rights is purely a private suit between two persons. No one else has any right to intervene and the judgment in such a suit cannot possibly be treated as a judgment **in rem.**

The only question raised in a case was whether **A** was or was not the wife of **B** at the time of his death **C** had brought a suit for restitution of conjugal right against her and obtained an **ex parte** decree, and her attempts to have the **ex parte** decree set aside proved abortive :

Held, that S 41, Evidence Act, did not apply to the case, and as the judgment was not that of a Court acting in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, it was not binding on **A** in the suit. A.I.R. 1933 Rang. 250=11 Rang. 198=148 Ind. Cas. 67.

——**S. 41—Judgment not in rem.**

Judment that **A** is not the adopted son of **B** is not one **in rem.** 116 Ind. Cas. 83=26 A.L.J. 797=A.I.R. 1923 All. 395.

——**S. 41**—Judgments not **in rem**—Judgment not falling under S. 41 can be used only in evidence under S. 42—Legal effect of a judgment **in personam** will depend on facts of each case. 67 Ind. Cas. 971=44 Mad. 778=14 M. L. W. 122=14 M. L. W. 188 =1921 M. W. N. 576=A.I.R. 1921 Mad. 248=41 M.L.J. 223=41 M.L.J. 278 (F.B.).

——**S. 41—Judgments not in rem—Decision as to the minority.**

A judgment holding a person to be a minor is inadmissible under S. 13 (b). 33 Ind. Cas. 142 (Mad.)

——**Ss. 41 and 43—Judgments not in rem—Decision as to age in Guardians and Wards Act proceedings.**

The decision of a Court as to the age of a minor in proceedings under Guardians and Wards Act or in curatorship proceedings, is not a judgment **in rem** but under S. 43 it is relevant to prove that the person was a ward at the time. 213 P. L. R. 1910=86 P. W. R. 1910=7 Ind. Cas. 505.

3. Decision of insolvency Court.

——**S. 41—Decision of Insolvency Court—Insolvency Court refusing to adjudicate person insolvent on ground that he was not partner of insolvent firm, whether judgment in rem.**

A declaration of legal right is a different thing from a declaration of a legal character. The word "character" means status, it is something more then a mere right. The declaration of a person's right operate as against a particular person or group of persons against whom the right is claimed, whereas, a man's status is something which defines his position, not in relation to any particular person or group of persons but in relation to the rest of the world; his status distinguishes him from the rest of the world. To say that a person is not a partner

of a firm is not to declare his status or legal character, it is merely to declare his position with respect to the particular firm. Therefore, an order of an Insolvency Court refusing to adjudicate a person insolvent on the ground that he was not a member of a firm which had been declared insolvent, is not a final order which conferred upon or took away from him any legal character within the meaning of S. 41 of the Evidence Act and hence, is not a judgment **in rem.** A.I.R. 1940 Cal. 225=190 Ind. Cas. 537.

——S. 41—Decision of Insolvency Court.

The language of S. 41, Evidence Act, shows that a decision under S. 4 (2) of the Provincial Insolvency Act, is not intended to be covered by the provisions of that section. A.I.R. 1939 Lah. 87=41 P. L. R. 302=183 Ind. Cas. 63.

——S. 41—Final order in earlier insolvency proceedings.

Under S. 41, Evidence Act a final judgment, order or decree of a competent Court in insolvency proceedings has the effect of a judgment **in rem** and cannot be disturbed by subsequent applications even is not between the same parties. A.I.R. 1935 Pat. 273=1 B.R. 486=155 Ind. Cas. 734.

——S. 41—Judgment of Insolvency Court declaring certain person as creditor of insolvent, whether judgment in rem.

The judgment of an Insolvency Court declaring a person as cdeditor of the insolvent does not confer any legal character on him within the meaning of S. 41, and hence the declaration does not operate as a judgment **in rem.**

In order that declaration of title to a specific thing should have a conclusive character as against the whole world, it is not enough to show that under the judgment of the Insolvency Court one has become entitled to a specific thing, but his title to such a thing must have been declared not as against any specified person but absolutely.

A right to recover a debt or a chose in action cannot be deemed to be a specific thing.

'Legal character' means something equivalent to status. The legal character assigned to a person announces to all the world what the legal status of the person in a question is. The meaning of "legal character" must be narrowly construed.

Per **Stone**, J.—A judgment in insolvency, declaring that a judgment-debt is a provable debt does not declare that an alleged debt which merged in that judgment debt is proved.

Though it be necessary as a step to making a declaration which will operate **in rem**, to find a fact, that finding will not bind third parties in subsequent proceedings. A.I.R. 1931 Mad. 441=1931 M.W.N. 774=61 M.L.J. 229=54 Mad. 601=34 L.W. 282=131 Ind. Cas. 817 (S.B.).

——S. 41—Vacating—Adjudication.

A firm declared insolvent—Order of adjudication against one partner vacated as he was not proved a partner—Judgment vacating the order does not come within S. 41. 110 Ind. Cas. 730=22 S. L. R. 105=A.I.R. 1928 Sind 121.

——S. 41—Judgment of Insolvency Court if bars subsequent suit.

When the Insolvency Court finds that the transfers by the debtor are not fraudulent, the decision bears the suit of the creditor for declaration that the transfers are fraudulent and void. 57 Ind. Cas. 612 (Nag.).

——S. 41—Decision in Insolvency Court—Conclusive proof of title.

A decision of Insolvency Court is conclusive proof of title against all the world. 15 A.L.J. 661=33 Ind. Cas. 798.

——S. 41—Last—clause—Insolvency—Estoppel against creditor—If arises.

Estoppel against an opposing arises creditor even if an Insolvency Court fails to make any declaration under the last para. of S. 41, of the Evidence Act 55 P. R. 1912 =242 P.W.R. 1912=13 Ind. Cas. 568.

4. Decision of Probate Court.

——S. 41—Applicability—Foreign Court—District Court. Civil Station, Bangalore—Judgment granting probate—Conclusive character of, in Mysore Courts.

Judgments of foreign Courts are not excluded from the operation of S. 41, Evidence Act, provided they are competent to pronounce a judgment as contemplated by that section. If the Court is competent, its judgment is conclusive against the whole world as to the status or title which it establishes. Hence a judgment of the District Court, Civil Station, Bangalore, in a probate cause is binding and conclusive on the Courts in Mysore State. A.I.R. 1950 Mys. 57.

——S. 44—Judgment of Probate Court.

Judgment of Probate is Court a judgment **in rem** and binds all the world. A judgment **in rem** cannot be revoked or set aside by a judgment which is only conclusive **inter partes.** Hence, even where there is allegation of forgery, the proper remedy of the party who wants revocation of a grant of probate is to apply to the probate Court under S. 263, Succession Act and not to file a civil suit which is operative only between the parties to it. A.I.R. 1944 Cal. 385=48 C.W.N. 751=220 Ind. Cas. 375.

——Ss. 41 and 44—Unless Probate is revoked by Court granting it, no evidence can be allowed in subsequent suit to prove that will was forgery.

The grant of probate is not a decree. It cannot be revoked except by the Court which granted it. Unless the probate is revoked, no useful purpose will be served by going into the question as to whether the will is a forgery in a subsequent suit. Hence disallowing evidence sought to be adduced to prove that the will was a forgery is not improper. A.I.R. 1944 Pat. 182=24 P.L.T. 390=22 Pat. 756=213 Ind. Cas. 345.

——S. 41—Decision of probate Court—Judgment in rem.

A judgment given in probate proceedings operates as a judgmcnt **in rem** so far as the genuineness or otherwise of the will is concerned; it binds not only the parties to the proceedings but also other persons. 6 Ind. Cas. 912; 7 Ind. Cas. 126 and A.I.R. 1924 Mad. 578, Foll. 128 Ind. Cas. 128=9 Pat. 698=A.I.R. 1930 Pat. 618.

——S. 41—Decision of probate Court.

The finding as to the execution of the Will of a probate Court binds at any rate the parties and privies to the probate proceedings. 101 Ind, Cas. 289=5 Pat. 777=8 Pat. L.T. 510=A.I.R. 1927 Pat. 61.

——S. 41—Will—Probate Court's decision on certain issues—Whether Dt. Court could re-try in a subsequent suit.

The decision of a probate Court in regard to a will and on the contentions, is conclusive and it is not open to a Dt. Court in a subsequent suit to re-try those issues. 38 Bom. 272=16 Bom. L. R. 164=23 Ind. Cas. 221.

——S. 41—Decision of Probate Court.

A judgment of a Probate Court is conclusive proof that the person to whom Letters of Administrations or Probate have been granted has been invested with the powers and the responsibilities of the deceased and nothing more. But a question of status decided in those proceedings can be contested again in a regular suit. (1910) 1 U.B.R. 61=10 Ind. Cas. 987.

——S. 41—Judgment in rem—Grant of probate—Court's duty.

As the grant of probate is a judgment **in rem** the Court must be satisfied before grant is made, that the will is duly executed. 12 C. L. J. 91=6 Ind. Cas. 912.

——S. 41—Probate Court—Decision of—Binding nature.

The decision of a probate Court as to the genuiness of a will and position of the widow as executor is binding in proceedings in courts exercising other than testamentary jurisdiction. 43 Cal. 694=43 I.A. 91=14 A.L. J. 466=20 C.W.N. 738=18 Bom. L. R. 397=23 C.L. J. 621=(1916) 1 M.W.N. 419=20 M. L. T. 1=3 L.W. 544=31 M.L.J. 77=33 Ind, Cas. 914 (P.C.). [**On appeal from** 11 C.L.J. 623=6 Ind. Cas. 301.]

5. Grant of Letters.

——S. 41—Grant of letters.

The grant of letters of administration so long as it subsists is conclusive evidence as regards the proper execution of the will and the legal character conferred on the administrator. 4 Cal. 360, Foll. 116 Ind. Cas. 452=A.I.R. 1929 Lah. 483.

S. 41—Grant of letters—Grant of Letters is no bar to further proceeding under Penal Code, S. 477. 97 Ind. Cas. 1054=4 Rang. 251=27 Cr. L.J. 1230=A.I.R. 1926 Rang. 202.

——S. 41—Grant of letters—Hindu widow—Revocation—Civil Court..

Where a Hindu widow has been granted letters of administration and she alienates her husband's property, the remedy of the reversioner is to apply to the Probate Court for revocation. A Civil Court has no jurisdiction to declare the grant of letters null and void in a suit by the reversioner to declare the alienation invalid. 28 C.W.N. 1045=31 C.L.J. 3=54 Ind. Cas. 197.

——S. 42. See also EVIDENCE ACT, S. 40.

S. 42 and 13—Judgment as to existence of family custom—Relevancy. A.I.R. 1950 Lah. 6.

——S. 42—Custom.

The value of a judicial decision on a question of custom arises not from the fact that it is relevant under Ss. 13 and 42 as forming in itself a "transaction by which the custom in question was recognised, etc." but from the fact that it contains on its records a number of specific instances relating to the relevant custom. A. I. R. 1941 P.C. 21=I.L.R. (1941) Kar. (P.C.) 22 (Sup.)=1941 A.L.J. 530=1941 A.W.R. 314=68 I.A. 1=7 B.R. 665=I.L.R. (1941) Lah. 154=43 Bom. L.R. 432=43 P.L.R. 318=193 Ind. Cas. 436 (P.C.).

——S. 42—Custom—Previous decision—Admissibility.

For the purpose of establishing a custom, a previous decision is relevant under S. 42. A.I.R. 1940 Pesh. 31=190 Ind. Cas. 35.

——Ss. 42, 13—Judicial decisions as evidence of custom.

A judgment on a question of custom is relevant, not merely as an instance under S. 13 but also under S. 42 as evidence of the custom, when a custom is repeatedly ascertained and acted upon judicially, the production of such judicial decisions is sufficient to prove the custom. A. I . R 1938 Lah. 309=40 P.L.R. 29=177 Ind. Cas. 775.

——S. 42—Proof of usage.

Where the usage of **pakki adat** is alleged, the Courts will require strict proof of it. The evidence one man does not fulfil the requirements necessary in order to establish the existence and legal validity of a custom admitted to be at variance with the ordinary law of principal and agent.

It is possible that if such a custom has been recognised by any judgment, the usage might be proved by the production under S. 42, Evidence Act, of a judgment of the High Court in which the alleged usage has been judicially recognised, such a judgment might be admissible under S. 42 as evidence of that usage though of course it is not conclusive proof. A.I.R. 1935 Sind 38=160 Ind. Cas. 6.

——Ss. 42 and 11—Custom—Judgment not inter partes.

Judgment not **inter partes** relating to a right or custom is proof of an instance or transaction in which the custom has been recognised or departed from. and is thus admissible under Ss. 11 and 42. 4 S. L. R. 88=8 Ind. Cas. 897.

——S. 42—Custom—Judgment recognising a custom—If admissible.

A judgment which recognises a custom by which an agent can have power to submit disputes to arbitration, is admissible under S. 42 of the Evidence Act. 3 S. L.R. 5=1 Ind. Cas. 937.

——S. 42—Claim of a public nature.

Where the right now claimed by plaintiff was asserted by one party and denied by the other in a previous suit and the right which the plaintiff claimed in previous suit was of a public nature, the case being that the land in suit was a **takya**:

Held, that previous decision was an important piece of evidence under Ss. 13 and 42, Evidence Act, in the present suit by plaintiff for declaration of her title to the land. A.I.R. 1936 Lah. 929=163 Ind. Cas. 924.

——S. 42—Judgment inter partes as to whether property is wakf property or not.

As soon as a property is dedicated for public charitable and religious purposes, it loses its private character altogether and at once acquires a public character and consequently any right claimed thereto will be a public right and not a private right. The matter of **wakf**, is a matter of public nature within the meaning of S. 42 of the Evidence Act, and cannot in any circumstances be less public than a right of way mentioned in the illustration to S. 42. A judgment, **inter partes**. therefore, is admissible in evidence under S. 42, Evidence Act. where it has a bearing on the question whether the property

in dispute is or is not a **wakf**. A.I.R. 1935 Lah. 64=36 P.L.R. 106=156 Ind. Cas. 268.

——Ss. 42 and 2—Coroner's inquisition—Admissibility.

A party tendering document must show that it is admissible under some provision of Evidence Act. Section 42 declares the relevancy of a judgment which relates to matters of public nature, such as the existence of a public right of way over a land. A coroner's inquest is aimed at inquiring into the cause of the death of any person which he has reason to believe to have been caused "by accident, homicide, suicide or suddenly by means unknown." The cause of such an unnatural death is not a matter of a public nature, though one of the objects of holding such a public inquiry is to satisfy the public conscience. The inquisition is not a decision but a **prima facie** opinion and stands on no higher footing than an order of commitment to Sessions. It is not a judgment, much less a judgment **inter partes.** Nor can it be admitted as an opinion since it represents the opinion of laymen often arrived at even before the Police investigations are complete. It is not relevant under any provision of the Evidence Act and is, therefore, not admissible. A.I.R. 1946 Bom. 184=47 Bom. L. R. 997=224 Ind. Cas. 25=47 Cr. L. J. 555.

——S 42—Decree granting additional rent.

The recitals and findings in judgment passsed in a suit for additional rent, on the ground that land in the holding has increase by accretion, are not evidence against persons who are not parties to that suit. But the fact that such decrees were passed by which additional rent was imposed is evidence as regards the time from which such reformed land became fit for possession. A.I.R. 1939 Cal. 354=69 C. L. J. 28=185 Ind. Cas. 714.

——S 42—Nature of grant—Old Judgment, relevancy of.

Evidence as to the interpretation placed upon an ancient document by persons who lived at, or at a time not remote from the time of the execution of the document, is not only admissible but very valuable. In the construction of ancient grants and deeds, there is no better way of construing them than by usage, and **contemporanea expositia** is the best way to go by. Where therefore, a **sanad** granted by a Muhammadan Ruler has been judicially interpreted by a Judge of that Ruler, the judgment so given is admissible in evidence in order to prove the nature of the grant. A.I.R. 1935 Oudh 96=11 O.W.N. 1435=152 Ind. Cas. 861.

——S. 42—Dispute about tenancy,

Question as to what villages were included in tenure decided between landlord and tenant—Plaintiff having subordinate interest in tenure suing landlord—Question is not strictly **res judicata** but ptaintiff must produce strong evidence in his support. 113 Ind. Cas. 681= 8 Pat. 122=9 P.L.T. 627=A. I. R. 1928 Pat. 615.

——S. 42—Evidentiary value.

Where a judgment is admissible, it is conclusive evidence for or against all persons whether parties, privies or strangers, or its own existence, date and legal effect as distinguished from the accuracy of the decision rendered. 82 Ind. Cas. 99=28 C.W.N. 942=A.I.R. 1925 Cal. 194.

——S. 42—Decree inter partes.

Obiter: Decree **inter partes** that recite the pleadings might be admitted in evidence. 27 Cal. 1004 (P.C.), Foll. 85 Ind. Cas. 996=22 M.L.W. 460=A.I.R. 1925 Mad. 1019.

——S. 42—Decisions about caste.

Caste of a particular family—Evidence of members and decisions in previous litigations are relevant. 93 Ind. Cas. 705=48 Mad. 1=A.I.R. 1925 Mad 497.

——S. 42—Evidentiary value.

Judgment after contest has more probative value than one on compromise. 73 Ind. Cas. 658=4 Lah. 176= A.I.R. 1924 Lah. 161.

——S. 42—Remarks.

Remarks about a plot of land not in dispute are not admissible. 85 Ind. Cas. 795=A.I.R. 1923 Lah. 384.

——S. 43.

Synopsis.

1. **Decision of Civil Court.**

See also EVIDENCE ACT. S. 40.

2. **Decisions of Criminal Court.**

3. **Judgment inter partes.**

See EVIDENCE ACT, S. 40.

4. **Judgment not inter partes.**

See EVIDENCE ACT, S. 40.

5. **Scope.**

6. **Miscellaneous.**

1. Decision of Civil Court.

See also S. 40,—EVIDENCE ACT.

——S. 43—Decision of Civil Court.

It is misdirection to tell the jnry that the decision of the Court in other case was relevant. 1932 M.W.N. 862.

——S. 43—Civil judgment.

A decision of a Civil Court is admissible to disprove an allegation, the truth of which is the basis of conviction of a person in criminal case. 72 Ind. Cas. 172= 24 Cr. L.J. 332=A.I.R. 1924 Mad. 516.

——Ss. 42 and 43—Question of liability—Decision of a Civil Court.

Where a person is charged with criminal breach of trust as regards certain items and the questions of Civil liability about the same items has been determined by a competent Civil Court, the judgment of that Court would be the best evidence of the civil rights of the parties and hence a relevant fact. 41 Bom. 1= 18 Bom. L.R. 185=17 Cr. L.J. 153=33 Ind. Cas. 633.

2. Decision of Criminal Court.

——S. 43—Decision of Criminal Court.

In a suit for damages for malicious prosecution, it has to be shown that the suit was instituted without any reasonable and probable cause and with a malicious intention. It lies on civil Court itself to undertake an entirely independent enquiry before satisfying itself of the absence of reasonable and probable cause and the judgment of the Criminal Court can be used only to establish the fact that an acquittal had taken place as a fact in issue in the civil suit. There is no provision in the evidence act which will justify Civil Court taking into consideration the grounds upon which that acquittal was based. A.I.R. 1933 Mad. 429=37 L. W. 623=65 M.L.J. 146=56 Mad. 641=1933 M. W. N. 1304=143 Ind. Cas. 825.

——S. 43—Finding of Criminal Court

The finding of a Criminal Court cannot be treated as evidence in a Civil action between different parties. 84 Ind. Cas. 1009=2 Rang. 549=A.I.R. 1925 Rang. 143.

——S. 43—Judgment of Criminal Court.

Judgment of Criminal Court is relevant to show that certain parties were on bad terms. 77 Ind. Cas. 391=10 O.L.J. 393=A.I.R. 1924 Oudh 115.

——S. 43—Depositions in criminal case.

Neither judgments nor depositions in criminal cases are admissible in Civil proceedings. 105 P. R. 1915=187 P.W.R 1915=32 Ind. Cas. 18.

——S. 43—Order of Criminal Court under S. 145, Cr. P. Code—When admissible.

The finding in an order of a Criminal Court under S. 145 is not admissible though the order itself is admissible to show the parties in dispute, the land in disputes, and the parties entitled to possession. 22 C.L.J. 525=31 Ind. Cas. 965.

——S. 43—Decision of Criminal Court—If admissible in Civil Court.

The finding of a Criminal Court on the question of possession is admissible in evidence in a Civil proceedings taken for recovery of possession of the same land, to show what order had been made, who the parties to the dispute were, what the land in dispute was and who was held entitled to possession. 21 C. W. N. 93=23 C.L.J. 563=31 Ind. Cas. 789.

——S. 43—Judgment in a Criminal case—Value.

A judgment in a criminal trial is by itself evidence only of the conviction and not of any other matter. 4 O.L.J. 299=40 Ind. Cas. 452.

3. Judgment inter partes.

——S. 43—Judgment inter partes.

Where all the parties to the present case were parties to a former litigation, the judgment in that suit is evidence of what were the points in issue between the parties in that suit of what was the result of the suit. A.I.R. 1937 Pat. 86=168 Ind. Cas. 109.

——Ss. 43, 13, 11—Judgment inter partes—Previous judgment in main suit.

Where the question of the genuineness of a transfer by the judgment-debtor to his children, was directly in issue in the original civil suit and the issue was contested very strongly, the fact that there was this contest and that the contest was decided against the judgment-debtor becomes relevant in the enquiry before the executing Court under S. 13 and under S. 11 of the Evidence Act. A.I.R. 1934 Rang. 212=154 Ind. Cas. 123.

——S. 43—Judgment inter partes.

Judgment in former legal proceedings are admissible in evidence to prove plaintiff's former recognition of defendant's status. 78 Ind. Cas. 981=A.I.R. 1924 Nag. 387.

——S. 43—Judgment inter partes.

Judgment in previous suit holding he had no right is admissible for showing that the Granthi's right was questioned then also. 31 Bom. 143, **Foll** 59 Ind. Cas. 734=49 P.L.R. 1921=A.I.R. 1921 Lah. 337.

4. Judgment not inter partes.

See also EVIDENCE ACT, S. 40.

——S. 43—Judgment to which neither plaintiff nor defendant was party.

The Court is not entitled to refer to or rely upon a judgment given in proceedings to which neither the plaintiff nor the defendant was a party, as proving the facts stated therein. A.I.R. 1942 P.C. 40=202 I.C. 203 (P.C.).

——Ss. 43, 13—Judgments not interpartes—Findings in judgment not inter partes.

Though the recitals and findings in a judgment not **inter partes** are not admissible in evidence, such a judgment and decree are admissible to prove the fact that a decree was made in a suit between certain parties and for finding out for what lands the suit had been decreed. A.I.R. 1941 Cal. 193=72 C.L.J. 320=44 C.W.N. 935=195 Ind. Cas. 412.

——S. 43 — Judgment not inter partes—Privy Council decision.

A finding in a Privy Council decision cannot be relied on by a party to a suit for showing that the village in question was a fixed place, where the judgment was not **inter partes**. A. I. R. 1941 Cal. 1 = 72 C. L. J. 14 = 193 Ind. Cas. 578.

——S. 43— Judgment not inter partes—Opinions of Judges as to nature of guardianship proceedings in judgments to which plaintiff was not party—Admissibility.

Where in a suit on a promissory note defendant puts forward the defence that on the date when the suit promissory note was executed he was a minor by reason of the fact that a guardian of his property was appointed by the Court, the opinions of the Judges as to the nature of the guardianship proceedings, expressed in judgment in previous proeeedings to which the plaintiff was not a party, are inadmissable in evidence A,I.R. 1941 Mad. 569=53 L. W. 352=1941 M. W. N. 237=(1941) 1 M.L.J. 492=198 Ind. Cas. 305.

——S. 43—Previous judgment not inter partes.

A previous judgment not **inter partes** is nor admissible in evidence in subsequent suit. A.I.R. 1940 Cal. 506=44 C. W. N. 1017=I.L.R. (1940) 2 Cal. 529=72 C.L.J. 303=191 Ind. Cas. 854.

——Ss. 43, 13—Judgment not inter partes.

A Judgment in a previous case not **inter partes** may be admissible under Ss. 13 and 43, Evidence Act. A.I.R. 1939 Bom. 313=41 Bom. L.R. 561=184 Ind. Cas. 387.

——S. 43—Judgment not inter partes.

The rule that a judgment is not admissible evidence against one who is a stranger to the suit has long been accepted as a general rule in English Law. Exceptions there are but the general rule is not in doubt. The same rule applies in India :

Held, that a deeree holding that the area of an estate was comprised within certain boundaries along with the plaint that proceded it and the steps in execution which followed were evidence of the as eertion of a right and were thus admissible as evidence of the right.

A judgment is evidence of weight even against third parties.

When a judgment is not **inter partes**, nor a judgment **in rem**, nor does it relate to a matter of public nature, and the existence of the judgment is not a fact in issue, even if it be relevant under some of the provisions of the Evidence Act, no inference can be drawn from its use. Serious consequences might ensue as regards titles to land in India if it were recognised that a judgment against a third party altered the burden of proof as between rival climants, and much "indirect laying" might be expected to follow therefrom, A. I. R. 1937 P.C. 69=18 P.L.T. 257=1937 O. W. N. 396=4 45 L.W. 580=41 C.W.N. 577=16 Pat. 258=1937 M.W.N. 593=1937 A.L.J. 938=31 Sind L.R. 242=39 Bom. L.R. 731=65 C.L.J. 241=1937 A.W.R. 459=(1937) 2 M.L.J.631=167 Ind .Cas. 329.

—Ss. 43, 11 and 13—Previous judgment not inter partes.

Under S. 43. Evidence Act read with Ss, 11and 13, a previous judgment which is not **inter partes** is admissible in evidence and although such a judgment does not operate as **res judicata** it ought to be treated as a piece of evidence to be used for certain limited purposes and to be taken into consideration along with the other evidences. if indeed any other evidence exists but in no case such a judgment which is not inter partes can be dealt with to discuss the basis of its decision. A. I. R. 1934 Cal. 788=59 C. L. J. 320=153 Ind. Cas. 134.

——S. 43—Judgment not inter partes.

Judgments not **inter partes** are admissible only under S. 13 or S. 43, Evidence Act. A.I.R. 1933 Cal. 21=36 C.W.N. 866=140 Ind. Cas. 385.

——Ss. 43,13—Judgement not inter pates—A Judgment not inter partes is only admissible under Ss. 13 and 43, Evidence Act, as establising particular transaction. A. I. R. 1931 P.C. 89=53 C.L.J. 333=35 C.W.N. 521=1931 M.W.N. 435=33 L.W. 707=33 Bom. L.R.885=61 M.L.J. 9=58 Cal. 1187=58 I.A. 125=131 Ind. Cas. 753 (P.C.).

——S. 43—Judgment not inter partes.

When an appeal is taken against a decree, the decree of the lower Court gets merged in the decree of the Appellate Court and so the judgment of the trial Court is not the final adjudication on the point in issue between the parties in the suit and, therefore, is not admisssble in evidence.

Section 43, Evidence Act, excludes all jugments in a former suit as irrelevant if they are not **inter partes** unless the existence of such judgment is a fact in issue or is relevant under some other provisions of the Act. The existence of a judgment may be relevant but the truth of it, by which it is understood, the decision of the Judge and the opinion expressed by him, is not relevant. It may be relevant to show that a certain circumstance existed at the time when the judgment was delivered; for instance, it may show that the witnesses in the previous suit made contradictory statements; or it may be relevant to show the nature and the character of the claim in the previous suit. But it cannot be used to prove the conclusion arrived at by the Judge on the particular evidence before him in the previous suit.

It cannot be laid down as a general proposition that a judgment against a party can always be used against him in a subsequent suit by another person. A.I.R.1931 Cal. 239=34 C.W.N. 1113=133 Ind. Cas. 573.

——S. 43—Admissibility of judgment not inter partes.

In a suit to contest a notice of ejectment the only evidence of a lease was a judgment on a suit not **inter partes. Held,** that the lease could not be held binding between the parties to the ejectment suit. 10 P.L.R. (B.R.) 46=54 Ind. Cas. 574.

——Ss. 43 and 11—Judgment not inter partes—Finding as to adoption in a suit—Admissibility in another suit.

Findings of fact in a case as to **factum** or validity of adoption are not evidence in another suit against persons who were not parties to the case in which the findings were given. 193 P.L.R. 1915=140=P.W.R. 1915 32 Ind. Cas. 312.

——S. 43—Judgment not inter partes Judgment—Admissibility to prove admission.

A judgment in a previous suit not **inter partes** is not admissible as evidence of an admission said to have been made by one of the parties in the course of that suit. The judgment is no better than any other hearsay evidence of the admission. The proper mode of proving an admission made by a party in a previous suit is by producing acertified copy of the party's written statement, or if the admission was made orally by producing a copy of his deposition or by putting in the witness box some noe who actually heard what was said by him. 20 C.W.N. 648=22 C.L.J. 270=30 Ind. Cas. 821.

——S. 43—Judgment not inter partes—Recitals in.

The evidence Act does not make a finding of fact arrived at on the evidence before the Court in one case, evidence of the fact in another case when the parties are not the same. A recital, therefore, of a judgment not inter partes of relevant fact is not admissible in evidence in another litigation, though the judgment may be used in evidence in certain circumstances as a fact in issue or as relevant fact or possibly as a transaction. 121 Ind. Cas. 509=11 L.L.J. 526=A.I.R. 1930 Lah. 237.

——S. 43—Judgment not inter partes.

A statement of opinion made by the Judge in a previous judgment not inter partes is no evidence in a subsequent case. 115 Ind. Cas. 422=10 L.L.J. 519=A. I.R. 1929 Lah. 123.

——S. 43—Judgment not inter partes—Admissibility.

A decree in a previous suit to which one party in a subsequent suit was not party, is admissible in evidence for corroboration of a fact asserted by the party in oral evidence and the question of weight to be attached to the fact so established is a question of fact. It is not admissible as the proof of the claim. A.I.R. 1929 Pat. 749.

——S. 43—Judgment not inter partes.

Judgment not **inter partes** is admissible if existence of judgment is relevant fact or fact in issue. 6 Cal. 171 (F.B.); 22 Cal. 533 (P. C.) and 25 Cal. 525 (F.B.), Rel. on. 121 Ind. Cas. 334=8 Pat. 783=A.I.R. 1929 Pat. 739.

——S. 43—Judgment not inter partes.

Previous judgment not **inter partes** is admissible to prove title when such title is in issue. 101 Ind. Cas. 74=A.I.R. 1927 Nag. 359.

——S, 43—Judgment uot inter partes.

In a suit by plaintiffs for a declaration that the sale of suit land is not binding on them, the land being ancestral land, the judgment in a previous suit by the same plaintiffs, but not **inter partes**, for a declaration that alienation of

part of the land in suit was not binding on the ground of the land being ancestral can only be treated as admissible for the purpose of showing that on a former occasion the right of the alienee to alienate part of the property in suit was called in question on the ground that the property was ancestral. The finding of the Court in the previous suit that the property was ancestral is not relevant. 1 Lah. 540, Foll. 96 Ind. Cas. 998=8 L.L.J. 492=27 P.L.R. 544.

——S. 43—Judgment not inter partes.

A judgment between the plaintiff and third parties is not admissible though the facts found therein may support plaintiff' title disputed in the present suit. 93 Ind. Cas. 454=5 P.L.T. (Sup.) 1=A.I.R. 1925 Pat. 68.

——S. 43—Judgment not inter partes.

A judgment of a Civil Court deciding a question of adoption is not admissible between third parties as evidence of the truth of the matters decided therein. 71 Ind. Cas. 929=A.I. R. 1924 Pat. 298.

——S. 43—Judgment not inter partes.

Judgments not **inter partes** are admissible in evidence for the purpose of showing that the title of a defendant was set up by third party and that the suit was decreed. 65 Ind. Cas. 699 (Cal.).

——S. 43—Judgment not inter partes.

The statements of the plaintiff's age in a decree to which the defendants or their predecessors were no parties, are not conclusive and binding against them. 59 Ind. Cas. 3=32 C.L. J. 75.

——S. 43—Judgment not inter partes—Admissibility.

A mortgagee in possession of a share in a village leased the property. The original mortgagor executed simple mortgage to the lessee with the covenant that the first mortgage was to be paid off which was accordingly done. Nevertheless the lessee's name continued to be recorded as lessee, on the strength of which entry, he brought a suit for profits against the lambardar. The Lambardar brought a suit to declare that the lessee was not entitled to profits, the mortgage having been redeemed. The lessee contended that by an arrangement between him and the mortgagor he was left in possession of the property as lessee for the period of the original lease and that he had been made to account to the mortgagor in a suit between them on the simple mortgage for the very year for which he had obtained a decree for profits against the Lambardar and produced the judgment between himself and the mortgagor to prove the allegation. **Held**, the judgment was admissible. 13 A.L.J. 317=28 Ind. Cas. 387.

——S. 43—Judgment not inter partes—Recitals in.

A judgment not **inter partes** may be used in evidence in certain circumstances as a fact in issue, or as a relevant fact, or possibly as a transaction, but the recitals in the judgment cannot be used as evidence in a litigation between the parties. The law attributing unerring verity to the substantive as opposed to the judicial portions of the record, every judgment is conclusive evidence, for or against all persons, whether parties, privies or strangers, of its own existence, date and legal effect, as distinguished from the accuracy or truth of the decision rendered. 20 C.W.N. 643=23 C.L.J. 583=35 Ind. Cas. 298.

——S. 43—Judgment not interpartes Statement of a right as to title in a will—Recital in judgment not inter partes no evidence.

In a suit for possession of lands as brahmatter, recital of the title in a will of plaintiff's father and a recital in a judgment not **inter partes** cannot be admitted. 36 Ind. Cas. 882 (Cal).

5. Scope.

——S. 43—Scope of—Judgment setting aside transfer.

In a summary proceeding for pre-emption under S. 26-F, Bengal Tenancy Act, which is based upon the assumption that the transfer from a tenant to a third party has taken place, a judgment setting aside the transfer must be regarded as a fact in issue under S. 43, Evidence Act, and as such, would be admissible in evidence. A.I.R. 1939 Cal. 432=I.L.R. (1939) 1 Cal. 558=43 C.W.N. 549=183 Ind. Cas. 489.

——S. 43—Scope of—Previous judgment.

A judgment is not admissible to prove the truth of the fact which it states, much less is any fact stated as part of the reasoning in arriving at the fact in issue, evidence of the truth of that fact. Where, however, the right of a party has already been concluded by a previous judgment, that fact can be proved by production of the judgment since in these circumstances the existence of the judgment itself is relevant. A. I. R. 1939 Nag. 72=1938 N.L.J. 466=I.L.R. (1940) Nag. 699=180 Ind. Cas. 118.

——S. 43—Scope of—Essentials for relevancy.

Per **Das, J.**—A judgment or decree is not admissible in evidence under S. 43 unless as a fact in issue or as a relevant fact under other sections of the Act. Thus if A has obtained a decree for the possession of land against **B**, and **C. B's** son, murders **A** in consequence, the evistence of the judgment is relevant as showing motive for the crime. So again, in a suit for malicious prosecution the judgment in the criminal proceeding is evidence to establish the fact of acquittal, the fact, namely that the criminal proceedings terminated in favour of the plaintiff. A reference to the finding of a judgment may explain the character, of the party's possession and the nature of the enjoyment had in the property in suit and so the finding of a judgment may be referred to in all other cases where the record is matter of inducement or merely introductory to other evidence. 87 Ind. Cas. 849=4 Pat. 510=6 P. L. T. 634=A. I. R. 1925 Pat. 625.

——S. 43—Scope of—Admissibility — Common defendant.

Section 43 excludes all judgments in a former suit as irrelevant if they are not **inter partes** unless the existence of such judgment is a fact in issue or is relevant under some other provision of the Act. The existence of the judgment may be relevant but not the decision of the Judge or the opinion expressed by him. It is immaterial if the defendant in both cases is the same and the decision of the Privy Council in 22 C. 533 is no authority for the general proposition that a judgment against a party can always be used against him in a subsequent suit by another person. 34 C.W.N. 1113=133 Ind. Cas. 573 A.I.R. 1939 Cal. 239.

——S. 43—Scope Relevancy.

Judgment that does not fall under Ss. 40, 41 and 42 is not relevant under S. 43 for decision of same point in subsequent suit. A.I.R. 1926 Nag. 109, Overruled. 121 Ind. Cas. 644=12 N.L.J. 164=26 N.L.R. 33=A.I. R. 1930 Nag. 1 (F.B).

6. Miscellaneous.

——S. 43—Miscellaneous.

Partition suit by mirasdars for miras property—Question as to joint acquisition of miras property—Sale of

one of brothers alleged to be benami—Decision in a previous title suit arising out of claim case can operate as good piece of evidence on question of benami. (1935) 62 C.L.J. 225.

——S. 43—Miscellaneous—Conclusiveness.

The principle of conclusiveness of a decree is much wider than the terms of S. 11: A.I.R. 1921 P. C. 11 and A. I. R. 1922 P. C. 80, Foll. 112 Ind. Cas. 169=5 O. W. N. 265=3 Luck. 487=A. I. R. 1928 Oudh 359.

——S. 43—Miscellaneous—Land acquisition cases.

Previous decisions in Land Acquisition cases are relevant in a subsequent Land Acquisition case where the market value of lands in the same neighbourhood is in issue. 78 Ind. Cas. 557=A. I. R. 1925 Cal. 481.

——S. 45—Miscellaneous—Judgment not res judicata.

Judgments not operating as res judicata may yet be admissible in evidence. 79 Ind. Cas. 621=A I.R. 1924 Nag. 422.

——S. 44. Synopsis.

1. **Applicability and scope.**
2. **Collusion.**
3. **Fraud.**
4. **Gross negligence.**
5. **Want of jurisdiction.**
6. **Miscellaneous.**

1. Applicability and scope.

——S. 44—" Any party to a suit or other proceeding "—Interpretation of.

The expression, " any party to a suit or other proceeding " occurring in S. 44, Evidence Act, must be given a restricted meaning, and must be limited to person or persons other than one who asserts the fraud or collusion. 1950 N.L.J. 226.

——S. 44—Scope—Decree, if can be avoided on ground of negligence—Fraud—Proof required.

S. 44 of the Evidence Act is the only provision of law under which a judgment or an order or a decree which is sought to be proved with a view to establish the plea of res judicata can be avoided. Under that section, a decree can be avoided on the ground that it was obtained by fraud or collusion. The section makes no mention of negligence. Consequently no decree can be avoided on the ground of negligence, even if negligence be of a very serious character. The protection of minors against negligent actions of their guardians is a special one and the principle cannot be extended to cases of gross negligence by parties litigating on behalf of public trusts.

Fraud, like any other fact, can be proved by circumstantial evidence and if the circumstances are such as from which no other inference except that of fraud can be deduced, a plea of fraud cannot be thrown out merely because no direct proof of it has been furnished. A party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof. It is not sufficient for him to prove constructive fraud, but he must prove actual positive fraud. Mere want of good faith cannot establish fraud. A. I. R. 1949 E. P. 141.

8 F. Y. D. 25.

——S. 44—Applicability and scope.

Section 44 Evidence Act, applies only to judgments etc., which are relevant under Ss. 40 41, 42. It does not apply to judgments admissible under S. 43. A.I.R. 1941 Mad. 569=53 L. W. 352=1941 M. W. N. 237=(1941) M.L.J. 492=198 Ind. Cas. 305.

——S. 44—Scope.

The provision of S. 44, Evidence Act, is permissive and not prohibitive. It allows a party to avoid a judgment by proving fraud or collusion but it does not destroy his substantive right which exists independently of the Evidence Act. A. I. R. 1941 Cal. 401=I. L. R. (1941) 1 Cal. 477=45 C. W. N. 508=196 Ind. Cas. 779.

——S. 44—Scope.

Section 44, Evidence Act, does not refer to a transfer of property either as a part of the decree or in carrying out the decree. It refers only to setting aside of a decree. A.I.R. 1940 Bom. 289=I.L.R. (1940) Bom. 526=42 Bom. L.R. 486=190 Ind. Cas. 606.

——S. 44—Applicability and scope.

Section 44, Evidence Act, applies in civil as well as criminal proceedings where the decree sought to be challenged is proved by adverse party. It is not that it only applies in a suit for revocation. A judgment in a probate suit is a judgment in rem but it can be contested on ground of collusion or fraud, etc. A stranger to a suit in which there has been passed a decree in rem may impeach it on the ground of fraud and get it set aside if the fraud or collusion is proved. It is not necessary under S. 44 for a party against whom a judgment is set up to bring a separate suit to have it set aside, but he may show in the suit or proceeding in which it is set up against him that it was obtained by fraud. A party offering evidence about the forgery of a will can prove that the probate decree was obtained fraudulently if it were set up against him by the other side, rather than to admit the probate and the title of the executors. A. I. R. 1940 Bom. 131=42 Bom. L. R. 231=I. L. R. (1940) Bom. 403=41 Cr. L.J. 526=187 Ind. Cas. 867.

——S. 44—Applicability and scope.

Section 44, Evidence Act, has no application to proceedings under S. 73, Civil P. C. It is only decrees under Ss. 40, 41 and 42, Evidence Act, which are referred to in S. 44, Evidence Act, and such decrees have no application in execution proceedings. A. I. R. 1935 Cal. 290=39 C.W.N. 490=61 C.L. J. 165=62 Cal. 715=155 Ind. Cas. 480 (F.B.).

——S. 44—Scope and applicability.

Where the manager of a joint Hindu family, acting for himself and his minor brother entered into a contract for the sale of their share in the joint property and a decree for specific performance was passed against them but on their failure to obtain partition of share, the decree-holder sued for partition ;

Held, that the mere fact that the minor had not brought a suit to have the decree outstanding against him set aside did not debar him from objecting to its validity on the ground of want of family necessity and that S. 44, Evidence Act, did not apply to the case. A.I.R. 1934 All. 1019=1934 A. L. J. 1028=4 A. W. R. 574=57 All. 374=154 Ind. Cas. 235.

——S. 44—Scope—Limitations.

Some limitation must be put upon S. 44. Where the case merely turns on in effect, a re-hearing of the previous suit on substantially, the same evidence, then the Court will not hear the second suit. On the other hand, in a proper case the Court has jurisdiction to set aside a decree which has been obtained by fraud practised on the Court. If, for instance, the existence of certain evidence

has been stoutly denied by one party, and the Court has been induced to frame its decree on the basis that that evidence did not exist, then, if that evidence is afterwards discovered and it is of such a nature, that, if it had been before the first Court, the probabilities are that the Court would have arrived at a different conclusion, then, it may be, when all the circumstances are looked at, that in that case the Court would set aside the original decree. 41 Mad. 748 (F. B.), Foll. 105 Ind. Cas. 296=29 Bom. L. R. 1046=A. I. R. 1927 Bom. 510.

——S. 44—Scope—Gross negligence.

Although only fraud or collusion and not gross negligence is mentioned in S. 44 the principle involved is applicable to cases of gross negligence also. 74 Ind. Cas. 218=18 M. L. W. 49=1923 M. W. N. 452=33 M.L.T. 46=A.I.R. 1923 Mad. 718=45 M.L.J. 324.

2. Collusion.

——S. 44—Collusion—Party alleging collusion on part of his predecessor in previous suit.

Where a party to the subsequent suit alleges fraud or collusion on the part of his predecessor-in-interest in the previous suit, onus is on him to establish such fraud or collusion. A. I. R. 1942 Cal. 1=73 C. L. J. 475=I.L.R. (1941) 2 Cal. 434=200 Ind. Cas. 822.

——S. 44—Collusion between parties to previous suit.

The meaning of S. 44, Evidence Act, is that if collusion is proved, then the judgment in that suit which is relevant under S. 40, cannot be set as a bar. A. I. R. 1937 All. 28=1936 A.L.J. 1162=1936 A.W.R. 1009=166 Ind. Cas. 624.

——S. 44—Collusive decree—Fraud and collusion—Difference.

A collusive decree binds the parties thereto and is not a nullity. It is also binding on the representatives of the parties.

No doubt a decree can be avoided on the ground of fraud or collusion under S. 44 of the Evidence Act, but there is a great difference between fraud and collusion. A party who has been made the victim of a fraud can obviously avoid a decree on the ground that he has discovered the fraud subsequent to the decree which could not have been made a point of defence in the former litigation. On the other hand, the fact of collusion is a matter which must have been well known to both the parties and is a point which could and might have been raised before the decree was passed on the last occasion. A third party can undoubtedly avoid a decree on the ground that it has been obtained collusively, but a party to a collusive decree cannot avoid it on that ground. 101 Ind. Cas. 765=A. I. R. 1927 All. 494.

——Ss. 44 and 115—Collusion—Decree obtained by collusion—Party to decree cannot as plaintiff plead his own collusion—True facts can be pleaded in defence.

A party cannot as plaintiff plead his own collusion to avoid a decree to which he was himself a party. But he can, as a defendant plead the true facts by way of defence to a suit. 6 N.L.R. 177=8 Ind. Cas. 1179.

3. Fraud.

——S. 44—Fraud.

A party to a decree cannot complain of the fraud practised by himself and another upon the Court. This means that a party cannot be allowed to take advantage of his own fraud or to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court. It is a different thing if one of the parties and the Court were deceived by the fraud of another. If, however, fraud is practised by both the parties on Court, neither of them can impeach the judgment on the ground that it was collusively procured.

X executed a pro-note in order to shield his property from his creditors. **Y** agreed not to execute the decree. **Y** brought a suit on pro-note and both **X** and **Y** made a bogus reference to arbitration and obtained a decree on award by falsely representing the award to be genuine. Subsequently, **Y** put the decree into execution. **A** brought a suit to set aside the decree as being collusive and fraudulent :

Held, that both the parties having colluded and practised fraud on Court were in pari delicto and it was not open to one of the parties to vacate the decree : **Held**, further, the proper remedy for **X** to prevent **Y** from executing the decree was by way of suit for injunction. A.I.R. 1941 Bom. 77=42 Bom. L.R. 1185=I.L.R. (1941) Bom. 160=193 Ind. Cas. 795.

——S. 44—Fraud—A decree can be annulled only when the Court has been misled by fraud or misrepresentation with regard to the consent of the party seeking to avoid the decree. A. I. R. 1933 Sind 29=26 Sind L. R. 395=141 Ind. Cas. 290.

——S. 44—Fraud or collusion—Judgment in rem.

Judgment in rem can be contested by person not party to the judgment—Fraud or collusion need not go to the root of the jurisdiction of the Court—English law is different. 111 Ind. Cas. 762=9 P. L. T. 397=A.I.R. 1928 Pat. 375.

——S. 44—Fraud.

Fraudulent decree—Not got cancelled—Party can show fraudulent nature of, in defence. 70 Ind. Cas. 548=36 C.L.J. 367=A.I.R. 1923 Cal 79.

——S. 44—Setting aside decree.

Time to set aside a decree expiring—Validity of the decree can be challenged in defence on the around of fraud. 110 Ind. Cas. 571=A. I. R. 1928 Cal. 810.

——S. 44—Fraud—Letters of administration.

Letters of administration—Court other than that issuing the letters can determine if they were obtained by fraud—But better course is to stay suit to enable application to be made to revoke grant. 62 Ind. Cas. 448=25 C.W.N. 207=A.I.R. 1921 Cal. 332.

——S. 44—Previous decree—Fraud.

In a suit to set an ex parte decree on the ground of fraud plaintiff is entitled to show that a certain High Court decree to which he was no party was obtained by fraud or collusion under S. 44 of the Evidence Act, without suing to set aside that decree. 21 C. W. N. 594=40 Ind. Cas. 607.

——S. 44—Probate—Party applying for revocation—Barred in subsequent suit.

Where a party's application for revocation of probate on the ground of fraud or collusion has been dismissed by the Dt. Court, the party will be barred by the decision in a subsequent suit of the executor to recover the estate. 38 Bom. 427=16 Bom. L.R. 459=25 Ind. Cas. 37.

——S. 44—Fraud—Suit to set aside a decree, on the ground of frant—Personal service not effected —Conduct of plaintiff.

The mere fact that personal service of sum mons has not been effected on a defendant would not make the ex parte decree obtained against him, abortive. But where the non-service is due to the fraudulent conduct of the plaintiff and others acting with him the decree. may be set aside as fraudulent. 7 A. L. J. 74 =32A145=4 Ind. Cas. 596.

——S. 44—Suit for rent by administrator—Tenant's plea that Letters of Administration were obtained by misrepresentation, if entertainable—Fraud—C.P.C., Ss. 562, 566—Remand.

Plaintiff, having obtained Letters of Administration to the estate of a deceased landlord, sued a tenant for rent. The latter in his written statement objected that the Letters of Administration had been obtained upon a misrepresentation by the plaintiff as his relationship with the intestate:

Held, that assuming that the Letters of Administration should be regarded as an order within the meaning of S. 44 of the Evidence Act, the allegations of the defendant were not such as would entitle him to go into evidence for the purpose of proving that the Letters of Administration were invalid in law and that such a defence could not be successfully raised so long as the Letters of Administration were not revoked by a court. Payment of rent to the plaintiff by the defendant would afford the latter full indemnity against the claim of any other party. (1905) 10 C.W.N. 422.

——S. 44—Decree obtained by fraud—Power of court to treat as a nullity the decree of another court obtained by fraud—Heir of party a fraud on the court not bound by the act of his ancestor—Evidence Act, S. 44.

When by means of a fraud practised on the court the owner of the considerable property, both moveable and immoveable, caused a decree to be passed against himself as a defendant in a collusive suit upholding a fictitious wakfnamah by which it was intended to tie up the property in perpetuity for the benefit of the direct descendants of the wakf to the exclusion of his collateral heirs, it was held, on suit by such heirs to recover possession of their share by inheritance of the property so dealt with (1) that a court which was otherwise competent to entertain the suit had jurisdiction, on the finding that it had been obtained by means of fraud, to treat the previous decree as a nullity; and (2), that the plaintiffs were not prevented from setting up the plea that the previous decree had been obtained by fraud by the fact that the person who practised such fraud was their predecessor in title. 1904 A. W. N. 25=26 A. 272.

——S. 44—Res judicata—Evidence—Competence of party against whom a former judgment is set up as constituting res judicata to show that such judgment was obtained by fraud or collusion.

Where a subsisting jndgment, order or decree which is relevant under S. 40, 41 or 42 of the Indian Evidence Act, 1872, is set up by one party, to a suit as a bar to the claim of the other party, it is not necessary for the party against whom such judgment, order or decree is set up to bring a separate suit to have the same set aside, but it is open to such party to the same suit in which such judgment, order or decree is sought to be used against him, to show, if such be the case, that the judgment, order or decree relied upon by the other side was delivered by a court not competent to deliver it or was obtained by fraud or collusion. (1902) A.W.N. 38=24 A. 242.

——S. 44—Decree—Sale—Fraud—Nullity—Suit in another court.

It may not be competent to a court to set aside a decree passed by another court as fraudulent, but in giving relief to the suitor before it, the court can consider whether the decree was obtained by fraud or collusion, and, if it so finds, may treat the decree as a nullity. (1901) 5 C.W.N. 559.

——S. 44—C.P. Code, S. 11—Avoidance of the plea on the ground of fraud.

The principle of res judicata in S. 11 of the C.P. Code is subject to S. 44, Evidence Act under which the principle does not apply where the prior decree is obtained by fraud. 3 O. L. J. 501=19 O. C. 334=36 Ind. Cas. 746.

——S. 44—Fraud—Compromise decree—Defence of fraud—Omission to sue.

Under S. 44, of the Evidence Act a party to a com promise decree can show that his consent to it was obtained by misrepresentation and fraud without bringing a fresh suit to set it aside. 30 Ind. Cas. 639 (Mad.).

——S. 44—Decree obtained by fraud—Rights of party to plead in defence.

A party can rely on fraud, even though he has not brought a suit to set aside the decree alleged to have been obtained by fraud. 29 Ind. Cas. 838 (Cal.).

——S. 44—Suit in ejectment—Title based on Court sale—Proof of fraud in such sale.

In an ejectment suit, where plaintiff relies on his title as purchaser in a Court auction the defendant may adduce proof of fraud in such sale. 1 L.W. 208= 23 Ind. Cas. 1.

——S. 44—Fraud—Defence—Onus.

In a suit for rent against defendant as Mokarrandar of certain lands in the village where the defendant raises the plea that an entry in the record of rights that he is patnidar, operates as res judicata, it is highly obligatory on them to prove that such entry operates as res judicata, and the plaintiff may in such cases raise the objection that the entry was obtained by fraud. 19 C.L.J. 29=18 C.W.N. 271=22 Ind. Cas. 789.

——S. 44—Execution sale—Fraud.

The section includes not only a suit but othet proceedings and a proceeding under S. 44 of C. P. C. (1882) also falls within its scope. 14 C.W.N. 823=3 Ind. Cas. 116.

——S. 44—Fraud—Application under S. 4, C.P.C. —Evidence, admissibility of.

It is open to an applicant seeking to set aside an execution sale to show by evidence that it was brought about by fraud, collusion, etc. 18 C.L.J. 264=31 Ind Cas. 938.

——S. 44—Fraud—Person affected by—Right of suit.

A person affected by fraud can impeach it and sue to set aside the results. 16 C.L.J. 141=17 Ind. Cas. 126.

——S. 44—Fraud—Plea in defence—Suit for possession.

A plea of fraud can be taken at any time in defence though the person pleading has not sought to set aside The transaction; lapse of time will not affect the plea under certain circumstances. 11 Ind. Cas. 882 (Cal.).

4. Gross negligence of guardian.

See also EVIDENCE ACT, S. 40.

——S. 44—Applicability—Decree against minor represented by guardian ad-litem—Gross negligence of guardian—If can form basis of suit by minor to set aside decree—Proof of fraud and collusion—Necessity 27 Pat. 441=A.I.R. 1950 Pat. 97 (F.B).

——S. 44—Scope—Suit by minor represented by next friend—Dismissal for gross neglect of guardian—Second suit by minor—Maintainability. **See** MYS. C.P. CODE, O. 9, R. 9. 53 Mys. H. C.R. 322.

——S.44—Substantive right of minor to avoid decree obtained against him on account of gross negligence of guardian ad litem cannot be defeated merely because gross negligence is not maintained in S. 44.

The right of the minor to avoid a decree obtained against him on account of the gross negligence of his guardian ad litem is a substantive right. It is not a mere matter of procedure and does not depend on any rule of evidence. He cannot be prevented from enforcing his substantive right simply because this may cause loss or inconvenience to the plaintiff of the previous litigation. Apart from the provisions of S. 44, Evidence Act, a minor would have the right to avoid a decree obtained against him by means of fraud or collusion. A substantive right cannot be defeated simply because gross neligence is not mentioned as one of the ground of avoiding a judgment in S 44, Evidence Act. Section 44 is merely permissive and not prohibitive. It does not enumerate or exhaust the grounds upon which a decree or order may be attached. A.I.R. 1946 Lah. 233=48 Pun. L.R. 280=I.L.R. (1946) Lah. 515=225 Ind. 456 (F.B.).

——S. 44—Gross negligence of guardian.

Minor's right to bring a suit for setting aside a decree against him on ground of gross and culpable negligence of guardian ad litem is an exception to the ordinary rule according to which a decree can be set aside only on grounds of fraud and collusion upon broad principles of equity, justice and good conscience. Neither S 44 nor S. 2, Evidence Act, bar such a suit. A.I.R. 1941 Cal 401=I.L.R. (1941) 1 Cal. 477=45 C.W.N. 508=196 Ind. Cas. 779.

——S. 44—Minor's right to challenge decree on ground of negligence of guardian.

Section 44, Evidence Act, deals with defences open against a judgment in a prior suit relied on. as res judicata but if it be part of the substantive law that a minor can challenge a decree on the ground of negligence by his guardian, it must necessarily be open to him to attack the judgment on that ground without reference to S. 44, Evidence Act. The Evidence Act does not destroy substantive rights. A.I.R. 1939 Bom. 66=I.L.R. (1939) Bom. 340=41 Bom. L.R. 59=180 Ind. Cas. 51 (F.B.).

——S. 44—Scope—Gross negligence.

The principle of S. 44, Evidence Act, cannot be extended to cases of gross negligence. A.I.R. 1937 P.C. 1 = 1937 M. W. N. 66 = (1937) 1 M. L. J. 113 = 1937 A.L.J. 240=64 I.A. 17=41 C. W. N. 257=45 L.W. 43=18 P.L.T. 27=1937 O. W. N. 42=39 Bom. L.R. 317=65 C.L.J. 14=1937 A.W.R. 42=I. L. R (1937) Mad. 263=166 Ind. Cas. 1 (P.C.).

[**Overrules** A. I. R. 1923 Mad. 718=74 Ind. Cas. 218.]

——S. 44—Gross negligence of guardian.

A minor can prove that judgment against him was obtained by negligence of guardian. A.I.R. 1932 All. 293=1932 A.L.J. 437=16 R.D. 327=54 All. 646=138. Ind. Cas. 465 (F.B.).

5. Want of jurisdiction.

——S. 44—Want of jurisdiction.

A suit cognizable alone by Revenue Court under the Agra Tenancy Act, was filed in a Civil Court. An objection was raised about the jurisdiction of the Court which was disallowed and the claim decreed. Neither any appeal was preferred nor any remedy sought from the High Court. The objection about the jurisdiction was again raised at the time of the execution of the decree:

Held that it would be contrary to the spirit of S. 47, Civil P.C., to allow the executing Court to go beyond the finding of the Civil Court, and to re-open and determine the question of jurisdiction again. Hence it is not open to the defendant to raise the question of jurisdiction in the execution department. A. I. R. 1934 All. 609=1934 A. L. J. 409=18 R. D. 275=3 A.W.R. 721=57 All, I -149 Ind.Cas. 636 (F.B.).

——S. 44—Competent court—Want of jurisdiction.

To avoid a prior judgment on the ground of fraud or want of jurisdiction, the fraud must have been "practised on the Courts" and a total want of jurisdiction is required, mere irregularity in the exercise of jurisdiction not enough. 37 All. 485=42 I. A 171=13 A.L.J. 937=29 M.L.J. 165=2 L.W. 671=18 M.L.T. 173=17 Bom. L. R. 754=20 C. W. N. 35=(1915) M.W.N. 736=23 C.L.J. 55=30 Ind. Cas. 849. (P.C.)

——S. 44—Competent Court—Compromise decree—Not objected to—Effect—Bengal Tenancy Act., Ss. 29 and 147,=A—Irregularity and nullity.

In a suit against three brothers, a decree was passed against them on a compromise by one of them without the knowledge of the others, who however, raised no objection to it:

Held, that they will be bound by the decree unless it could be shown to have been obtained by fraud.

Under S. 147, B.T. Act a court is not competent within S. 44, Indian Evidence Act, to pass a decree on a compromise which is not a lawful contract being on contravention of S. 29 of the B. T. Act. 17 C. W. N. 496=18 Ind. Cas. 809.

——S. 44—Want of jurisdiction—Agra Tenancy Act (1901), S. 32.

If a suit is objected to, on the ground that it is barred by S. 32, Agra Tenancy Act, and is decided against the objector, he cannot object subsequently under S. 44, Evidence Act that the decision was passed without jurisdiction. 6 Ind. Cas. 98 (All.).

Miscellaneous.

——S. 44—Miscellaneous — Admissibility of a decree for rent obtained by one co-sharer in a suit by another co-sharer.

Where the tenant holds on one contract of tenancy and each co-sharer claims to receive proportionate rent from him a decree obtained by one co-sharer is admissible in a suit for rent by another co-sharer to prove the rate of rent. 17 C.W.N. 1016=15 Ind. Cas. 624.

——S. 44—Consent decree.

The plaintiff being no party to the consent decree can attack it in his suit and need not have it set aside. 32 Ind. Cas. 849 (Cal.).

——Ss. 45 to 47.

Synopsis.

(1) **Duty of Court.**
(2) **Duty of expert.**
(3) **Expert—who is.**
(4) **Finger print.**
(5) **Handwriting expert.** **See also** EVIDENCE ACT Sc. 45 to 47—DUTY OF COURT.
(6) **Handwriting—Proof of.**
(7) **Medical evidence.** **See also** Cr. P. C. Sc 509 AND 510.
(8) **Procedure.**
(9) **Rights and duties of parties.**
(10) **Roport of experts.**
(11) **Scope.**
(12) **Tracker.**
(13) **Value of.**
(14) **Miscellaneous.**

1. Duty of Court.

——S. 45—Duty of Court—Handwriting—Comparison — Judge should not take upon himself task of comparing signatures—At least assistance of lawyers should be taken.

It is not desirable that a Judge should take upon himself the task of comparing signatures in order to find out whether there has been a forgery in a case. The least the Judge should do is to seek the assistance of the lawyers concerned in comparing the two signatures and arriving at his conclusions. It is not unusual to find a difference in the writing of one and the same person even after a short interval of time. It all depends upon so many extraneous circumstances—the pen, the ink, the paper, the posture of his hand, the general conditions in which he writes. It is for this reason that the law merely requires a consideration of the general character. A.I.R. 1946 All. 67=1945 A. L. J. 426=I.L.R. (1946) All. 130.

——S. 45—Duty of Court—Expert, opinion of—Value—Corroboration, necessity—Conviction.

There is nothing the Evidence Act which requires the evidence of an expert to be corroborated before it can be acted upon as sufficient proof of what the expert stated. As to how much reliance can be placed on the statement of any particular witness depends on the facts and circumstances of that particular case. But a Court should be careful not to delegate its authority to a third party and should itself be satisfied that the accused was guilty and not hold him guilty, merely because an expert comes forward and says that in his opinion the accused is guilty. A. I. R. 1945 Sind 4=I. L. R. (1944) Kar . 305=46 Cr.L.J. 490=218 Ind. Cas. 379.

——S. 45—Duty of Court—The Magistrate, who has to deal with the evidence of an expert witness should take the pains to have the expert explain in Court the reasons for his opinion. It is only after hearing those reasons in detail that the Magistrate would be in a position to express a sound opinion whether or no the expert's opinion is satisfactory. A.I.R. 1941 Mad. 551=1941 M. W. N. 218=53 M.L.W. 396=(1941) 1 M.L.J. 475=42 Cr. L. J. 696=195 Ind. Cas. 183.

——S. 45—Duty of Court—Expert evidence—Finger impressions.

The Court is not bound to accept the evidence of an expert, even though there are no special reasons for not accepting it ; but in the case of finger impressions it is certainly proper on the part of the Magistrate to satisfy himself by personal examination that the impressions of the accused and of those alleged to be that of the accused and found at the place of occurrence are identical. A. I.R. 1942 Mad. 551=1941 M.W.N. 218=53 M.L.W. 396=(1941) 1 M. L. J. 475=42 Cr. L. J. 696=195 Ind. Cas. 183.

——S. 45—Duty of Court—Expert's evidence as to foot-prints found near corpse—Value of.

The expert's opinion is valuable but it must be supported by statements of fact, the accuracy or otherwise of which can be verified by the Judge.

In a murder case before relying on the opinion of the expert regarding the foot-prints found near the corpse of the victim, as conclusive evidence against the accused. the Judge should form his own opinion with regard to the identity of the foot-prints found near the corpse with the foot-prints of the accused. A.I.R. 1941 Mad. 88=1940 M.W.N. 761=53 M.L.W. 198=42 Cr. L. J. 316=192 Ind. Cas. 704.

——S. 45—Duty of Court—Expert—Opinion on scientific basis but differing.

It may be said generally that expert evidence produced by an interested party may have a certain amount of unconscious bias in favour of that party. But if the difference of opinion between two expert witnesses is purely of a scientific character, the Court must accept one opinion or the other without characterising the opposite opinion as partial. A.I.R. 1937 All. 182=38 Cr. L. J. 401=1936 A. W. R. 1065=167 Ind. Cas. 676.

——S. 45—Duty of Court—Handwriting expert.

A comparison of handwriting is something hazardous and inconclusive, and should be made with care and caution in the light of assistance that may be available in the shape of expert evidence or argument on behalf of parties concerned, or other ways ensuring a right decision. No hard and fast rule could possibly be laid down as to the best method of arriving at a proper conclusion on the question of similarity of handwriting. The rejection, even **in toto** of an expert's opinion would not exonerate the Court from the duty of coming to an independent finding on the question of an authorship of handwriting ; the Court has to examine the opinion and come to its own decision. The most importnnt things are to examine the general characteristics, foran-tion of letters, fixed pen habits and mannerisms, mad discern the identify of the writer. The identity or resemblance in handwriting has to be found out on the value of the effect of various considerations arising from individual characteristics and idiosyncracies which have been embodied in technical language of experts. A.I.R. 1937 Cal. 99=38 Cr. L. J. 818—169 Ind. Cas. 977 (S.R).

——S. 45—Duty of Court—Expert evidence—Admissibility of—Circumstantial evidence—Duty of Court to draw conclusions.

Evidence of similarity of the impressions of the foot shod or unshod. is admitted by the Courts in India and

in Great Britain, and in every other country, though there is no science of such impressions. The fact is that such evidence comes under the head of circumstantial evidence. In a case of this kind, it is not the opinion of the expert that is of any importance but the facts that the expert has noticed. A person who has made a study of the prints made by the human foot is better qualified to notice points of similarity or dissimilarity than one who has made no such study. He is liable to lay these points before the Court and from his evidence, the Court draws its own conclusions. A.I.R. 1937 Mad. 951=1937 M.W.N. 874=46 M.L.W. 477=39 Cr. L.J. 149=I.L.R. (1938) Mad. 262=172 Ind. Cas. 485.

——S. 45—Duty of Court—Comparison of disputed signatures.

There is considerable danger of a miscarriage of justice when a Criminal Court relies on its own comparison of a disputed signature with another signature for the purpose of determining its authenticity. It is usually desirable to obtain the opinion of an expert with regard to this or, better still, the evidence of persons who can speak to the signature having been written in their presence. A.I.R. 1937 Pat. 146=17 P. L. T. 896=33 Cr. L.J. 136=166 Ind. Cas. 136.

——S. 45—Duty of Court—Opinion of handwriting expert that signature is genuine but the document is forged is inadmissible—Court must form its own opinion on the question as to whether forgery was committed. 1936 M. W. N. 825.

——S. 45—Duty of Court—Document typed on same machine as another document—Admissibility.

The opinion of an expert that one document has been typewritten on the same machine as another document is not admissible under S. 45, Evidence Act. The Court may ask the witness points in favour of the view whether the two documents have or have not been typewritten on the same machine, but must come to its own conclusion and not treat such assistance as an expert opinion, a relevant fact in itself. A. I. R. 1935 All. 162 =36 Cr. L. J. 684=1935 A.W.R. 1=155 Ind. Cas. 369.

——S. 45—Duty of Court—Expert evidence—Court, if can surrender opinion to that of expert.

A Court is not to surrender its own opinion to that of experts who are called before it, but with such help as the experts can afford, the Court must form its own opinion on the subject in hand. A.I.R. 1935 Rang. 178 =36 Cr. L. J. 961=156 Ind. Cas. 582=13 Rang. 518 (S.B.).

——S. 45—Duty of Court—Court must never surrender its will or independence of judgment to an expert.

A Court must never surrender its will or independence of judgment to an expert, and a Court must, in all cases in which expert evidence is adduced before it after giving it such weight as it thinks such evidence deserves, make up its own mind upon the issue in respect of which the expert testimony has been given. 157 Ind. Cas. 82.

——S. 45—Duty of Court—Handwriting expert—Mere report of handwriting expert—Admissibility—Duty of Court to give opportunity to examine experts.

The mere report of a handwriting expert who has not been examined and to cross-examine whom no opportunity was given to the parties is not admissible in evidence.

Where the defendant is illiterate and the genuineness of a paper said to have been executed by him is in dispute and the decision of the question depends upon the genuineness of the finger print, the parties should be allowed, if they want, to examine experts. A. I. R. 1933 Pat. 159=141 Ind. Cas. 767.

——S. 45—Duty of Court.

It is not the duty or function of the Court to decide before-hand whether the evidence of a handwriting expert, if produced, would influence his opinion one way or other. That is a matter which should be settled only after the evidence has been recorded and read in the case. A. I. R. 1932 Lah. 481=33 Cr. L. J. 761=33 P.L.R. 811=139 Ind. Cas. 508.

——S. 45—Duty of Court—Corroboration.

Court must not take the expert's opinion for granted but it must examine his evidence in order to satisfy itself that there can be no mistake, and the responsibility is all the greater when there is no other evidence to corroborate the expert. A.I.R. 1931 Cal. 441=35 C.W.N. 863=32 Cr. L. J. 1001=54 C. L. J. 107=133 Ind. Cas. 111.

——S. 45—Duty of Court.

Where the so-called "expert witnesses" as to value of land given no data in support of their opinion, their evidence should be rejected. A.I.R. 1931 Lah. 364=33 P. L. R. 1100=135 Ind. Cas. 183.

——S. 45—Duty of Court—Opinion on foreign law.

Expert's opinion on foreign law, where it is elaborately laid down in a Code, need not be called for—Court should itself interpret such law. 123 Ind. Cas. 600=A.I.R. 1930 Mad. 146.

——S. 45—Duty of Court—Opinions on law.

—It is the duty of Courts themselves to interpret the law of the land and apply it and not to depend on the opinion of witnesses howsoever learned they may be. It would be dangerous to delegates their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in British India are not supposed to be conversant. Opinions of experts on foreign law are therefore allowed to be admitted. 89 Ind. Cas. 690=47 All. 823 =23 A. L. J. 768=A. I. R. 1925 All. 720.

——S. 45—Duty of Court—Handwriting.

Court convinced against alleged signature—Witnesses deposing in its favour—Court would not declare it to be forgery in absence of other corroborating evidence. 87 Ind. Cas. 534=41 C.L.J. 300=A. I. R. 1925 Cal. 768.

——S. 45—Duty of Court—Court as expert.

Judge should not himself compare signatures without the help of other evidence. 78 Ind. Cas. 668=A.I.R. 1925 Cal. 485.

——S. 45—Duty of Court.

A Court's opinion based upon its own knowledge without the help of trained assistant to the effect that a certain amount of arsenic contained in certain prescriptions would produce arsenical poisoning, collapse and unconsciousness, is unsound and valueless especially where it is by itself untrained in medicine. Similarly it cannot say what medicines should be prescribed for biliary colic by reference to medical books 83 Ind. Cas. 631=28 C. W. N. 579=26 Cr. L.J. 71= A.I.R. 1924 Cal. 611.

——S. 45—Duty of Court—Expert Opinion—Questions for.

The opinion of an expert on facts proved admitted is only relevant when the court has to form an opinion on a point of science or art. Expert opinion even on admitted or proved facts will differ, and then the court has to decide which opinion it will rely on. But when the facts are not admitted, the Court has first to come to a conclusion on the evidence as to what facts have been proved and then apply to such facts the various expert opinions which have been offered. But if it is not a point of science or art the court or jury can form an opinion without expert evidence though the line where there no longer remains a point of science or art on which the court has to form an opinion is not always very clearly defined. (1908) 10 Bom. L. R. 1004.

——S. 45—Duty of Court—Trade mark, limitation of—Expert opinion whether admissible.

Expert opinion as to whether goods of a particular firm bearing particular trademarks alleged to be imitation would be likely to deceive the ultimate purchasers to buy imitation goods in place of genuine ones, is not admissible, as the matter is not a question of science or art, and so the Court must decide whether the marks complained of, are likely to deceive the public. 10 S.L.R. 175=41 Ind. Cas. 539.

2. Duty of Expert.

——S. 45—Duty of Expert—Medical evidence about age—Doctor must express definite opinion.

Medical Officers must not forget that the Court must decide matters beyond reasonable doubt and not on a preponderence of probability. Where the age of the accused is in question, if they are convinced beyond reasonable doubt they should say "I feel certain accused is of particular years old", and not "I do not think he is younger than a particular years of age." A.I.R. 1938 Rang. 56=39 Cr. L.J. 412=174 Ind. Cas. 338.

——S. 45—Duty of expert—Duty of Medical Officer to give evidence when required—Contempt of Court.

Medical Officers, like other persons, are bound to attend to Court on receipt of summons and to give evidence if required by the Court. They cannot refuse to give evidence for reasons which they may consider to be sufficient, but they should represent to the Court as regards fees payable to them. Any dictation of term on which they would give evidence is unnecessary and should be avoided. A.I.R. 1937 All. 768=1937 A.L.J. 972=39 Cr. L. J. 113=1937 A. W. R. 899 (1)=172 Ind. Cas. 81.

——S. 45—Duty of Expert.

If an expert witness, on payment of a reasonable fee fixed by Magistrate, declines to give evidence the Magistrate can compel him to do so. A.I.R. 1932 Lah. 481=33 P.L.R. 811=33 Cr. L. J. 761=139 Ind. Cas. 508.

3. Expert—Who is.

——S. 45—Expert, who is.

Proceedings under S. 23, Land Acquisition Act—The experienced architects and municipal land surveyors cannot be regarded as valuators or experts merely because in the cousse of their business or duty, they have had occasion to value a property here or there. A. I. R. 1388 Sind 225=179 Ind. Cas. 359.

——S. 45—Expert, who is expert witness on wear and usage of tyres.

Where a haulage contractor owning many lorries and in the business for years testifies as an expert, it will be ridiculous to say that the witness could not be described as an expert on the quality, wear and usage of tyres merely because he had not seen the process of manufacturer 157 Ind. Cas. 18.

——S. 45—Expert, who is—Skilled witnesses.

The opinion and conclusion of a skilled person on proved facts are receivable in evidence provided the witness has made a special study of the subject or acquired a special experience therein. A.I.R. 1931 P. C. 189=131 Ind. Cas. 771 (P. C.).

——S. 45—"Expert."

In law and as applied to a witness, the term "expert" has a special significance and no witness is permitted to express his opinion unless he is an "expert" within the term of S. 45 or in special cases is permitted to express such opinion by some special law. A. I. R. 1930 All. 587=128 Ind. Cas. 441.

——S. 45—Non-expert.

Evidence of person who is not "expert" in art of handwriting can be ruled out as inadmissible. 31 P. L. R. 109=A. I. R. 1930 Lah. 336.

——S. 45—Assistant Mint Master.

Assistant Mint Master is an expert. 88 Ind. Cas. 848=12 O. L. J. 497=2 O W.N. 377=26 Cr. L. J. 1232=A. I. R. 1925 Oudh 616.

4. Finger Print.

——S. 45—Finger print expert—Opinion of—Value.

Although the evidence of a handwriring expert is frequently found to be faulty, the evidence of a thumb impression expert is more reliable, because with regard to finger prints it has never been found that two finger prints are identical in all respects. The Court, however, cannot delegate its authority to the expert but has to satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself as to the value of any other evidence. 83 C.L.J. 397=A.I.R. 1950 Cal. 66=51 Cr. L. J 376.

——S. 45—Finger-print expert—Conviction resting on his evidence—Duty of Court.

When a conviction rests entirely upon the evidence of a finger-print expert, it is the duty of the trial Court to direct its mind to such evidence with a view to satisfying itself that the thumb impression in question is in fact the thumb impression of the person charged, taking such assistance as it can from the evidence of the finger print expert. A trial Court is not absolved from the duty of forming its own conclusions in respect of a questioned finger-print, merely because a finger-print expert says that the questioned print is the print of an accused person's finger or thumb. 1 A. I. Cr. D. 198 =A. I. R. 1947 Sind 177.

——S. 47—Corroboration of evidence.

It is going too far to say that the Court must insist upon corroboration of the evidence of a finger-print expert. On the other hand the Court must be careful not to delegate its authority to a third party. The Court has to be satisfied that the accused is guilty, and the Court cannot hold him guilty merely because an

expert comes forward and says that, in his opinion, the accused must be guilty. The Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence The Court has to rely on the expert upon two distinct points, (1) on the question of similarity between the marks, which is a question of fact on which the Court can and should, with the assistance of the expert satisfy and (2) on the point, which is one for expert opinion, whether it is possible to find the finger-print or thumb-impression of two individuals corresponding in as many points of resemblance as are shown to exist between the impressions found in the case before the Court and those of the accused. When the expert tells the Court that it is impossible to find so many characteristics in the finger-prints of two persons as are found in this case, and when that statement entirely agrees with what one has read on the subject in scientific books, the Court need not hesitate in accepting the opinion. A.I.R. 1956 Bom. 151=38 Bom. L.R. 160=60 Bom. 187=37Cr. L. J. 539=162 Ind. Cas. 231.

——S. 47—Summary comparison, not scientific comparison.

Where a finger print expert gives evidence merely on his observation and summary comparison and not scientific comparison of the two thumb-impressions in Court, his evidence is not, under the circumstances, admissible. A.I.R. 1936 Lah. 681=38 P. L. R. 219=164 Ind. Cas. 689(1).

——S. 47—Finger-print.

The evidence of handwriting experts has often been found to be faulty but the evidence of finger-print experts is entitled to much weight. A.I.R. 1935 Lah. 147=36 P. L. R. 477=155 Ind. Cas. 799.

——S. 45—Finger-print—Thumb impression.

Evidence of thumb-impression expert in valuable. 113 Ind. Cas. 68=30 Cr. L. J. 52=11 A. I. Cr. R. 428=A. I. R. 1929 Lah. 210.

——S. 45—Finger-print.

As to the probative value of the opinion of an expert on fingerprints, it must have the same value as the opinion of any other expert, such as a medical officer, etc. In each case the evidence is only a guide to the Court to direct its attention to judge of its value. The Court is at liberty to use its own discretion and to come to conclusion either in affirmance or differing from the view taken by the expert. Though it is not safe to convict an accused upon the sole testimony of an expert, yet the Court cannot refuse to convict a person on the evidence of a finger-print expert, merely on the ground that it is unsafe to base a conviction upon such evidence. A.I.R. 1926 Cal. 531, A. I. R. 1923 Mad. 178 and 32 Cal. 759, Foll. 104 Ind. Cas. 626=6 Pat. 305=28 Cr. L. J. 850==A.I.R. 1928 Pat. 129.

——S. 45—Finger-print—Evidence of Finger-print Expert as to age of thumb impression opposed to date on the document—Court should be careful to accept expert opinion. 97 Ind. Cas. 335=A.I.R. 1956 Pat. 575.

——S. 45—Finger print—Although finger-prints sometimes afford valuable evidence of identity, great caution must be exercised in arriving at a conclusion by a comparison of thumb impressions, and the positive evidence of witnesses who were undoubtedly present and were eye-witnesses to the transaction should not be lightly brushed aside. 70 Ind. Cas. 194=36 C. L. J. 9=A.I.R. 1923 Cal. 240.

——S. 45—Finger print—Thump impression—Conclutions from can be basis of conviction. 69 Ind. Cas. 374=1 M.L.W. 663=1922 M.W.N 642=31 M. L. T. 427=23 Cr. L. J. 694=46 Mad. 715=A,I.R. 1923 Mad. 178.

——S. 45—Finger-print—Expert evidence—Cross-examination—Opinion.

If a finger print expert has not been cross-examined as to the grounds of his opinion and as to the test to which he had put a particular finger print, the weight to be attached to such witness's evidence cannot be diminished by applying to it considerations to which the witness's attention was never directed. 21 Cr. L. J. 257=55 Ind. Cas. 273 (Pat.).

——S. 45—Finger-print—Thumb-impression—Decision on—Propriety.

Where in a suit on a promissory note the Appellate Court being unable to believe the evidence on either side, decided the case on the report of the Thumb-impression Bureau to whom it sent the document the procedure was held to be unwarranted by law. 28 Ind. Cas. 32 (All.).

5. Handwriting expert.

See also EVIDENCE ACT, SS. 45—47—DUTY OF COURT.

——S. 45—Handwriting expert—Opinion of—Value of.

The opinion of a handwriting expert cannot in law be accepted as conclusive proof. At best it can only be taken as an unconclusive aid in conjunction with other evidence. A.I.R. 1949 Kut. 3=50 Cr. L.J. 994.

——S. 47—Handwriting expert—Comparison—Court, if can use its own eyes.

The Court is not incompetent to use its own eyes for the purpose of deciding whether certain handwritings placed before it are similar or not. The opinion of experts is only a piece of evidence. The opinion of the Judge is the decision in the case. A.I.R. 1937 Pat. 303=18 P. L. T. 491=169 Ind. Cas. 822.

——S. 47—Expert evidence value of—Corroboration—Expert not familiar with characters in which document is written—Value.

The value of expert evidence depends largely on the cogency of the reasons on which it is based. In general, it cannot be the basis of conviction unless corroborated. The fact that the hand-writing expert is not acquainted with the characters (Urdu) in which the disputed document is written and he cannot read or write them will not make him incompetent as an expert in handwriting. But he is undoubtedly not possesed of an advantage which one well familiar with the Urdu characters has. So far as the evidence of the expert is based on a comparison of words shown by him in juxtaposition, it is not of great value. A.I.R. 1936 All. 165=1936 A.W.R. 119=37 Cr. L. J. 263=1936 A.L.J. 317=160 Ind. Cas. 2?4.

——S. 45—Handwriting expert.

In considering the value of the evidence of an expert it must be borne in mind that an expert witness, however impartial he may wish to be, is likely to be unconscious prejudiced in favour of the side which calls him.

It must also be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to it

interests. A. I. R. 1933 Lah. 561=34 Cr. L J. 735= 34 P.L.R. 719=144 Ind. Cas. 331.

——S. 45—Handwriting expert—Signature in language which expert cannot read or write—Opinion of Expert—Value of.

The fact that the expert cannot read or write the language in which the signature is made, must detract from the value which would otherwise have been attached to his evidence. Though it may be of value as corroboration of direct evidence or evidence afforded by surrounding circumstances, still, it can hardly be sufficient in itself to warrant conviction. A.I.R. 1933 Pat. 559=1933 Cr. C. 1259.

——S. 45—Handwriting expert.

It is not the duty or even the function of a Maigstrate to decide beforehand whether the evidence of a handwriting expert, if produced, would influence his opinion one way or the other. That is a matter which should be settled only after the evidence has been recorded and read in the case. A.I.R. 1932 Lah. 481 =33 Cr. L.J. 761=33 P.L.R. 811=139 Ind. Cas. 508.

——S. 45—Handwriting—Expert—Inspection by Court.

It is always unsafe to hold that a document is a forgery on the personal inspection of the document by the Court. 72 Ind. Cas. 748=A.I.R. 1924 Pat. 284.

——S. 45—Handwriting expert — Penal Code, S. 193—Opinion of hand expert not examined on oath—Magistrate's own observation may be used as evidence.

Where in a trial for perjury in respect of a promissory note which the accused said on oath was in his handwriting, the Magistrate admitted in evidence the opinion of a handwriting expert against the accused without his being examined on oath and also had his own opinion after comparing the handwriting of the promissory note with various other handwritings, that the writing was not of the accused:

Held, that a conviction under S. 193 based on these materials is bad. The proposition that a Judge should not import his personal knowledge into his judgments and that if he wishes to rely on facts within his knowledge, he must go to the witness box and depose to them on oath is no doubt correct in the main, but it does not apply to facts of which a Judge is permitted to take judicial notice and nowhere in the Indian Evidence Act is it laid down that a Judge must not look at exhibits produced in Court or partly base his judgment on them. 11 W.R. Cr. 25, Foll. 76 Ind. Cas. 425=1 Rang. 290= 25 Cr. L.J. 185=A.I.R. 1924 Rang. 17.

——S. 45—Handwriting expert.

Expert evidence as to handwriting—Only similarities must be pointed out to Court—Court has to decide whether particular writing is to be assigned to particular person. A.I.R. 1921 P.C. 168 (P.C.).

——S. 45—Handwriting—Expert opinion.

In the case of handwriting, it is unsafe to base conviction on the opinion of an expert. 6 A. L. J. 184= 9 Cr. L.J. 498=2 Ind. Cas. 154.

——S. 47—Handwriting expert—Comparison of handwriting — Handwriting — Comparison of — Weight due to—Resemblance of signature—Denial of signature—Onus.

Although it is true that under the Evidence Act comparison of handwriting is legitimate enough and the view of persons competent to express opinion may be in many cases of considerable value, the opinions of those who have not carefully studied the art of caligraphy is not as a rule of very great utility. Indeed so uncertain and inexact is the science of the study of caligraphy that it has been for some years past the tendency to regard evidence even of experts as of somewhat inconclusive character. The mere fact that there is a resemblance between the signature alleged to be false and a signature admitted to be genuine does not carry great weight. If a signature is denied, the onus of proving it is on the party relying on its genuineness. 64 Ind. Cas. 234 (Pat.).

——S. 45—Handwriting—Expert opinion.

Experts differ in their opinion. When the admitted facts lead to one conclusion and to one conclusion only it would be unsafe to rely on the testimony of the handwriting expert. (1920) P.H.C.C. 155=1 Pat. L. T. 136=56 Ind. Cas. 879.

——Ss. 47, 73—Expert evidence—Value of—What must be proved.

In a case of forgery the only chief evidence being an expert's examination of the forged document as compared with the other documents alleged to be in the handwriting of the accused, the other documents must be strictly proved to be in his handwriting. A mere statement therefore by a witness that it is the handwriting of the accused is no evidence if he is not able to say how long ago they were written. In arriving at a conclusion of the authorship of the forged document the expert should show marked peculiarities in this handwriting of the accused which are reproduced in the forged document and when the writing has no such peculiarities, the comparison is of no consequence and cannot be relied on. Also the fact that the disputed samples are put separately from the standard ones for the examination lessons its usefulness. A conviction cannot be based on an expert's comparison, if it is not supported by corroborative evidence. 36 Mad. 159= 11 M.L.T. 93=22 M L.J. 270=(1912) M. W. N. 125= 13 Cr. L.J. 226=14 Ind. Cas. 418.

——S. 45—Expert evidence—Evidence to prove handwriting—Sufficiency to a prove a disputed writing.

To base a conviction on the evidence of an expert in handwriting as a general rule is very unsafe. There may be cases in which the handwriting is of such a peculiar character that the conclusion as to identity of the writer is irresistible. In this case two anonymous threatening letters were sent to the Government. The Government expert in handwriting was examined and he deposed that having regard to the movement, execution, style, direction, curve and pen pressure of certain letters the writing of the exhibits resembled the admitted handwriting of the accused.—**Held,** that the evidence was not enough to prove beyond reasonable doubt that the accused was the writer of the anonymous letters. 2 A.L.J. R. 445 foll. (1908) 6 A.L.J. 184=2 Ind. Cas. 154=9 Cr. L.J. 498.

——S. 47—Handwriting—Expert opinion—Value of.

The opinion of an expert in handwriting should be received with great caution and should not be relied on, unless corroborated. 8 Ind. Cas. 98 (Bom.).

——S. 45, illus.(c)—Handwriting expert—Comparison of handwriting—Expert's evidence.

The writing with which the comparison is made must be clearly proved to be that of the person alleged. 22 W.R. 272, Rel. on. A comparison of handwriting is

to be used with great care and caution and especially in a Criminal case when a large quantity of apparently different handwriting is under comparison. Where there is no comparison by the expert in open Court before the accused with documents proved or admitted to be in his handwriting the evidence of the expert is inadmissible. 39 Cal. 606=13 Cr. L.J. 289=16 C.W.N. 812=14 Ind. Cas. 753.

——S. 45—Handwriting expert's opinion—Value.

It is unsafe to base a conviction on handwriting expert's opinion which though valuable to corroborate direct evidence, can only in rare cases take the place of direct evidence. If there are few similarities discovered in the handwritings compared, and no peculiar style is found, it is unsafe to convict the accused of forgery. 13 O.C. 1=11 Cr. L J. 114=5 Ind. Cas. 355.

——S. 45—Handwriting expert—Reception of evidence—Practice.

To make the evidence of a handwriting expert admissible, it is not necessary that the handwriting should be actually compared in Court. It is enough if the documents admittedly in the accused's handwriting, are shown to him in open Court and he expresses his oipnions thereon. 16 Cr. L.J. 703=30 Ind. Cas. 751 (Mad.).

6. Handwriting—Proof of.

——S. 47—Handwriting—Proof.

A witness need not state in the first instance how he knows the handwriting, which he is examined to prove, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands. A.I.R. 1942 Pat. 449=198 Ind. Cas. 711.

——S. 45—Handwriting—Proof of—Comparison.

A comparison of handwriting is at all times, as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts.

Where the lower Appellate Court did not discuss either the oral evidence or the probabilities of the case, but simply relied upon what appeared to it to be a signature on the Will as a mere "tracing forgery" of some other signature of the testator and quashed the probate granted on a consideration of the evidence, by the first Court.

Held, that the lower Appellate Court had erred : 49 Cal. 235; A.I.R. 1922 Cal. 12, Foll. 85 Ind. Cas. 525=29 C.W.N. 75=A.I.R. 1925 Cal. 145.

——S. 45—Handwriting—Proof—Person proving handwriting must prove his acquaintance with the handwriting to be proved.

In order to prove the handwriting or signature of another person one must show that he is acquainted with the handwriting or signature of that person. '92 Ind. Cas. 1034=4 Pat. 394=7 P.L.T. 507=A.I.R. 1925 Pat. 787.

——S. 47—Handwriting—Proof of—Comparison is always an unsafe method of proof—Standard writing must be admitted or proved to be writing of person to whom it is attributed and writing compared must purport to be in that person's hand.

One of the ordinary methods of proving handwriting are (1) by calling as a witness a person who wrote the document or saw it written or who is qualified to express an opinion as to the handwriting by virtue of S. 47 of the Evidence Act. 66 Ind. Cas. 774=26 C.W.N. 113=49 Cal. 235=34 C.L.J. 373=A.I.R. 1922 Cal. 12.

——S. 47—Handwriting—Evidence of persons acquainted.

The evidence of persons acquainted with the handwriting of a person by whom the document is supposed to be written is admissible, though they are not experts. 18 P.R. 1915=12 P.W.R. (Cr.) 1915=16 Cr. L.J. 338=28 Ind. Cas. 722.

——S. 47—Handwriting—Evidence of persons acquainted with.

The evidence of persons acquainted with the handwriting of a person by whom the document is supposed to be written is admissible though they are not experts. 147 P.L.R. 1912=13 Cr. L. J. 563=18 P. W. R. (Cr.) 1912=15 Ind. Cas. 979.

——S. 45—Handwriting, proof of.

A comparison of signatures is a mode of ascertaining the truth which ought to be used with very great care and caution. It is at all times, as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. (1909) 37 C. 467=14 C. W. N. 1114=7 Ind. Cas. 359=11 Cr. L.J. 453.

——S. 47—Handwriting, proof of—Witness.

A witness need not state in the first instance how he knows the handwriting since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands. It is permissible and may often be expedient that the matters referred to in the explanation to S. 47. Evidence Act, should be elicited in the examination-in-chief, and it is within the power of the presiding judge, if expedient, to permit the opposing advocate to intervene and cross-examine so that the court may be in a position to come to a definite conclusion on adequate materials as to the proof of the handwriting. 5. Bom. L.R. 663=28 B. 58.

——S. 45—Handwriting—Genuineness.

The test of genuineness ought to be the resemblance not to the formation of letters in some other specimen or specimen but to the general character of writing which is impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is, therefore, itself permanent. The best usually, perhaps, the only proper evidence of handwriting is that of persons who have acquired a previous knowledge of the party's handwriting from seeing him write and who form their opinion from the general character and manner of these, and not from criticising the particular letters. 3 Ind. Cas. 291 (Cal.).

7. Medical evidence.

See also CR. P. CODE SS. 509, 510.

——S. 45—Opinion of doctor in regard to age—Admissibility and value.

The opinion of a doctor in regard to the age of a person is a relevant piece of evidence under S. 45 of the

Evidence Act, and it is quite a different question as to what weight in a particular case ought to be attached to such an opinion. A.I.R. 1949 Pesh. 11.

——S. 45—Medical evidence—Question of unsoundness of mind—Opinion of medical—Value of.

Under S. 45 of the Evidence Act the opinion of a medical witness conversant with the disease of insanity, however eminent be may be, must not be read as conclusive of the fact which the Court has to try. Such opinion may be invited in exceptional circumstances where there is no dispute as to facts or their interpretation but it must be considered by the Court as nothing more than relevant. The question whether in given circumstances a man was sane or insane is for the Court to decide. An expert can only furnish a Court with data from which insanity can be inferred. I.L.R. (1948) Nag. 711=A.I.R. 1949 Nag. 66=50 Cr. L.J. 181.

——S. 45—Medical evidence—Question of unsoundness of mind—Relevancy of expert evidence.

The opinion of an expert is relevant under S. 45, Evidence Act, when a question of science is involved in arriving at a finding as to whether an accused in a criminal case was of unsound mind at the time of the commission of the act or was incapable of knowing the nature of the act or that he was doing what was wrong or contrary to law, the opinion of an expert in mental diseases is relevant and such an expert is relevant and such an expert is generally examined as a witness in cases involving a question of insanity. I.L.R. (1946) Nag. 946=226 Ind. Cas. 377=47 Cr. L.J. 918=1946 N.L.J. 656=A.I.R. 1946 Nag. 321.

——S. 45—Medical evidence—Evidence as to age.

It cannot possibly be said that a doctor's opinion on the point of a person's age is not entitled to any greater weight than that of any other person. Even if the indications from which age can be deduced are known to a layman, a layman is not in a position, as a medical man is, to examine a person with a view to discovering the presence or absence of those indications. A.I.R. 1934 Oudh 32=10 O.W.N. 1274=35 Cr. L.J. 498=147 Ind. Cas. 759 (2).

——S. 45—Medical evidence.

Medical evidence can only be used as corraborotive of the charge. A.I.R. 1934 Pesh. 27=35 Cr. L. J. 961 =148 Ind. Cas. 1043.

——S. 45—Medical evidence—Result of medical examination.

Fact that consent of accused was not put down in writing does not affect admissibility of evidence disclosed on medical examination. A.I.R. 1932 Cal. 723=60 Cal. 179=36 C.W.N. 1152=34 Cr. L.J. 177=141 Ind. Cas. 622.

——S. 45—Medical evidence.

The absence of an early medical examination in the case of crime of violence must be regarded as a very unsatisfactory feature of the prosecution case. A. I. R. 1932 Lah. 345=13 Lah. 573=33 Cr. L. J. 220=33 P.L.R. 443=136 Ind. Cas. 5.

——S. 45—Medical witness.

Experts—Medical witness—Opinion must not depend on which party calls him as witness. 87 Ind. Cas. 534 =41 C.L.J. 300=A.I.R 1925 Cal. 768.

——S. 45—Medical evidence—Theory of the case should succeed collection or evidence—Concocted evidence to fit in with wrong theory.

Where amongst other marks noticed on the body of the deceased, there appeared certain scratches on the front part of the neck running downwards:

Held, upon a consideration of medical authorities, that though, in the opinion of the Civil Surgeon's it was probable that the deceased met with his death from throttling, the alternative theory was equally possible, that the scratches were self-inflicted whilst the deceased was labouring under an epileptic or other fit and of which he died. Having regard to this, as also to the nature of the evidence adduced in support of the prosecution, the accused who were charged with murder were acquitted. The theory of a murder upon which is the prosecution proceeded in this case was arrived at by the Sub-Inspector or Police the day following the night of the occurrence. Per **Curiam**: 'It is scarcely necessary to say that a theory should succeed and not proceed the collection of evidence; otherwise it is a matter of common knowledge that the evidence may be made to fit in which the theory such as the Police Officer in this case propounded. 4 Ind. Cas. 286 =10 Cr. L.J. 548=13 C.W.N. 622.

——Ss. 45 and 46—Medical Certificate—Admissibility in evidence.

A certificate of a Civil Surgeon unless deposed to by that officer is inadmissible in evidence. 8 Ind. Cas. 743 (Cal.).

——Ss. 45 and 46—Medical evidence—Opinion of experts—Value of.

The effect of medical testimony is to render other evidence as to the age of the person medically probable or improbable. 7 O.L.J. 219=2 U.P.L.R. (J.C.) 77=56 Ind. Cas. 313.

——Ss. 47 and 46—Medical evidence—Condition and state of health of testator.

Where the general condition and some of the health of a person is in issue, isolated extracts from medical works ought not to be preferred to evidence of a medical man, who should be examined with reference to the symptoms deposed to by the witnesses, and to whom the extracts might be put. 6 O.L.J. 178=51 Ind. Cas. 419.

——S. 45—Medical evidence—Expert medical opinion—Post mortem—If relevant.

Expert Medical opinion of a Surgeon who conducted post mortem examination is relevant. 26 P.W.R. (Cr.) 1911=12 Cr. L.J. 485=12 Ind. Cas. 93

8. Procedure.

——S. 45—Procedure—Expert evidence—Thumb-impressions, genuineness of—Finger print expert should be examined.

Where the genuineness of documents bearing thumb impression and produced before a Magistrate, is in question, the proper procedure is to examine a finger-print expert. The Magistrate should not take upon himself the function of a finger-print expert to compare the finger prints. A.I.R. 1946 Pat. 104=226 Ind. Cas. 43=47 Cri. L.J. 821.

——S. 45—Procedure—Report of expert of itself no evidence.

Report of expert by itself is no evidence, if the Court wants to rely on his report he should be produced in open Court and examined and cross-examined. A.I.R. 1935 All. 142=1935 A.W.R. 76.

——S. 45—Procedure — Expert evidence as to peculiarities of typing due to defect of machine.

Although S. 45 makes no reference to type-writers, yet evidence as to the fact that the type-writers used in the typing of the various exhibits have certain defects which are clear from the typing of these exhibits is evidence of the fact which can be competently given by an expert who has had an opportunity of examining the documents. The Court is entitled to draw its own conclusion as to the source and authorship of the documents from the whole evidence in the case and is entitled to take into consideration the fact spoken to by an expert witness that there were certain peculiarities in the typing of the documents resulting from defects of the machines by which the documents were typed. A.I.R. 1933 All. 498=35 Cr. L.J. 768=148 Ind. Cas. 833.

——S. 45—Procedure.

Where the President of Calcutta Improvement Tribunal, in the Course of inquiry into valuation of certain properties, referred the matter to a valuation export and accepted his valuation but the expert was examined or cross-examined:

Held, president acted illegally in adopting the procedure. A.I.R. 1932 Cal. 844=36 C. W. N. 848=59 Cal. 1272=140 Ind. Cas. 866.

——S. 45—Suit on hand-note—Plea of alteration—Appellate Court obtaining opinion as to date of stamp—Person giving opinion not examined—Admissibility of opinion.

Where in a suit on a hand-note, alterations in the note were pleaded by the defence but the suit was decreed and in appeal the Court obtained a written opinion from an expert as to the date of stamp affixed, and used it for giving judgment in the defendant's favour:

Held, that inasmuch as the opinion was not formally proved and the plaintiff was not given an opportunity to cross-examine the person who gave the opinion, it ought not to have been taken in evidence, and the finding of the Judge, based as it was on the opinion, must be discarded. A.I.R. 1932 Pat. 352=11 Pat. 782 =140 Ind. Cas. 895.

——Ss. 45 and 46—Procedure—Expert evidence—Technical works—When can be used to contradict.

Technical works cannot be used to refute an expert witness's opinion unless the passages to be used are put in cross-examination to the witness for him to explain them if he can. 22 C.W.N. 745=28 C.L.J. 32=19 Cr. L.J. 753=46 Ind. Cas. 593.

——S. 45—Procedure—Admissibility of the opinion of an expert.

The opinion of Government expert for handwriting who is not called as a witness and is subjected to cross-examination is not admissible in evidence. 15 C.W.N. 728=10 Ind. Cas. 965.

9. Rights and Duties of Party.

——S. 45—Additional evidence.

Drain constructed by Municipality for draining sewage and rain water into plaintiff's jheel—Suit by plaintiff for injunction—Evidence closed—Additional evidence of the expert;

Held, that when the evidence was closed, the Municipality could not be allowed to adduce expert evidence to show that the drain water would not pollute the jheel as the Municipality knew well what case it had to meet. A. I. R. 1941 All. 78=1940 A.L.J. 896=1940 A.W.R. (H.C.) 620=I.L.R. (1941) All. 141=193 Ind. Cas. 121.

——S. 47—Rights and duties of parties—Witness deposing that certain document is in the handwriting of particular person—Proof.

The witness deposing that a certain document is in the handwriting of a particular person need not say in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge if he is not satisfied with the testimony as it stands. So when he says that the document was in the handwriting of a certain person, that is evidence of fact It. is not rendered inadmissible by the absence of the mere statement "I know his handwriting," particularly when his evidence throughout indicates that he must have been acquainted with the handwriting of that person. A.I.R. 1938 Pat. 497=40 Cr. L. J. 27=178 Ind. Cas. 324.

——S. 47—Rights and duties of parties.

In every case where experts are called, there must, of necessity, be an expert for the defence as well as for the Crown. It is geneally possible, in most cases, to get an expert to deny the opinion of another expert, and this is specially so as regards handwriting experts. There is never the slightest difficulty in getting a handwriting expert to contradict what another handwriting expert says. To have, therefore, on the record a handwriting expert's opinion for the benefit of the Crown without giving the defence an opportunity of calling another handwriting expert to give the opposite view would be most unfair. A. I. R. 1934 All. 372=35 Cr. L. J. 591=1934 A. L. J. 67=3 A. W. R. 241=147 Ind. Cas. 1197.

——S. 47—Rights and duties of parties—Government Handwriting Expert—Letter No. 276, Home-Judicial, dated March 19, 1912—Desirability of examining expert.

Letter No. 276, Home-Judicial, dated March 19, 1912, from the Revenue Secretary to the Government of the Punjab only says that the Government Handwriting Expert should not be called unnecessarily to give evidence. It does not mean that he should never be called.

Where in a suit, the only possible evidence which the defendant could produce to disprove that of the plaintiff is that of the Handwriting expert, it is desirable that he should be allowed to examine the expert. A.I.R. 1932 Lah. 202=33 P.L.R. 76=137 Ind. Cas. 224.

10. Report of experts.

——S. 45—Report of experts.

The opinion of an expert which is admissible against an accused is the opinion given by him at the trial.

Opinion given for the purposes of a previous suit is not substantive evidence and when the accused has not the opportunity to cross-examine the expert regarding that opinion its evidential value is very little.

It is doubtful whether the opinion of an expert recorded for the purposes of a civil suit though proved in a criminal case is admissible at all at the latter trial. 110 Ind. Cas. 810=11 A. I. Cr. R. 5=29 Cr. L. J. 778=A.I.R. 1928 Lah. 921.

——S. 45—Report of experts are not legal evidence unless they appear and are examined in Court—Evidence expert. 106 Ind. Cas. 493=29 P.L.R. 125=A. I. R. 1923 Lah. 427.

——S. 45—Report of experts—Chemical examiner's negative report regarding absence of trace of blood in the earth, leaves and grass taken from the alleged place of occurrence will not displace strong direct evidence of the place of a certain murder. 83 Ind. Cas. 485=26 Cr. L.J. 5=28 C.W.N. 561=A.I.R. 1924 Cal. 625.

——S. 45—Reports of experts—Report of finger print bureau is not admissible if not subjected to cross-examination though parties agree to abide by it. 79 Ind. Cas. 641=A. I. R. 1924 Nag. 183.

——S. 45—Expert opinion—How to be given.

An expert opinion can better be given by the expert hearing the evidence as to which he is asked an opinion than to give it on a copy of the deposition. 39 Cal. 245=16 C.W.N. 265=13 Ind. Cas. 577.

——S. 45—Report of experts.

The Report of the Government Expert, who never came into witness-box and whose report is not supported even by an affidavit is inadmissible in evidence and should not form the basis of the order directing the prosecution on a charge of forgery. A sanction based on a piece of evidence that can in no circumstances be called legal evidence and especially when there is positive legal evidence against it is illegal. The power of sanction should be used with great caution. 75 Ind. Cas. 148=21 A.L.J. 399=4 L.R.A. Cr. 92=A. I. R. 1923 All. 601.

11. Scope.

——S. 45—Science or art—Meaning of—Opinions of persons who have studied customs and manners of tribes and castes—Admissibility.

The words "science or art" in S. 45 of the Evidence Act are to be broadly construed, the term "science" not being limited to the higher sciences and the term "art" not being limited to the fine arts. In order to determine whether the particular question be one of a scientific nature or not, and consequently whether skilled witnesses may or may not pass their opinions upon it, the following tests may be applied:—Is the subject-matters of inquiry such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without the assistance of experts; Does it so far partake of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature, or is it one which does not require such habit or study. The study of customs and manners of tribes and castes, the areas occupied by them and other connected matters come within the meaning of "science or art" and persons who have made a special and systematic study of them are experts whose opinions expressed in books are admissible under S. 45 of the Evidence Act. I. L. R. (1947) Nag. 781=1947 N. L. J. 478=A. I. R. 1948 Nag. 287.

——S. 45—Jewish law is foreign law and expert evidence is admissible—Jewish law.

When the Government of India Act, 1915, enjoined the application of Jewish law in certain specified matters, the Jewish law did not cease to be foreign law and did not become part of the law of India. No foreign law becomes part of the law of India merely by the circumstance that it is to be applied by the Courts in India. Such foreign law remains a foreign law and consequently under S. 45, Evidence Act, expert evidence is admissible in respect of such foreign law. A. I. R. 1946 Cal. 90=48 C.W.N. 513=I.L.R. (1944) 2 Cal. 201.

——S. 45—Scope—Insanity of accused—Proof of—Opinion of expert in mental diseases is relevant.

Under S. 45, the opinion of an expert is relevant where a question of science is involved. The question whether the accused was of sound mind at the time of the commission of the act or by reason thereof he was doing what was either wrong or contrary to law are questions of fact to be decided by the Judge. But in arriving at the finding whether the accused was insane, the opinion of an expert in mental diseases is relevant. A. I. R. 1946 Nag. 321=1946 Nag. L. J. 656=I. L. R. (1946) Nag. 946=47 Cr. L. J. 918=226 Ind. Cas. 377.

—S. 45—Scope.

In specific cases. an expert can be engaged to cross-examine another expert coming as a witness for the other side. 1942 N.L.J. 449.

——S. 45—Scope—Gambling, if art or science.

It is impossible to say that gambling is either an art or science within the meaning of S. 44, Evidence Act. A. I. R. 1937 Bom. 385=39 Bom. L. R. 613=I. L. R. (1937) Bom. 670=38 Cr. L. J. 1047=171 Ind. Cas. 782.

——S. 47—Scope—Statement in regard to partnership—Proof of.

A statement in regard to partnership cannot be proved by a witness who merely says that the statement is in the handwriting of a certain person. A statement, oral or written by a person not called as a witness comes under the general rule of hearsay. A. I. R. 1935 All. 1023=37 Cr. L.J. 117=1935 A. W. R. 1229=1936 A. L. J. 379=155 Ind. Cas. 561 (S. B.).

——S. 45—Scope—Expert, examination of—Practice.

Whether an expert is examined or not generally depends on whether the parties apply to have one examined. A. I. R. 1935 Pat. 482=16 P. L. T. 844=153 Ind. Cas. 155.

——S. 45—Scope—Religious expert to prove marriage—Opinion of expert.

Per **Sulaiman, C.J.**—Where a marriage is challenged on the ground of non-observance of certain rites, a Court is not bound to accept the opinion of a religious expert, however high he may be placed in Church. The duty is on the Court itself to decide whether the marriage was void or not. A.I.R. 1934 All. 273=1934 A. L. J. 1129=56 All. 428=3 A. W. R. 70=153 Ind. Cas. 733.

——S. 45—Scope—Literature.

In copyright cases, it is not permisible to admit as evidence the opinion of literary gentlemen that the

defendant did copy from the plaintiff's book This is not a matter for expert testimony at all. A.I.R. 1933 P. C. 26=64 M. L. J.193=37 L. W. 314=1933 A.L.J. 393=142 Ind. Cas. 815 (P.C.).

——S. 45—Scope—Type-written document—Expert evidence, value of.

The opinion of an expert to the effect that one document has been type-written on the same machine as another document is not admissible under S. 45. It is for the Legislature to consider whether the section should not be amended ; but as it stands, it does not includes such expert opinion.

The idenity of the machine on which two letters have been type-written would not by itself show that the writer of the two is one and the same person. But such a conclusion may be drawn from additional evidence, **e.g.,** internal evidence afforded by the document, or external circumstances, or the continuity of the correspondence passing between the sender and the addressee. A.I.R. 1933All. 690=1933 A. L. J. 799=34 Cr. L. J. 967=55 All. 1040=145 Ind. Cas. 481.

——S.47—Scope and interpretatiou—"Habitually."

The term " habitually " in S. 47 means " Usually," " generally" or according to custom.' It does not refer to the frequency of the occasions but rather to the invariability of the practice.

The opinion of a record-keeper, who in the course of his official duty has to examine and file papers sent to him, is relevant to prove the hand-writing of a person whose papers are so filed, though the number of such papers may not be great. 89 Ind. Cas 1042=27 Bom. L.R. 1031=26 Cr. L.J. 1474=A.I.R. 1925 Bom. 429.

——S. 45—Scope—Expert evidence—Trade marks infringement case—Evidence as to whether purchaser can be deceived.

Evidence of experts or men in the trade cannot be given to show whether or not a combination is such as is calculated to deceive the purchase. It is a question entirely for the Judge. Evidence of facts which may assist the Judge to come to a conclusion whether one mark is a colourable imitation of another may be given. 1899 A.C. 83 at 85, foll. 4 C.L.J. 286=10 C.WN. 107

——S. 45—Scope—Expert evidence—On Hindu law, not admissible.

Evidence of experts on questions of Hindu law (not being foreign law) is not admissible. (1904) 16 M.L.J. 178=29 M 437 =1 M.L.T. 12.

12. Tracker.

——Ss. 45 and 133—Evidence of footprint expert —Value—General nature of approver evidence.

The opinion of a footprint expert is not admissible as evidence. If the Court is to make any use at all of footprint impressions, it must be satisfied from a comparison of the various footprints that they are those of the persons whom the expert says they are. The value of evidence with regard to footprints is obviously very much less trustworthy than evidence with regard to finger prints. In examining a finger print, one not merely compares the general configuration of the finger and all the lines on it, but one is able to study such minute details as the bifurcations and junctions of the ridges and the relative positions on those ridges of the sweat pores. With regard to footprints, one can only compare the general shape of footprints found with the shape of impressions taken from the feet of the person suspected. Even in this limited comparison, one has not the same certainty as one would have in comparing finger prints, because foot impressions vary considerably according to the circumstances under which they are made. Footprints made when a person is walking slowly or fast or running slowly or fast or jumping, all create differences which are material. Moreover, a footprint taken after a person has walked a considerable distance is larger than a footprint taken when a person has been at rest.

One generally expects the evidence of an approver to be rich in detail and colour, consistent within itself and not having any important contradictions when compared with other statements made by him earlier. Such evidence carries conviction to the mind, so that a Court feels that very little other evidence is necessary to satisfy it beyond all reasonable doubt that the approver's story is true. But where it is bare and fails to so carry conviction, then very substantial corroboration of the approver's story would be necessary before it would be possible to bring home the guilt of the accused beyond all reasonable doubt. 1949 M. W. N. 634=(1949) 2 M. L. J. 544.

——S. 45—Foot-print—Nature of evidence.

Mere fact that foot-prints tally with those of the accused's shoes is not sufficient. Evidence must show that the marks had some peculiarity which was found in the shoes of the accused and would not be found in most other shoes. A.I.R. 1943 Bom. 458=45 Bom. L.R. 884 =45 Cr. L. J. 221=I. L. R. (1944) Bom. 25=210 Ind. Cas. 362.

——S. 45—Tracker—Foot-print expert—Evidence of—Value of.

Experts in foot-prints are not recognized by the Evidence Act, but these can be no doubt that a Magistrate is entitled to take into consideration the evidence of a person who has seen a foot-print and taken the foot-prints of the accused and found that they are very similar. That evidence is not, however, sufficient to bring home the offence to the accused in the absence of further knowledge regarding the differences between one foot and another. A.I.R. 1942 Mad. 452 (2)=55 L.W. 231 (1)=1942 M. W. N. 293=43 Cr. L. J. 702=200 Ind. Cas. 594.

——Ss. 45, 7—Evidence of trackers—Admissibility.

Evidence that there were foot-prints at or near a scene of offence or that these foot-prints came from a particular place or led to a particular place, is relevant evidence under S. 7, Evidence Act, and the statements as to these facts made by persons skilled in identifying foot-prints are not excluded by S. 45, Evidence Act. The words 'science' or 'art' in S. 45, are to be construed widely. The amendment relating to finger impressions does not operate to limit in any way the wide meanings which should be given to the expressions 'science' or 'art'. Whether a particular tracker called upon to assist, is or is not an expert in this art or science, is, of course, a matter to be decided by the Judge or Magistrate, before reliance can be placed upon his evidence. But if it is established to the satisfaction of the Court that the tracker is a person capable of distinguishing and identifying foot-prints, there is no reason why his evidence should not be given such consideration as it may deserve. A.I.R. 1942 Sind 11=I.L.R. (1941) Kar. 525 =43 Cr. L. J. 308=198 Ind. Cas. 110.

——S. 45—Tracker—Comparison of foot-prints two months after occurrence—Original tracks nor preserved—Value.

Where a tracker compares the admitted footprints of the accused with the impression left on him of the foot-prints which he saw when he first went to the spot, and this is made about two months after the occurrence and the original tracks had not been preserved, the tracker's evidence is of little value. A.I.R. 1933 Lah. 299=35 Cr. L.J. 610=148 Ind. Cas. 72.

13. Value of.

——S. 45—Value of—Interested expert.

There cannot be any more unsatisfactory evidence than that of an interested party called as an expert. A.I.R. 1945 P.C. 174=1945 O.W.N. 287=1945 M.W.N. 634 =221 Ind. Cas. 587=26 P.L.T. 279.(P.C).

——S. 45—Value of—Determining market value of land acquired.

In considering the fair market value of the land under acquisition, the evidence of expert witnesses is generally of assistance to the Court but it has also its limitations. Every expert witness has his own set of conjectures of more or less weight according to his experience and personal sagacity with the result that the enquiry bounds with uncertainty and gives more than ordinary room for guess work. Further, the expert witness sometimes begins with a predetermined conclusion, and tries to adjust his figures, his answers and his conjecture to that conclusion. A.I.R. 1942 Bom. 105=44 Bom. L.R. 57=I. L.R. (1942) Bom. 403=200 Ind. Cas. 661.

——S. 45—Value—Expert—Weight to be attached.

Great weight should undoubtedly be attached to the testimony of an expert witness such as a doctor but his opinion may be discarded if there are good grounds for doing so. A.I.R. 1942 Cal. 239=74 C.L.J. 423=43 Cr. L.J. 565=199 Ind. Cas. 610.

——S. 45—Value of.

Experts in foot-print are not recognised by the Evidence Act but there can be no doubt that a Magistrate is entitled to take into consideration the evidence of a person who has seen a foot-print and taken the foot-prints of the accused and found that they are very similar. That evidence is not, however, sufficient to bring home the offence to the accused in the absence of further knowledge regarding the differences between one foot and another. A. I. R. 1942 Mad. 452 (2)=1942 M.W.N. 293=55 L.W. 231 (1)=43 Cr. L. J. 702=200 Ind. Cas. 594.

——S. 45—Value of—Deliberate opinion of doctor conducting autopsy that nature and number of wounds indicated that either there was deep motive for murder or murderer must have been insane—Admissibility.

The deliberate opinion of a doctor who conducted the autopsy that from the nature and number of the injuries on the body of the deceased which he had examined, there must have been either some deep seated motive for the murder or the offender must have been insane, is admissible in evidence. A.I.R. 1941 Mad. 326=1940 M.W.N. 963=52 L.W. 689=42 Cr. L.J. 558=194 Ind. Cas. 332.

——S. 45—Value of—Expert witness—His evidence how to be tested.

The evidence of an expert witness has to be tested like that of any other witness for even expert witnesses are liable to make mistakes. At the same time, if a person with special professional qualifications such as a doctor or an engineer, is called in to make professional examination of a person or a building, and is then asked to give the results of his examination as evidence in Court, it is hardly fair to treat him as being on the same footing as those persons who may be said to make a profession of giving evidence, nor is it necessary to suppose that he must necessarily be suffering from undue **bias** merely because he has professional qualifications. A.I.R. 1940 Lah. 505=42 P.L.R. 616=192 Ind. Cas. 747.

——S. 45—Value of—Medical witness—Evidence relying on text-books.

Where a medical witness gives evidence relying largely on statements in text-books as to the time of the death from the appearance of blisters on the dead body, the theoretical evidence of this description is not of value unless it is exhaustive with regard to all possible circumstances. A. I. R. 1940 Mad. 710=1940 M.W.N. 86=I. L.R. (1940) Mad. 254=52 L.W. 981=42 Cr. L. J. 582 =194 Ind. Cas. 527.

——S. 45—Value of—Evidence of Police dog.

The evidence of the behaviour of the Police dog to establish that the smell of a certain person who has been in one place is the same as that which the dog points out, is completely irrelevant. A.I.R. 1940 Pesh. 47=42 Cr. L.J. 259=192 Ind. Cas. 246.

——S. 45—Value of—Eye-witnesses—Unreliable.

Where the evidence given by eye-witnesses was not relied upon, track evidence together with the oral confession made to an Honorary Magistrate was in the circumstances of the case, held insufficient to turn the scales against the accused. 42 P.L.R. 559.

——S. 45—Age—Value of—Statement of doctor as to age based upon certain physical peculiarities —Whether legal proof.

It is true that a doctor is in a better position to form an opinion about the age of a person than a layman, but the statement of a doctor is no more than an opinion. When, from his statement, it does not appear that he brought any scientific knowledge to bear upon his opinion, where the doctor has relied entirely on certain physical peculiarities, such as teeth, etc., his statement is not a legal proof but a mere opinion. A.I.R. 1939 All. 708=1939 A.L.J. 980=41 Cr. L. J. 142=I.L.R. (1939) All. 871=1939 A.W.R. 693=185 Ind. Cas. 271.

——S. 45—Value of Expert evidence Appreciation of.

The value of the opinion given by an expert, depends, to a great extent, upon the materials put before him and the nature of the questions that are put to him. The criticism that the expert speaks from an impregnable fortress hardly holds good to-day. Experts are always ready to explain the reason for their opinions; and Judges are entitled to attach little or no importance to their evidence if the explanations given are not satisfying. A.I.R. 1939 Mad. 283=1938 M.W.N. 962=40 Cr. L. J. 483=181 Ind. Cas. 364.

——S. 45—Value of—Expert.

Where handwriting experts have been produced by both the parties, their evidence is of little help when each of them supports the case of the respective party. A.I.R. 1939 Oudh 213=1939 O.W.N. 581=182 Ind. Cas. 190.

——S. 45—Value of—Witnesses having diplomas and experience in telephony and engineering—Evidence.

Telephony is a science or art and the witnesses' knowledge of the telephone and of engineering generally places them in a special position and makes them competent to express an opinion upon articles and matters which are largely in use in the department of the telephone and of engineering generally. The evidence of these witnesses is relevant and admissible as opinion of experts, and where they hold diplomas in telephony and engineering and have great experience, the expert evidence of these witnesses is entitled to a very considerable weight. A. I. R. 1939 Sind 245=184 Ind. Cas. 359.

——S. 45—Value of.

In determining market value of land in proceedings under S. 23, Land Acquisition Act, the opinion of experts is evidence but its value is not great and it would be unsafe to place much reliance on this kind of evidence unless it is supported by or coincided with other evidence. Where, in a case, not only is the evidence of experts not supported by or coincident with best evidence in the case but there is divergence and disagreement on material points between evidence of experts, their evidence should not be relied upon. A.I.R. 1938 Sind 225=179 Ind. Cas. 359.

——S. 45—Value of—Expert evidence—Conviction.

The opinion of an expert has a corroborative value only and is useful for ascertaining whether the direct evidence is true or not. It is absolutely unsafe to base a conviction on that opinion only, when there is no other evidence in the case ; for it can never be said with certainty that the weapon with which the crime is said by the expert to have been committed, though found in possession of the accused person, was in his possession when the offence was committed. A.I.R. 1937 Pesh. 99 =39 Cr. L.J. 234=172 Ind. Cas. 540.

——Ss. 45, 51—Value of—Expert opinion—Basis of opinion should be put before the Court.

The opinion of an expert by itself may be relevant but would carry little weight with a Court unless it is supported by a clear statement of what he noticed and on what he based his opinion. The expert should, if he expects his opinion to be accepted, put before the Court all the materials which induced him to come to his conclusion, so that the Court, although not an expert, may form its own judgment on those materials. The mere mention, that a certain kind of test known as Binet and Simon tests were applied and certain results were obtained, might be relevant as a piece of evidence but would not be conclusive. A. I. R. 1934 All. 273=56 A. 428= 1934 A.L.J. 1129=3 A.W.R. 70=153 Ind. Cas. 733.

——S. 47—Value of—Evidence, held insufficient to prove handwriting.

The only witness examined to prove a particular letter to be in the handwriting of the accused **H**, stated : " I have no writing of **H** with me. I have no correspondence with him. From a single letter, I would not be able to identify the handwriting of any person. I was not particularly friendly with **H**" :

Held, that the evidence was hardly sufficient to prove that the letter was written by **H**. A.I.R. 1934 Nag. 204.

——S. 45—Value of—Evidence of interpreters.

The evidence of translators of Hindu Law texts who assume the role of interpreters is not admissible in evidence when the questions raised are not questions of foreign law .A.I.R. 1933 Pat. 306=14 P.L.T. 1 (Sup.)= 12 Pat. 359=145 Ind. Cas. 1.

——45. 5—Value of.

The opinion of experts as to the market value of a land is evidence but its evidential value is not great inasmuch as the value of experts' opinion depends upon the facts on which it rests and validity of the process by which the conclusion reached. A.I.R. 1933 Sind 124=143 Ind. Cas. 699.

——S. 45—Value of—Handwriting expert.

Evidence of the genuineness of signature based upon the comparison of handwriting and of the opinion of experts is entitled to proper consideration and weight. But of all kinds of evidence admitted in a Court, this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence. A.I.R. 1931 Lah. 408=32 Cr. L. J. 818=132 Ind. Cas. 185.

——S. 45—Value of—Evidence on commission.

Expert evidence on commission loses much of its value. 108 Ind. Cas. 369=9 A. I. Cr. R. 561=10 L.L.J. 235= 29 Cr.L.J. 377=A. I. R. 1928 Lah. 533.

——S. 45—Value of expert evidence.

Expert evidence by itself is not sufficient to base a conclusion. 113 Ind. Cas. 698=A.I.R. 1928 Pat. 568.

——S. 45—Value of—Expert opinion.

An opinion of an expert witness not based on any well-defined inexorable laws of nature cannot be taken as decisive especially where there is direct evidence opposed to it. 96 Ind. Cas. 641=27 Cr.L.J. 977=A. I. R. 1926 Lah. 313.

——S. 45—Value of—Land Acquisition Act, S. 23— Expert's evidence is useless if unsupported by data. 11 C.W.N. 875, ; 10 Bom. L.R. 907, ; 33 Bom. 325, Foll, 79 Ind. Cas. 74=5 Lah. 227=A. I. R. 1924 Lah. 548.

——S. 45—Value of—Expert evidence—Value—Opinion of an expert is not infallible—He is likely to be partial to the party citing him. 11 W. R. Cr. 25, Foll, 59 Ind. Cas. 220=3 L.L.J. 110=12 P.L.R. 1921=A.I.R. 1921 Lah. 126.

——S. 45—Expert evidence—Value of.

Evidence of an expert should be approached with considerable care and caution, especially where much depends upon such evidence. (1905) 1 C.L.J. 385.

——S. 45—Value of Per Stanley, J.

In the case of expert witness there exists a tendency to support the view which is favourable to the side which employs them so that it is difficult to get from them an independent opinion. (1902) 29 C. 323=6 C. W. N. 495.

14. Miscellaneous.

——S. 45—Appreciation of evidence.

In assessing the relative value of the testimony of expert witnesses, as compared with witnesses of fact, their demeanour, their type, their personality, and the impression made by them upon the trial Judge—e. g.,

whether, they confined themselves to giving evidence or acted as Advocates—may powerfully and properly influence the mind of the Judge who sees and hears them in deciding between them. These advantages are denied to the Court of Appeal. A.I.R. 1936 P.C. 154 =1936 M.W.N. 432=1936 A.L.J. 638=1936 A.W.R. 606=44 L.W. 67=162 Ind. Cas. 426 (P.C.).

——S. 45—Palm impressions.

Opinion of expert as to identity of palm impression is admissible. 108 Ind. Cas. 598=52 Boms 223=30 Bom. L.R. 321=29 Cr.L.J. 410=10 A.I. Cr. R. 84=A.I.R. 1928 Bom. 158.

——S. 46. See EVIDENCE ACT, Ss. 45—47.

——S. 47. See EVIDENCE ACT, Ss. 45—47.

——Ss. 48 and 49—Applicability—Statement of dead persons.

Ss. 48 and 49 of the Evidence Act do not deal with the statements of dead persons or persons who cannot be found. Such cases are dealt with by S. 32. 22 Luck. 522=1947 O.W.N. 421=A.I.R. 1948 Oudh 307=1947 A.W.R. (C.C.) 301=1947 O.A. (C.C.) 301.

——Ss 48, 49—Statement of dead person—Statements made by deceased person after the controversy had arisen and therefore inadmissible under S. 32 are admissible under Ss. 48 and 49, Evidence Act. A.I. R. 1033 Oudh 246=10 O. W. N. 268=17 R. D. 274=8 Luck. 445=190 Ind. Cas. 282.

——Ss. 48, 49—Statement of dead persons—The value of evidence admissible under Ss. 32, 49 aud 60, Evidence Act depends on the character of witnesses who depose to what they heard from deceased person and also on the character of the deceased and whether they were expressing their own opinion or merely repeating hearsay. A. I. R. 1933 Sind 213=150 Ind. Cas. 266.

——Ss. 48 and 35—Statements contained in Riwaj-i-am—Admissibility and value of.

Answers to questions put to the representatives of tribes contained in the Riwaj-i-am are clearly admissible under S. 48, Evidence Act, being the opinion as to the existence of a general custom or right of persons who would be likely to know of its existence if it existed. They are also admissible under S. 35 of that Act, as entries relating to a relevant fact contained in what may be regarded as a public record made by a public servant in the discharge of his duty. Indeed the statements contained in the **Riwaj-i-am** form strong piece of evidence in support of the custom therein entered subject to rebuttal. 52 P.L.R. 369.

——S. 48—Riwajiam—Answer contained in Manual of Customery Law of district, admissibility.

The answers (**riwajiam**) contained in a manual compiled by Mr. (afterwards Sir) James Wilson, called a General Code of the Tribal Customs in the Shalpur District, published in 1896, are clearly admissible in proof of custom under S. 48, being the opinion as to the existence of a general custom or right of persons who would be likely to know of its existence. 68 I.A.1= A.I.R. 1941 P.C. 21=I.L.R. (1941) Lah. 154=42 Bom. L.R. 432=43 P.L.R. 318=I.L.R. (1941) Kar. (P.C.) 22 Sup.=1941 A. L. J. 530=1941 A. W. R. 314=193 Ind. Cas. 436 (P.C.).

——S. 48—Proof of—Statement of, in wajib-ul-arz circa 1860—Value of—Statements in nature of traditions—Held, pedigree on which appellant based his claim was not proved—Practice—Appreciation of evidence in lower Courts.

Unless pedigrees drawn up **circa** 1860, can be shown to have been derived from earlier and more authentic documents, the evidence which they afford is at best evidence of traditions; in so far as the statements are interested or contradictory or disputed, they rapidly lose value. The fact that in a **wajib-ul-arz** such a pedigree is given in the course of the account of the village history does not (necessarily, at least) transmute it into something higher than tradition. Where the tradition has been ascertained with reasonable certainty a proper value must be given to it on questions of pedigrees, and it may be sufficient of itself: but the fact that a case is difficult of proof does not dispense with, proper proof, and in many cases, there is good reason to record traditions as poor and teacherous material. The nature of the evidence is such as to have substantial value only if the statements of tradition can be seen to be an expression of the information possessed by persons having special means of knowledge at a time when they had no interest to serve one way or another and were not taking sides as to any matter then in controversy :

Held, that the pedigree was plainly untrue on several matters and went contrary to the appellant's case. That they should select particular points from it which favour their case may be permissible, but as evidence was not impressive. If the pedigree was admissible at all it wou.d seems to be so only as an admission:

Held, further that while fully appreciating the injustice that might be done to the appellant if the standard of proof be raised too high, their Lordship could not but conclude, upon a review of the documentary evidence as a whole, that the careful criticism of the Judges in the Chief Court was sufficient to justify their refusal to hold the appellants' case establi shed and demonstrated the interested the interested uninformed and inconsistent characeer of the evidence in favour of the tradition upon which the appellants relied. The links in the chain of descent upon which the appellant based his claim which the Chief Court regarded as weak were, in their Lordships' judgment. really weak. A. I. R. 1937 P. C. 310 =3 B. R. 782=1937 O. W. N. 845=31 S. L. R. 702= 1937 A.L.J. 1022=(1937) 2 M.L.J. 772=1937 A.W.R. 1049=170 Ind. Cas. 335 (P.C.).

——S. 48—Statement in settlement report.

Statement in sifton settlement Report, as to the non-transferability of **'dwami thicka'** is admissible uet.er Ss. 48, 57 (13) and S. 32 of the Evidence Act. A. I. R. 1937 Pat. 463=18 P. L. T. 575=171 In Cas. 115.

——S. 48—Inheritance.

Tribal or family custom as to inheritence—Evidence of members of famiiy or tribe is relevant—Specified instances are unnecessary. 172 Ind. Cas. 91 455=52 I. A. 379=3 O. W. N. 93=6 Lah. 502=30 C. W. N. 506=6 L.R. A. P. C. 190=A.I.R. 1925 P. C. 267=50 M.L.J. 637 (P.C.).

——Ss. 48, 49, 60—Family custom—Opinion—Basis of opinion—Information of deceased.

A statement by a witness of his opinion on the existence of his opinion on the existence of a family custom and as the grounds of that opinion of information derived from deceased persons is admissible in evidence, but it must be the expression of independent opinion

based on hearsay and not mere repetition of hearsay. The weight of such evidence would depend on the position and character of the witness and of the Persons on whose statements he has formed his opinion. 5 C.W.N. 33=23 A. 37=10 M.L.J. 267=2 Bom. L.R. 831=17 I.A. 238 (P.C.).

——S. 48—Opinion of the Bar—Admissibility.

Quaere.—Where the opinion of the Bar as to the adoption of special customs of a Hindu family by sects of Mahomedans is admissible under S. 48 of the Act. 41 Bom. 181=17 Bom. L.R. 799=31 Ind. Cas. 106.

——Ss. 48, 60—Scope.

Section 48 when read with S. 60 requires that the person who holds the opinion should be called as a witness. A.I.R. 1933 Oudh 246=10 O.W.N. 268=17 R.D. 274=8 Luck. 445=150 Ind. Cas. 282.

——S. 48—Value and sufficiency of expert evidence—Second appeal.

The opinions of expert is relevant but not conclusive as to the matters to which they relate and their value and sufficiency cannot legitimatey form the subject of consideration and scrutiny in second appeal. A.I.R. 1935 All. 501=1935 A.W.R. 429=157 Ind. Cas. 30.

——S. 49—Document making gift of piece of land and relinquishment of reversionary rights not registered—Admissibility for proving relinquishment.

Where an unregistered document executed by a reversioner contains relinquishment of reversionary right and also an agreement to make a gift of a piece of land to the donee, even if the document requires registration so far as the gift is concerned it can be admitted in evidence for the collateral purpose of proving the relinquishment of reversionary rights under S. 49, Evidence Act. A.I.R. 1939 Lah. 414=187 Ind. Cas. 865.

——S. 49—Satta gambling—Slips found in possession of accused unintelligible—Police Officer, if can merely give opinion that such slips must be records of gambling transaction.

Under S. 49, Evidence Act, a Police officer might give evidence that he has had a long experience amongst people who indulged in **satta** gambling in a particular district and that from that experience, supported by instances which he should be prepared to give so as to establish his means of knowledge, he was satisfied that a system or code prevailed among such persons and he might ihen express an opinion (which would be relevant under the section) that the slips in question were prepared in accordance with that system or code and had a certain meaning. But he is not entitled merely to express the opinion that unintelligible documents found in the room of a man charged with gambling must be records of gambling transactions. It is for the Court to decide what the documents mean, and opinion on the matter can only be relevant—made so by the Legislature. A. I. R. 1937 Bom. 385=39 Bom. L. R. 613=I.L.R. (1937) Bom. 670=38 Cr. L.J. 1047=171 Ind. Cas. 282.

——S. 49—Opinions of dead.

Opinion of dead person cannot be proved save under S. 323. 2 All. 37, Foll. 82 Ind. Cas. 886=40 C.L.J. 331=A.I.R. 1925 Cal. 116.

——S. 49—Opinion—evidence—Validity.

Opinions of the members of Malabar, Tarward about the status of the family do not affer the real status of the family. (1911) 1 M. W. N. 281=9 Ind. Cas. 849.

——S. 49—Usages of body of men.

The words "usages of any body of men" in S. 49 do not cover inferences or conclusions that may be drawn on the basis of past experience. 13 P. R. 1914 Cr.=16 Cr. L.J. 33=223 P.L.R. 1915=26 Ind. Cas. 625.

——Ss. 49, 60—Evidence of usage.

Evidence which represents the opinions of persons having special means of knowledge based on information derived from deceased members of the family is admissible under Ss. 49 and 60, Evidence Act. 23 A. 37, foll. 1904 A.W.N. 244=27 A. 203=(1904) 2 A. L.J. 720.

——S. 49—Wajib-ul-arz.

Interpretation of wajib-ul-arz by some members of family is admissible when custom applicable to that family as entered in the wajib-ul-arz is in question. 87 Ind. Cas. 8=A.I.R. 1925 Oudh 688.

——S. 50.

Synopsis.

1. **Adoption.**
2. **Legitimacy.**
3. **Marriage.**
4. **Scope and applicability.**

1. Adoption.

——S. 50—Adoption—Validity—Presumption from long acquiescencee by members of adopting family—Need for clear evidence of such acquiescence.

Where the fact of adoption has been acquiesced in by the members of the adopting family for a long period there is a very strong presumption in favour of the validity of the adoptien and the burden is very heavy on the person who challenges the adoption. But this principle has no application if there is no clear evidence to the effect that for a long period the parties behaved on the footing that the adoption had been recognised A.I.R. 1949 Orissa 27.

——S. 50—Adoption.

Section 50 excludes evidence of mere rumour or gossip to the effect that an adoption has taken place or that such and such person has no adopted son. A.I.R. 1941 Rang. 276=1641 Rang. L. R. 445=198 Ind. Cas. 42.

——S. 50—Adoption—Evidence of repute—Nature of.

Section 50, Evidence Act, sets out the conditions when an opinion as to relationship is relevant. Such opinion must be expressed by conduct and it must be the opinion of a person who, as a member of the family or otherwise, has special means of knowledge on the subject. Evidence of notoriety of an adoption must be evidence of a number of people who, owing to their circumstances are in a position to say what was the attitude of the alleged adoptive parents towards the claimant. A. I. R. 1936 Rang. 518=67 Ind. Cas. 362.

=—**Ss. 50, 32 (5)**—The statement of a witness on the question of relationship can be admissible either under S. 32 (5), of S. 50, Evidence Act. A.I.R. 1934 All. 117=151 Ind. Cas. 338.

2. Legitimacy.

——S. 50—Legitimacy—Opinions of relations and members of the family.

On a question of legitimacy, the opinions of relations and members of the family are entitled to weight. 38 All. 627=13 M. L. J. 607=14 A. L. J. 1248—19 O. C. 192=18 Bom. L. R. 103=21 C. W. N. 130=(1916) 2 M. W. N. 577=21 M. L. T. 40=1 Pat. L. W. 157=4. O. L. J. 22=25 C. L. J. 363=6 L. W. 378=10 Bur. L. T. 140=43 I. A. 212=36 Ind, Cas. 124 (P. C.) (On appeal from 14 O. C. 356=13 Ind. Cas. 882).

——S. 50—Legitimacy—Recognition of marriage by all relations, etc.—Presumption of.

Where a man and woman, were proved to have been recognised by all persons concerned, as man and wife, so described in important documents and their daughters were, respectably married as would be natural in the case of legitimate children.

Held, that these facts, following upon a ceremony of marriage which undoubtedly took place. though its validity attached, afforded an extremely strong presumption in favour of the validity of the marriage and legitimacy of its offspring. The like presumption applies to the question whether the formal requisites of a valid marriage ceremony were satisfied. 3S Cal. 700=15 C. W. N. 90=(1910) 2 M. W. N. 31=13 Bom. L. R. 534=14 C. L J. 72=10 M. L. T. 53=21 M. L. J. 933 =11 Ind Cas. 502 (P. C.).

——S. 50—Illegitimate.

The onus of proving that plaihtiff is an illegitimate son in a suit by the illegtimate son for partition or maintenance is upon the plaintiff and is alleged paternity might be established like any other disputed question of re)lationship (vide S 32 Cl. 5 and S. 50, Evidence Act.. (1903) 27 M. 32.

3. Marriage.

——S. 50—Marriage—Evidence as to non-existen- of marriage—If admissible.

Quaerel—Whether, under S. 50 of the Evidence Act, evidence of non-existence of marriage is admissible. I. L. R. (1949) Cut. 527.

——S. 50—Marriagc—Statement of witness that certain man and woman were regarded as man and wife by members of locality—Admissibility.

A statement by a witness that a certain man and a woman were regarded as man and wife by the members of the locality, does not come within the purview of S. 50 of the Evidence Act. At the utmost this amounts to an expression of opinion, but according to the words of the section only that opinion is relevant which is expressed by conduct. 50 P. L. R. 131= A.I.R. 1949 E. P. 35.

——5S—Marriage.

A reputation about marriage can only be established by means of evidence admissible under S. 50, Evidence Act. A.I.R. 1940 Rang. 181=1940 Rang. L. R. 562 =192 Ind. Cas. 49.

——S. 50—Maraiage — Requirements under—Marniage, proof of.

Mere statements that a person or is not married are not admissible under S. 50, Evidence Act what the Court wants under S. 50, Evidenee Act is opinion expressed by conduct of any person who, as as member of the family or otherwise, has special means of knowledge of the relationship. A.I.R. 1937 Sind 126 =31 S. L. R. 71=169 Ind. Cas. 685.

——S. 50—Marriage—Evidence of marriage that couple regarded as husband and wife, legality of.

Where all that the witnesses state about the tactum of marriage is that the couple were regarded by the brotherhood as husband and wife, the evidence does not come within the purview of S. 50, Evidence Act as it is not opinion expressed by conduct as to the existence of such relationship of any person who is a member of the family or otherwise had special means of knowledge. Such evidence is altogether inadmissible in evidence. A.I.R. 1933 All. 130=1942 A.L.J. 208=143 Ind. Cas. 815.

——S. 50—Marrige—Proof of.

Proof of by character and conduct of relatives of parties is not correct. 117 Ind. Cas. 17=1929 A. L.J. 465=33 C. W. N. 645=31 Bom. L.R. 846=6 O. W.N. 517=56 I. A. 201=50 C. L. J. 89=30 M. L. W. 97= 1929 M. W. N. 676=10 Lah. 725=31 P. L. R. 1= A.I.R. 1929 P. C. 135=57 M. L. J. 366.

——S. 50—Marriage.

A court under the provisions of S. 50 while not directed to exclude evidence of opinion as expressed by conduct to prove such a marriage is directed not to base a finding that such a marriage has taken place upon the evidence of opinion alone. 100 Ind. Cas. 538=4 O. W.N. 172=28 Cr. L.J. 311=7 A-I. Cr. R. 436=A.I.R. 1927 Oudh 140.

——S. 50—Marriage—English Law and Indian Law =General reputation of marriage relationship.

S. 50 enacts a rule different from the law in England. According to English Law general reputation is admissible to establish the fact of parties being married but S. 50 is limited to opinion as expressed by conduct. 91 Ind. Cas. 462=A.I.R. 1926 Mad. 475.

——S. 50—Marriage—Long co-habitation—Presumption of marriage.

Long co-habitation and conduct inconsistent with any other relationship would give rise to a staong presumption of the existence of a valid marriage, 21 Cal. 666 and 8 L. B. R. 222. Foll. 96 Ind. Cas. 762=5 Bur. L. J. 17=A.I.R. 1926 Rang. 90.

——S. 50—Marriage—Long co-habitation cannot establish marriage were proof to the contrary exists.

The so-called sword wives of the Tanjore Raja were held to be mere concubines though permanent concubines and though treated in many respects as legally married wives. 93 Ind. Cas. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.

——S. 50—Marriage—Legality of.

Where the question is as to the legitimacy of a certain type of marriage contracted by the members of a certain family much may be gathered from the treatment accorded to the the alleged wives and from the name

in which they speak of themselves in official documents and petitions and legal proceedings in which they were parties. Evidence of this kind is conduct admissible under S. 50 of the Evidence Act (Illustration B), as it shows the repute in which such marriage was held in the family. 93 Ind. Cas. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.

——S. 50—Proof of marriage.

S. 50 requires direct proof of marriage in cases under S. 498, I.P.C. and conviction based upon opinion evidence in illegal. 14 N. L. R. 28=18 Cr. L. J. 1016 =42 Ind. Cas. 760.

——S. 50—Proof of marriage.

A draft of a will written, not by the testator, but by another, and containing no mention of the respondents as wife and daughter is inadmissihle in evidence to prove the respondent's relation to the testator. The fact that after an alleged **nika** marriage, in a will executed by the testator there was no mention of the wife, is, so for as it goes, an item of evidence against the marriage having taken place; but at best a piece of evidence, the cogency of which must depend on whether the circumstance of the marriage made it natural that the wife should be the object of the husband's testamentary bounty and improbable that he should have left her to depend on her legal right to maintenance. (1903) 5 Bom. L.R. 475=7 C.W.N. 765=27 B. 485=30 I A. 127 (P.C.).

4. Applicability and scope.

——S. 50, proviso—Applicability—Civill cases.

Chaturvedi J.—The proviso to S. 50, Indore Evidence Act lays down nothing more than this that in those cases where marraige is an ingredient in an offence as in bigamy, adultery or the enticing away of a married woman, or in divorce cases, the fact of the marriage must he strictly proved. The proviso cannot be applied to ordinary civil cases where the fact of marriage or of divorce is in dispute. In civil proceedings a mere preponderance of probability, due regard being had to the burden of proof is a sufficient basis of decision. A.I.R. 1950 Madh. B. 1.

——Ss. 50, 2 (1)—Applicability and scope—Relationship—Evidence of—Reputation, if admissible—Evidence of opinion expressed by codnuct, relevancy.

Reputation is simply a cumulation of ordinary "perception testimonies" heard and gathered and reduced to a single implied assertion. The special weakness of reputation is the anonymity of the original assertors. Hence all the considerations for hearsay testimony apply and such evidence is not admissible.

While judging the relationship, the Court is permitted to take into consideration the "belief" or "judgment" of a person, provided the requirements of S. 50 are satisfied. Section 50 makes only "opinion" as relevant and enjoins how this opinion itself is to be proved. It is only "opinion as expressed by conduct" which is made relevant. In order to enable the Court to infer "the opiniou," the conduct must be of a tenor which cannot will be supposed to have been willed without the inner existence of the "opinion." It still remains for the Court to weigh such evidence and come to its owa opinion as to the factum probandum—as to the relationship in question. The opinion that is made relevant by the section is "the opinion . . . . as to the existence of such relationship," and not "the opinion as to such relationship." The person whose opinion is made evidence by the section must be shown to have 'specia means of knowledge on the subject." A.I.R. 1943 Cal. 76=I. L. R. (1942) 2 Cal. 299=75 C. L. J. 301= 46 C.W.N 729=205 Ind. Cas. 344.

——S. 50—Scope.

Relationship can be established either under S. 32 (5) and (6) or under S. 50, Evidence Act, and unless a piece of evidence comes within the four corners of these provisions of law, it cannot be acted upon by any Court. A. I. R. 1940 Lah. 245=190 Ind. Cas. 597.

——S. 50—Scope—The general reputatiou of a man amongst the community may, no douht, be evidence in iuquiries under S. 110, Criminal P. C., the nature of which is such as to render admissible what persons who know him, think of him. But this fact in no way nullifies the provisions of S. 50, Evidence Act. A. I. R. 1940 Rang. 181=1940 Rang L.R. 562=192 Ind. Cas. 49.

——S. 50—Scope—Standard of special strictness. —Evidence of general reputation.

No standard of special strictness is applicable to the proof of collateral relationships in India, and it cannot be laid down us a general rule that where the plaintiff claims as a collateral heir, he is bound to allege and prove his title through the common ancestor in all its stages.

The Evidence Act does not contain any express provision making evidence of general reputation admissible as proof of relationship. A.I.R. 1937 P. C. 201= 39 P. L. R. 540=18 P. L. T. 471=46 L.W. 88=1937 O.W.N. 724=39 Bom. L.R. 1005=31 S.L.R. 575=1937 M.W.N. 1271=1937 A.W. R.1010=168 Ind. Cas. 881. (PC)

——S. 50—Hearsay evidence.

Mere hearsay evidence about relationship of parties is not admissible. 109 Ind. Cas. 774= A.I.R. 1928 Lah. 824.

——S. 50—Scope—Family conduct.

Distribution and devolution of family property is often very valuable evidence of "family conduct" under S. 50. 91 Ind. Cas. 462=A.I-R. 1926 Mad 475.

——S. 50—Applicability and scope—Reversionership.

Inam statements purporting to be filed on behalf of a certain Hindu womnn but actually signed by her brother's son are inadmissible on a question as to whether certain persons are her reversioners. 88 Ind. Cas. 646=22 M. L. W. 73=1925 M. W. N. 117=A.I.R. 1925 Mad. 823=48 M.L.J. 467.

——S. 50—Scope—Dispute about divorce.

Where the question is whether **A** divorced **B** and **B's** marriage to **C** was valid, the conduct and opinion expressed by the parties concerned and of all the people of their caste is relevant under S. 50. 63 Ind. Cas. 594=A.I.R. 1921 Nag. 71.

——S. 50—Scope—Instancce of conduct.

In questions of relationship, recital or omission of the names of certain persons during ceremonies and the observance of pollution, are instancesof conduct within the meaning of S. 50 so as to make them admissible in evidence. 26 Ind. Cas. 110 (Mad.).

——S. 51—Expert opinion—Ground for opinion to be ascertained.

There is no doubt that the Excise Sub-Inspector is an expert in his own department and is able to distinguish liquors, but the Court should, under S. 51, Evidence Act, ascertain the grounds on which his opinion was based, so as to test it. A.I.R. 1935 Nag. 13=36 Cr. L. J. 511 = 154 Ind. Cas. 341.

——S. 51—Opinion of expert as to validity of marriage.

Where a marriage is challenged on the ground of non-observance of certain rites, a Court is not bound to accept the opinion of a religious expert, however high he may be placed in Church. The opinion of an expert by itself may be relevant but would carry little weight with the Court unless it is supported by a clear statement of what he noticed and on what he based his opinion. A.I.R. 1934 All. 273=1934 A.L.J. 1129=3 A.W.R. 70=56 All. 428=153 Ind. Cas. 733.

——S. 51—Grounds of opinion.

An expert may give an account of the experiments performed by him for the purpose of forming his opinion. A.I.R. 1933 All. 394=34 Cr.L.J. 754=1933 A.L.J. 1617=144 Ind. Cas. 357.

——Ss. 52 to 54—General repute.

In an action for damages, for libel or slander, evidence may be given in mitigation of damages to show that the plaintiff had general bad character. Similarly in Criminal prosecution where it is essential, in order to constitute the offence of defamation, that the person who makes or publishes the imputation complained of, should intend to harm, or know or have reason to believe that the imputation will harm the reputation of the person concerning whom it is made or published, the question what reputation the complainant had is relevant. If it is proved that the complainant had a notoriously bad reputation as a bribe-taker, the imputation made as to his having taken a bribe on the particular occasion even if false, could not damage his reputation as he had none to lose. 73 Ind. Cas. 805=4 Lah. 55=2 P.W.R. Cr. 1923 =24 Cr. L.J. 693=A.I.R. 1923 Lah. 225.

——Ss. 53 and 167—Evidence of character.

In a criminal trial the character of an accused person is wholly irrelevant unless the accused has given evidence of good character. The conduct of a Magistrate in looking into the confidential police record of the accused maintained in the police station and allowing his judgment to be influenced thereby is therefore a violation of the fundamental principles of criminal jurisdiction.

(It was, however, held that independent of the police record there was other evidence on record sufficient to justify the conviction of the accused.) A.I.R. 1946 Oudh. 233=1946 O.W.N. 232=224 Ind. Cas. 311=47 Cr. L.J. 588.

——Ss. 53 and 54—General repute.

In a proceeding under S. 110, Criminal P.C., it is not necessary that witnesses who speak to the general reputation of the accused must be residents of the same village where the accused lived. Evidence of witnesses of other villages is certainly admissible in evidence. A.I.R. 1942 Oudh. 356=1942 O.W.N. 39=43 Cr. L.J. 398=1942 A.W.R. (C.C.) 51=198 Ind. Cas. 547.

——Ss. 53 and 54—General repute.

In one sense the evidence of a general repute is, of course, hearsay but it is hearsay of a particular kind which is made admissible in cases under S.110, Criminal P. C., by S. 117, Criminal P. C. A.I.R. 1938 Mad. 591=1938 M.W.N. 313=47 L.W. 428=I.L.R. (1938) Mad. 720=39 Cr. L.J. 898=177 Ind. Cas. 586.

——Ss. 53 and 54—Reputation—List of crimes committed—If admissible.

In a proceeding under S. 110, a list of crimes which a Police Officer has suspected the accused to have committed, is inadmissible to establish the reputation of the accused. 13 Cr. L.J. 9=13 Ind. Cas. 102.

——Ss. 53 and 54—Evidence of character—Cr. P. C. (1898), S. 110.

Evidence of good character given by accused suspected of burglary, prosecuted but discharged, and proceeded against under S. 110 is material. 6 A.L.J. 487=9 Cr. L.J. 528=2 Ind. Cas. 225.

——S. 53—Presumption of good character.

The presumption from the evidence of good character, education, etc., of an accused cannot be safely drawn where the offences originate in extreme political feeling. 6 M.L.T. 17=11 Cr.L.J. 730=4 Ind. Cas. 700.

——S. 54.

Synopsis.

1. Evidence of bad character.
2. Evidence of previous convictions.
3. Evidence of reputation.
4. Habitual theft.
5. Past good character.
6. Past history of accused.
7. Previous conduct.
8. Previous dishonesty.
9. Previous security proceedings.
10. Previous sedition.
11. Previous similar Criminal Acts.
12. Scope.

1. Evidence of bad character.

——S. 54—Evidence of bad character.

The fact that an accused is a registered member of a criminal tribe is, like a previous conviction, a matter from which bad character can be inferred and which may affect the sentence. A.I.R. 1940 Pat. 14=5 B.R. 978=40 Cr.L.J. 833 (2)=20 P.L.T. 879=183 Ind. Cas. 660.

——S. 54—Evidence of bad character—Pending proceedings under S. 110, Criminal P. C.

Mere evidence that proceedings under S. 110, Crimibal P. C., were pending against the accused is not evidence of bad character. A.I.R. 1939 Cal. 497=40 Cr.L.J. 877=184 Ind. Cas. 206.

——S. 54—Evidence of bad character.

Admission of hearsay evidence of bad character for a collateral purpose does not vitiate the trial. I.L.R. (1939) 1 Cal. 337.

——S. 54—Evidence of bad character.

In cases of crime where it is thought desirable by the prosecution to bring evidence of previous conduct of a similar character to the suggested crime, before the jury, the intention of S. 54, Evi. Act, is not infringed, because that section refers to specific evidence of bad character not confined to acts similar to the crime which was being investigated which may influence the jury on the question of motive which is dealt with in the same connection and such a motive, of course, must be the same kind of motive that, in all probability, actuated the mind of the accused or may have actuated his mind in committing the crime for which he is being tried. A.I.R. 1936 Cal. 469=38 Cr.L.J. 195=166 Ind. Cas. 364.

——S. 54—Evidence of bad character but otherwise relevant.

Under S. 54, Evi. Act, evidence which is otherwise relevant does not become inadmissble merely because it shows bad character or the commission of offences

other than those with which the accused is charged. A.I.R. 1932 Cal. 474 = 33 Cr.L.J.854=55 C.L.J.439= 59 Cal. 1361=139 Ind. Cas. 873.

——Ss. 54, 167—Evidence of bad character—Illegal admission—Duty of Magistrates.

Where the prosecution case was that the accused came to the complainant and complained to him of his making reports to the Police and thereupon attacked him and to corroborate the complainant's statement to this effect, a Police Officer was called to prove that the accused was under Police surveillance :

Held, that the evidence of the Police Officer was entirely inadmissible under S. 54, Evi. Act, and it was the duty of the Magistrate to exclude such evidence even though no objection was taken by the accused. A.I.R. 1931 Pat. 345=12 P.L.T. 471=32 Cr.L.J. 1025 =133 Ind. Cas. 449 (2).

——S. 54—Evidence of bad character.

Evidence to show character of persons associating with accused and nature of association is also inadmissible. 32 Bom. L.R. 324=A.I.R. 1930 Bom. 157.

——S. 54—Evidence of bad character.

It is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue :

Evidence of defalcations both prior or subsequent whether such defalcations formed the basis of another charge on which the accused may have been acquitted or not are admissible in evidence to prove guilty intent as also to anticipate the defence of the non-existence of such intent. 97 Ind. Cas. 1041=27 Cr.L.J. 1217=21 S.L.R. 55=A.I.R. 1927 Sind. 28.

——S. 54—Evidence of bad character.

Evidence of bad character to prove motive for the crime or otherwise relevant is not excluded. 93 Ind. Cas. 884=5 Pat. 63=7 P.L.T. 396=27 Cr.L.J. 484= A.I.R. 1926 Pat. 232.

——S. 54—Evidence of bad character.

Evidence of previous bad character is relevant except where it is given for the purpose of showing that the accused was of a bad character and therefore likely to commit offences of the kind in question. Under S. 167, improper admission is no ground for a new trial if there is other evidence sufficient to support the conviction. 2 Lah. L.J. 653=22 Cr.L.J. 128= 59 Ind. Cas. 560.

——S. 54—Evidence of bad character.

The fact that an accused is of bad character or is reputed to be a thief or a habitual thief is no evidence against him for a charge under S. 401 of the I. P. C. 13 P.R. 1914 Cr.=16 Cr.L.J. 33=223 P.L.R. 1915= 26 Ind. Cas. 625.

—S.—5 4—Evidence of bad character—Admission in cross-examination.

Evidence of bad character is not inadmissible as against the accused but the fact that the accused has a bad character is irrelevant. Hence admission in cross-examination that the accused is a reputed thief is inadmissible. 5 L.B.R. 4=9 Cr.L.J. 578=2 Ind. Cas. 349.

——S. 54—Evidence of bad character.

Where the bad character of the accused is not a fact in issue, evidence to show that the accused had committed crimes other than decoity is inadmissible in a case under S. 400, I.P.C. 32 Mad. 179=5 M.L.T. 100 =9 Cr.L.J. 567=2 Ind. Cas. 307.

——S. 54—Evidence of bad character.

Per **Jenkins, C. J.**—In a case of perjury, a document made by the accused, but put in for the purpose of proving the untruthful character of the accused, is highly improper. 6 Bom. L.R. 379=28 Bom. 533.

——S. 54—Evidence of bad character. **See 5 Bom.** L.R. 1034.

2. Evidence of previous convictions

——S. 54—Evidence of previous convictions.

Before an accused can be questioned about previous convictions, there must be evidence legally admissible upon the record which shows that he has committed these previous offences about which he is examined by the Court and legally admissible evidence as to previous convictions must fall either within S. 511, Criminal P. C., or S. 54, Evi. Act. A.I.R. 1939 Sind 203=40 Cr.L.J. 770=I.L.R. (1939) Kar. 677=183 Ind. Cas. 219.

——Ss. 54, 14—Evidence of previous conviction—When admissible.

Evidence of previous conviction is admissible only as specified in S. 54, Evi. Act, although when a prisoner is charged under S. 401, I. P. C., previous convictions can be proved under S. 14, Evi. Act. A.I.R. 1935 Sind 115=29 S.L.R. 121=36 Cr.L.J. 1310=158 Ind. Cas. 282.

——S. 54—Evidence of previous convictions.

S. 54, Evi. Act, does not relate to the manner of proof of previous convictions, but relates only to the proof of previous convictions in certain cases. A.I.R. 1941 Sind 173=I.L.R. (1941) Kar. 308=43 Cr.L.J. 12= 197 Ind. Cas. 98.

S. 54—Evidence of previous convictions.

Where evidence of good character has not been given and bad character is not a fact in issue, evidence of previous conviction is not admissible under S. 54, Evi. Act. A.I.R. 1935 Sind 115=29 S.L.R. 121=36 Cr.L.J. 1310=158 Ind. Cas. 282.

——S. 54—Evidence of previous conviction—Admissibility.

It is contrary to the elementary principles of British Criminal Jurisprudence that any evidence of a previous conviction should be allowed to be adduced in the course of a trial save in a few well-defined and exceptional circumstances. A.I.R. 1934 Cal. 198=35 Cr.L.J. 722=8 C.L.J. 1=148 Ind. Cas. 597.

——Ss. 54, 14—Evidence of previous conviction—Whether can be used to prove habit and association.

Under S. 54, Evi. Act, evidence that an accused person has a bad character is inadmissible unless evidence has been given that he has a good character, in which case it becomes admissible. But this section does not apply to cases in which the bad character of any person is itself a fact in issue. If the evidence of bad character is introduced in order to establish a relevant fact, which cannot be proved, the evidence of bad character is admissible. Where the evidence of previous conviction or the evidence that a man has been bound over under the preventive sections can be considered only as evidence of character, it must be excluded, but where such evidence is admissible **aliunde,** it should not be excluded. Such evidence is admissible, not as evidence of character but as evidence to prove habit and association. A.I.R. 1933 Oudh.

355=10 O.W.N. 688=9 Luck. 22=35 Cr.L.J. 273=146 Ind. Cas. 1064.

——S. 54—Evidence of previous conviction.

Previous convictions and proceedings under S. 110, Cr. P. Code, are admissible in a case under S. 401 for the purpose of proving habit though not of general bad character and are not excluded by S. 54, Evidence Act. A.I.R. 1930 Sind 211=24 S.L.R. 252=126 Ind. Cas. 468.

——S. 54—Evidence of previous conviction.

S. 54 does not apply to cases in which the bad character of any person is itself a fact in issue. If the evidence of bad character is introduced in order to establish a relevant fact, the evidence of bad character is admissible. Where the evidence of previous conviction or the evidence that a man has been bound over under the preventive sections can be considered only as evidence of character it must be excluded, but where such evidence is admissible **aliunde**, it should not be excluded. Such evidence is admissible under S. 14, not as evidence of character, but as evidence to prove habit and association. 112 Ind. Cas. 337=5 O.W.N. 760=29 Cr.L.J. 1009=11 A.I. Cr. R. 273=A.I.R. 1928 Oudh. 430.

——S. 54—Evidence of previous conviction.

Guilt of joint possession of cocaine—Evidence of previous conviction of trafficking in cocaine and history sheet opened by the Police are inadmissible. 109 Ind. Cas. 349=5 O.W.N. 124=9 A.I. Cr. R. 416=10 A.I. Cr. R. 169=29 Cr.L.J. 525=A.I.R. 1928 Oudh. 215.

——S. 54—Evidence of previous conviction.

Former judgment more than 25 years old and convicting accused of dacoity is admissible in a case under S. 401, I.P. C. , for showing criminal tendency to commit theft and not habit of committing theft. 89 Ind. Cas. 527=26 Bom. L.R. 1223=25 Cr.L.J. 1391=A.I.R. 1925 Bom. 195.

——S. 54—Evidence of previous conviction.

A previous conviction is inadmissible against an accused person, except where evidence of bad character is relevant. 81 Ind. Cas. 106=1 Rang. 520=A.I.R. 1924 Rang. 91.

——S. 54—Evidence of previous conviction.

During the trial of the accused for a substantive offence, the evidence about the previous conviction should not be recorded. Such evidence is forbidden by S. 54 unless the accused offers evidence of good character. 60 Ind. Cas. 331=22 Cr.L.J. 219=5 Pat. L.J. 706.

——Ss. 54 and 165—Evidence of previous conviction—Accused found guilty.

Where a previous conviction is relevant with reference to the question of the applicability of S. 562 of the Cr. P. C. and also on the question of punishment, it may be taken into consideration in giving punishment after the accused is found guilty. 39 Bom. 326=16 Bom. L.R. 934=16 Cr.L.J. 83=26 Ind. Cas. 995.

——S. 54—Evidence of previous conviction—Penal Code, S. 75—Evidence Act, S. 54.

Evidence of previous conviction cannot be allowed except where, after the accused has been found guilty, it is necessary to receive it for the purposes of S.75, I. P. C., or where the accused, having given evidence of good character, the prosecution desires to adduce the evidence of previous convictions as proof of his bad haracter. (1903) 5 Bom. L. R. 1034.

3. Evidence of reputation.

——S. 54—Evidence of reputation.

Evidence that the accused associates with bad character is evidence of reputation. Evidence of bad reputation can be based on association with proved bad characters, and not with reputed bad characters. 9 C.L.J. 439=13 C.W.N. 318=10 Cr.L.J. 122=2 Ind. Cas. 651.

4. Habitual theft.

——S. 54—Habitual theft.

In a case where the offence for which the accused are being tried is the particular one of belonging to a gang of decoits, evidence merely that the accused habitually commits thefts (as opposed to dacoity and possibly robbery) is not evidence indicating an intention to commit the particular crime of which the accused is charged and is therefore inadmissible. But where the accused himself has given evidence that he has a good character such evidence is admissible under S. 54. 75 Ind. Cas. 67=46 Bom. 958=25 Bom. L.R. 214=24 Cr.L.J. 867=A.I.R. 1923 Bom. 71.

5. Past good character.

——S. 54—Past good character.

The mere fact that a person has enjoyed the confidence of his superiors or that he had in fact led a life of honesty during the past, is no reason to suppose that he will not succumb to temptation at the close of his career, but before a man of this type and such antecedents is adjudged guilty, the evidence against him must be of an unimpeachable character. 110 Ind. Cas. 676 = 10 L.L.J. 262 = 29 P.L.R. 703 = 10 A.I.Cr.R. 519 = 29 Cr. L.J. 740 = A.I.R. 1928 Lah. 647.

6. Past history of accused.

——S. 54—Past history of accused if relevant.

The past history of a gang of dacoits would be significant only if an offence under S. 400 of the Penal Code has been made out. 16 C.W.N. 69 = 13 Cr.L.J. 39 = 13 Ind. Cas. 279.

7. Previous conduct.

——S. 54—Previous conduct—Deposition of a witness in prosecution under S. 107, Cr.P.C.

Statement by a prosecution witness in a prosecution for a riot that he had brought a case under S. 107, Cr.P.C., against some of the accused who had been bound down, is admissible not for proving the bad character of the accused but as part of the **res gesta**, the events which had transpired before and which led up to the riot with which the accused were charged. 40 Cal. 367 = 13 Cr. L.J. 821 = 17 Ind. Cas. 565.

8. Previous dishonesty.

——S. 54—Previous dishonesty.

Evidence of a previous act of dishonesty of the accused can only be allowed to prevent the accused person from pleading that the act under consideration was committed without a dishonest intention. 102 Ind. Cas. 492 = 8 A.I.Cr.R. 196 = 28 P.L.R. 313 = 28 Cr.L.J. 556 = A.I.R. 1927 Lah. 549.

9. Previous security proceedings.

——S. 54—Previous security proceedings.

Order under S 118, Cr.P.C. can be proved against a person proceeded against under S. 110, though the order is not a conviction under Evidence Act, S. 54, Expln. 2. 51 All. 275 = 1929 Cr.C. 346 = A.I.R. 1929 All. 650.

10. Previous sedition.

——S. 54—Previous sedition.

As a general rule in sedition cases evidence of previous sedition is inadmissible. It is no doubt open to the prosecution, where the accused himself tries to show that he is a well affected man, because he has been particularly making loyal speeches, to prove that he has been in the habit of making seditious speeches. Also the speech, the subject of charge, may be of such a character that its meaning is not patent. It may contain obscure, political, social or historical references, elucidation of which may be sought from previous speeches of the same accused. In such a case previous speeches would be admissible. 84 Ind. Cas. 448 = 26 Cr.L.J. 304 = A.I.R. 1921 Sind 199.

11. Previous similar criminal acts.

——S. 54—Evidence that accused had committed similar criminal acts previously—Admissibility.

Evidence may be led in a case against an accused that the accused had committed other acts of a criminal nature on previous occasions, but such evidence can only be admissible rarely and in a very limited type of cases. Evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to him. A.I.R. 1942 Pat. 291 = 8 B.R. 441 = 43 Cr.L.J. 413 = 198 Ind. Cas. 662.

12. Scope.

——S. 54—Scope.

S. 54 of the Evidence Act does not apply to cases in which the bad character of any person is itself a fact in issue. 7 O.W.N. 862 = 1930 Cr.C. 1079 = A.I.R. 1930 Oudh 455.

——S. 54—Scope.

The object of S. 54 is to lay down that evidence of bad character including a previous conviction is, as a rule, irrelevant "to help to establish an accused person's guilt", but not to lay down that it may not be taken into account in passing sentence. 115 Ind. Cas. 483 = 52 Mad. 358 = 29 M.L.W. 194 = 2 M.Cr.C. 65 = 1929 M.W.N. 393 = 30 Cr.L.J. 471 = 12 A.I. Cr.R. 256 = A.I.R. 1929 Mad. 306 = 56 M.L.J. 595.

——S. 54—Scope.

S. 54 regulates what is relevant for the purpose of proof at an enquiry or trial, not what is relevant for the purpose of deciding whether a longer or shorter sentence is to be imposed. 111 Ind. Cas. 453 = 6 Rang. 391 = 11 A.I.Cr.R. 126 = 29 Cr.L.J. 869 = A.I.R. 1928 Rang. 200 (F.B.).

——S.54—Scope. *See* BOMBAY ACTS—GAMBLING ACT. 28 B. 129 = 5 Bom. L.R. 805.

——S. 55—Character, evidence as to—Admissibility in suit for damages.

Evidence under S. 55, Evidence Act, about the character of a person is relevant in connexion with the amount of damages in civil cases, and a case of defamation is a quasi-civil case. As the same time only general evidence of character or reputation can be given and not, for instance, evidence of a particular conviction. A.I.R. 1932 Nag. 158 = 34 Cr.L.J. 154 = 141 Ind. Cas. 438.

——S. 55—Character, evidence of, in civil cases.

In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant, but evidence can be given only of general character and not of particular acts by which character is shown. 41 Ind. Cas. 699 = (L. Bur.).

——S. 56—Custom—Judicial notice of.

The fact that a particular custom has been judicially recognised establishes that the custom is reasonable and not opposed to public policy so that it will be upheld whenever it is proved. But, judicial recognition of a custom in another suit leaves untouched the proof of the fact that the custom is applicable to the particular parties who are before the Court.

The custom may have been continually put forward and proved by evidence, so that the time has come when a Judge may say that he no longer requires it to be proved, but that he will take judicial notice of it. A.I.R. 1937 Bom. 65 = 60 B. 919 = 38 Bom. L. R. 1034 = 167 Ind. Cas. 380.

——S. 56—Custom.

Court will take judicial notice of judgments but not of statements of facts therein—Custom proved in a previous suit between certain parties will not affect other parties in a subsequent suit.

When a custom has been repeatedly proved, the Court may take judicial notice of the fact that a certain class of people is governed by the custom. 93 Ind. Cas. 321 = 19 S.L.R. 376 = A.I.R. 1926 Sind 161.

——S. 56—Custom.

Custom repeatedly brought to the notice of Court may be taken judicial notice of. 78 Ind. Cas. 461 = A.I.R. 1925 Nag. 174.

——S. 56—Fact transpiring in Court.

A Court can take judicial notice of facts transpiring in Court. 121 Ind. Cas. 337 = A.I.R. 1931 Pat. 114.

——S. 56—Judicial notice—Notorious facts.

Judges are entitled to take judicial notice of the notorious facts of the social life of any class in the community without requiring actual positive evidence. 13 M.L.T. 131 = 24 M.L.J. 211 = 14 Cr.L.J. 33 = (1913) M.W.N. 207 = 18 Ind. Cas. 257.

——S. 56—Personal knowledge of Judge.

Per **Sundara Iyer, J.**—A Judge is not entitled to rely on specific facts not proved but known to him otherwise. But he may use his general knowledge and experience in determining the credibility of the evidence placed before him. **Per Sadasiva Iyer, J.**—A Judge may use even his personal knowledge of concrete private facts, provided he mentions the knowledge to the parties and they do not object to his deciding the case and he must be allowed to use his knowledge of public, historical or scientific facts in coming to a conclusion. 36 Mad. 168 = 23 M.L.J. 624 = (1912) M.W.N. 1193 = 12 M.L.T. 561 = 17 Ind. Cas. 383.

——Ss. 56 and 57—Personal knowledge of Judge—Judge confused to decide because of the personal knowledge.

A Judge should not import into a case his own knowledge of particular facts. If the presiding officer of a court feels considerably embarrassed when he is called upon to try a disputed question of fact of which he has personal knowledge he should decline to hear the matter. 16 Ind. Cas. 859 (Cal.).

——S. 56—Registration endorsement.

Judicial notice should be taken of the endorsement of the Sub-Registrar and his signature. 105 Ind. Cas. 422 = 47 C.L.J. 118 = A.I.R. 1928 Cal. 154.

——Ss. 56 and 57—Scope.

With respect to the existence of certain tauzi numbers, a report, published by Government was filed by the party relying on it. But the Court returned it thinking that it was a matter of which it was entitled to take judicial notice under Ss. 56 and 57, Evidence Act. There was a reference to the report in the judgment of the Court:

Held, that the report was a public document which could be proved by document purporting to be printed by order of Government. The Court should have admitted it formally in evidence and marked it as an exhibit. A.I.R. 1937 Pat. 334 = 3 B.R. 648 = 170 Ind. Cas. 61.

——Ss. 56 and 57 (8)—State recognised by British Crown—Judicial notice.

The existence of a State recognized by the British Crown is a fact which requires no evidence, and does not require any proof of which the Court must take judicial notice, on the production of such documents as it might consider necessary to enable it to take notice of it. (Letters from the Deputy Secretary to Government of India held admissible for the purpose.) A.I.R. 1944 Sind 188 = I.L.R. (1944) Kar. 293 = 46 Cr.L.J. 110 = 216 Ind. Cas. 50.

——S. 57.

Synopsis.

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1. Books.

——S. 57—Books—Passages containing tradition—Writer's special knowledge.

Before any judicial notice could be taken of any passages in books relating to the alleged tradition, something more than the mere existence of the passages would have to be proved before the passages could be regarded as evidence of a tradition. It must be shown that the writers had any special knowledge of the alleged tradition or that the story was described as a tradition or was merely the repetition of that given in the history. A.I.R. 1937 Lah. 529 = 39 P.L.R. 802 = 171 Ind. Cas. 970.

—— .57—Books of reference.

Evidence of the sources of common knowledge, if not of its extent, may perhaps be obtained by reference to a cyclopaedia and the lists of text books there to be found. Detailed information supplied from such sources requires usually to be established by experts. A.I.R. 1931 P.C. 189 = 131 Ind. Cas. 771 (P.C.).

——S. 57—Books on custom—Bhutala Pandya's Code.

Bhutala Pandya's Code has not often been proved to be genuine and authoritative and so the court might not take judicial notice of its contents. 25 M.L.J. 411 = 14 M.L.T. 348 = (1914) M.W.N. 333 = 21 Ind. Cas. 432.

2. Calendars.

—— S. 57—Calendars—Corresponding dates of Indian and Gregorian calendars not correct.

Court can take judicial notice of the fact where corresponding dates according to Indian and Gregorian calendars are not correctly given in pleadings and documents, although the parties had not raised such point. A.I.R. 1938 Lah. 558 = 40 P.L.R. 848 = 178 Ind. Cas. 436.

3. Court of Wards.

——S. 57—Court of Wards.

The Court can take judicial cognizance of the fact that the Court of Wards is much concerned with the welfare of its wards. A.I.R. 1942 All. 267 (2) = 1942 A.L.J. 197 = 1943 A.W.R. H.C. 305 = I.L.R. (1942) All. 518 = 202 Ind. Cas. 227.

4. Current events.

——S. 57—Current events.

Per **Mockett J.**—Court can take judicial notice of current events or facts which are notorious. A.I.R. 1943 Mad. 475 = (1943) 1 M.L.J. 396 = 56 L.W. 320 = 1943 M.W.N. 459 = 44 Cr.L.J. 748 = I.L.R. (1944) Mad. 8 = 208 Ind. Cas. 222 (S.B.).

——S. 57—Current events.

The fact that in 1942 acts of incendiarism had been committed; sabotage was rampant: telegraph wires had been cut, and all means of communication between man and man came to an end, can be taken judicial notice of. A.I.R. 1944 All. 94 = 1944 A.L.J. 87 = 1944 O.W.N.(H.C.) 36 = 1944 A.W.R.(H.C.) 64 = 45 Cr.L.J. 573 = 212 Ind. Cas. 309.

——S. 57—Current events.

The facts that the Congress party is a political party with a very large number of adherents and that in August, 1942, Police Station at Minapur was attacked, other Police Stations and public buildings over a wide area elsewhere were also attacked by persons who professed to be members of the Congress party and to be acting on its behalf, are facts so notorious that judicial notice may properly be taken of them. A.I.R. 1944 Pat. 58 = 10 B.R. 477 = 22 Pat. 662 = 45 Cr.L.J. 606 = 212 Ind. Cas. 266.

——S. 57—Current events.

Per **Iqbal Ahmad, C.J.**—A Court can take judicial notice of a political movement prejudicial to the public safety or peace, *e.g.*, disturbances in the month of August, 1942. A.I.R. 1943 All. 26 = 1942 A.L.J. 686 = 44 Cr.L.J. 216 = I.L.R. (1943) All. 238 = 1942 A.W.R. 392 (1) = 205 Ind. Cas. 113 (F.B.).

5. Custom.

——S. 57—Custom—Judicial notice.

When a particular custom is of general prevalence and is commonly recognised, it is open to a Court to take judicial notice of such custom having the force of law, and it is, therefore, not necessary that there

should be evidence produced in each case to establish custom. A.I.R. 1935 All. 1002 = 1935 A.L.J. 1131 = 1935 A.W.R. 1109 = 58 A. 370 = 159 Ind. Cas. 683.

——S. 57—Custom of privacy.

There is a customary right of privacy prevailing in Oudh which is so well established and known, as not to require proof, in any case by a party setting it up and the Court itself may take judicial notice of the custom. 93 Ind. Cas. 332 = 13 O.L.J. 512 = A.I.R. 1926 Oudh. 352.

6. Dictionary.

——S. 57—Dictionary.

Dictionaries may properly be referred to in order to ascertain not only the meaning of a word, but also the use to which the thing (if it be a thing) denoted by the word is commonly put. A.I.R. 1942 P.C. 40 = 8 B.R. 889 = 202 Ind. Cas. 203 (P.C.).

7. Events since institution of suit.

——S. 57—Events since institution of suit.

Per **Agarwal, J.**—It is incumbent upon a Court of Justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances, as they stand at the time the decree is made. A.I.R. 1941 Oudh 422 = 16 Luck. 742 = 1941 O.W.N. 661 = 1941 A.W.R. 175 = 195 Ind. Cas. 402.

8. Government notification.

——S. 57—Government notification.

Judicial notice of a Government notification should not be taken by Court. 107 Ind. Cas. 578 = A.I.R. 1928 All. 355.

9. History.

——S. 57—History—Statement as to custom.

Where the Appellate Court relies on a custom given in a book when the custom is not pleaded by the party in his plaint, and no evidence is adduced thereon, and the author of the book is not called in evidence, the decision of the Appellate Court must be set aside. Such a statement of custom is inadmissible. A.I.R. 1941 Pat. 146 = 21 P.L.T. 1118 = 7 B.R. 374 = 192 Ind. Cas. 290.

——S. 57—History.

The question of title between trustee of property alleged to be dedicated to religious user, though an old and historical institution, and a private person cannot be deemed to be a " matter of public history " within the meaning oi S. 57 and historical works cannot be used to establish title to such property. Books written as late as when the dispute has already arisen cannot be referred to even if S. 57 is held applicable. 31 P.L.R. 372 = A.I.R. 1930 Lah. 744.

——S. 57—History—Admissibility of letters.

Letters of the Jesuit fathers, though admissible strictly to prove the facts of history, could not be used to prove where certain missionaries lived or when they died. 36 Mad. 418 = (1912) M.W.N. 152 = 24 M.L.J. 630 = 13 Ind. Cas. 599.

——S. 57—History—Vernacular histories—Admissibility.

Vernacular histories which have never received any recognition as historical works of value and reliability relating to matters of public or general interest are not admissible under S. 57, Evidence Act. A.I.R. 1943 Oudh 91 = 1942 O.W.N. 657 = 18 Luck. 346 = 205 Ind. Cas. 433.

10. Land Revenue Report.

——S. 57—Land Revenue Report—Admissibility—Judicial notice.

A Court is not entitled to take judicial notice of Land Revenue Reports and they are inadmissible unless formally proved. 20 C.L.J. 516 = 27 Ind. Cas. 470.

11. Magistrate in Native State.

——S. 57 (7)—Magistrate in Native State.

A " Magistrate " in a Native State does not come within S. 57 (7). 16 Bom. L.R. 261 = 15 Cr.L.J 433 = 24 Ind. Cas. 169.

12. Matter of public notoriety

——S. 57—Matter of public notoriety—Train Service.

The Court cannot take, as matters of public notoriety, the running time of trains and the number of trains within a given time and other facts involved in such an inquiry. 20 C.L.J. 455 = 19 C.W.N. 489 = 26 Ind. Cas. 962.

13. Municipal rules.

——S. 57—Municipal rules.

Rules by the Hyderabad (Sind) Municipality in regard to water rates and purporting to have the force of law, can be taken judicial notice of by the Court. 87 Ind. Cas. 258 = 16 S.L.R. 98 = A.I.R. 1923 Sind 1.

14. Parliamentary debates.

——S. 57 (4) and S. 78 (2)—Parliamentary debates—Hansard—Matter of history—Meaning—Parliamentary proceedings.

The course of proceeding of Parliament mentioned in S. 57 (4) is distinct from the proceedings themselves which may be proved as under S. 78 (2). Speech of a person who is not yet a historical parsonage, in the presence of persons who still exist, is not a matter of history. Per **Harrington J.**—The existence of a political agitation in India, the deportation of some persons on its account, the debates in Parliament on those questions are matters of public history. " Hansard ", is a proper book of reference to enable the Court to take judicial notice of the facts mentioned in penultimate para. of S. 57. 37 Cal. 760 = 14 C.W.N. 713 = 6 Ind. Cas. 81.

15. Proceedings in Legislative Assembly.

——S. 57—Proceedings in Legislative Assembly.

A Court may take judicial notice of the course of proceedings in the Legislative Assembly, but there should be some indications on the record when and in what circumstances, the specified statements were made. A.I.R. 1943 Lah. 298 = 45 Cr.L.J. 154 = 46 P.L.R. 334 = 209 Ind. Cas. 468.

16. Provisions of Statute.

——S. 57—Provisions of Statute.

The Courts should take judicial notice of the provisions of a statute, *e.g.*, Paper Currency Act, though the objection is not raised by the parties. (1914) II U.B.R. 13 = 24 Ind. Cas. 721.

17. Public Holidays.

——S. 57—Public holidays notified in Gazette.

The Court is bound to take judicial notice of public holidays notified as such in the **Official Gazette** and a ligitant is entitled to presume that the Court will take such notice thereof. A.I.R. 1933 Lah. 558 = 14 Lah. 240 = 34 P.L.R. 540 = 149 Ind. Cas. 958.

18. Registered letter.

——S. 57—Registered letter.

Court can take judicial notice that registered letter

reaches the destination 24 hours later than an ordinary letter. 99 Ind. Cas. 622 = A.I.R. 1927 All. 215.

19. Rules of Executive business of Governor.

——S. 57—Rules of Executive Business of Governor.

The Court is entitled to take judicial notice of the rules of Executive Business of the Governor. A.I.R. 1944 Pat. 354 = 23 Pat. 252.

20. Settlement Report.

——S. 57—Settlement Report.

Statement in Sifton Settlement Report as to the non-transferability of 'jwami thicka' is admissible under Ss. 48, 57 and S. 32 of the Evidence Act. A.I.R. 1937 Pat. 463 = 18 P. L. T. 575 = 3 B. R. 811 = 171 Ind. Cas. 115.

21. Signature of Officers.

——S. 57—Signature of Honorary Magistrate—Affidavit sworn before—Judicial capacity.

An affidavit sworn before a pleader in the Bar room, who was also an Honorary Magistrate is inadmissible. The Court can take judical notice of the signature of Honorary Magistrate only when he was acting judicially, but not in his private capacity. 5 Ind. Cas. 537 (Cal.).

——S. 57—Signature of officer.

The applicability of the sub-section is not contingent on the exhibition of a copy of the **Fort St. George Gazette** containing a notification of his appointment as such officer. 72 Ind. Cas. 515 = 24 Cr.L.J. 403 = 17 M.L.W. 615 = 32 M.L.T. 300 = 1923 M.W.N. 290 = A.I.R. 1923 Mad. 600 = 44 M.L.J. 557.

——S. 57—Signature of Secretaries to Government.

Judicial notice of the signatures of the Secretaries to the Government on any instrument can be taken under S. 57. A.I.R. 1945 Pat. 59 = 23 Pat. 475 = 218 Ind. Cas. 340 = 46 Cr.L.J. 460.

22. State recognised by British Crown.

——S. 57—State recognised by British Crown.

The existence of a State recognised by the British Crown requires no evidence and does not require any proof of which the Court must take judicial notice on the production of such documents as it might consider necessary to enable it to take notice of it. A.I.R. 1944 Sind 188 = I.L.R. (1944) Kar. 293 = 46 Cr.L.J. 110 = 216 Ind. Cas. 50.

23. Territory under British Dominion.

——S. 57—Territory under British Dominion.

The statement of the Advocate-General that certain territory is under the Dominion of British Crown is proper and the Court can take judicial notice of such a statement. 1935 M.W.N. 1034.

24. Thefts on Railways.

——S. 57—Thefts on Railways.

It is obviously unfair to the railway company to take judicial notice of thefts on the railways. It is for the plantiff asking for damages to prove "wilful neglect" on the part of the defendant railway. If he wishes to rely on the occurrence of thefts and inadequacy of the method of sealing waggons, it is for him to lead evidence on the point. 111 Ind. Cas. 523 = 10 Lah. 329 = A.I.R. 1928 Lah. 837.

25. Warrant.

——S. 57—Warrant.

A warrant issued under the provisions of S. 46 of the Calcutta Police Act is not a public record and there is no presumption of any kind attaching to it; therefore the contents thereof must be proved in the regular way and, therefore, it is incumbent upon the prosecution to prove that a warrant of this description was in strict compliance with the provisions of S. 46 of the Act and that it was issued after information upon oath had been brought before the issuing officer and after such enquiry as he thought it necessary to make had been made. 96 Ind. Cas. 264 = 53 Cal. 718 = 30 C.W.N. 713 = 27 Cr.L.J. 920 = A.I.R. 1926 Cal. 966.

——S. 58.

Synopsis.

1. **Admission.**
2. **Admission of execution.**
3. **Applicability.**
4. **Denial of document and subsequent admission.**
5. **Mortgage.**
6. **No admission—Effect.**
7. **Partition.**
8. **Valuation not objected to.**

1. Admission.

——S. 58—Admissions—Value of.

Though it is true that an admission does not operate as an estoppel against the party making it, nevertheless it remains as an admission and under S. 58 of the Evidence Act, admissions are quite relevant to prove the facts admitted. 1948 R.D. 441 (2) = 1948 A.W.R. (Rev.) 252.

——S. 58—Admissions—Effect.

That which is admitted in the pleadings or statements made to the Court need not be proved. A.I.R. 1939 Nag. 233=1939 N.L.J. 375= I.L.R. (1939) Nag. 607 = 183 Ind. Cas. 845 (F.B.).

——S. 58—Admission—Proof of fact admitted—Power of Court to call for.

Courts can call for proof even of facts admitted under S. 58 and there may be cases where the failure to call for proof may be so improper as to make the High Court interfere even in a second appeal. 14 M.L.T. 117 = 25 M.L.J. 329 = 20 Ind. Cas. 792.

——S. 58—Admission, what is.

Mere reference in plaint to suit contract being made on 'office dhara' is no indication to the defendants that plaintiffs rely on one of the terms of the "office dhara" in support of their claim. 86 Ind. Cas. 364 = 18 S.L.R. 265 = A.I.R. 1925 Sind 80.

2. Admission of execution.

——S. 58—Admission of execution by defendant of hand letter sued on coupled with plea of substitution of liability by execution of a different promissory note and a partial discharge towards it—Necessity for proof of claim by admission in evidence of the hand-letters.

When the fact of an execution of a document is admitted it need not be proved and this would be so even when the document in question is not admissible on account of any provision of the Stamp Act.

Where in a suit to recover amounts lent on unstamped hand-letters, the defendant admits the execution of the documents but only pleads substitution of liability by the execution of another promissory note and partial discharge towards it, there is no necessity for the plaintiff to adduce proof of his claim by seeking to get the hand-letters admitted in evidence. The plaintiff will be entitled to a decree on the failure of the defendant to substantiate the plea set up by him in defence. 60 M.L.W. 442 = 1947 M.W.N. 568 = A.I.R. 1947 Mad. 422 = (1947) 2 M.L.J. 116.

——S. 58—Admission of execution—Effect.

While S. 58, Evidence Act, can be invoked where the documentary evidence about the admitted facts is shut out by provisions made in purely revenue laws, it cannot be invoked to overrule the provisions of non-revenue enactments, nor can it be used to bind the party who has made an admission of the genuineness of a document, when such admission is accompanied by a legal plea that the contract and the other facts mentioned in that document could not be relied upon by the opposite party owing to the provisions of the statutory law relating to registration or attestation, etc. A.I.R. 1935 Pesh. 12.

——S. 58—Admission of execution—Effect.

A purchaser of certain lands who admitted the existence of a prior mortgage on the lands could not get the lands without paying the mortgage money even though the mortgage was unregistered. An admission made by a party when examined as a witness comes within the purview of S. 58, Evidence Act. 8 Bur. L.T. 18 = 29 Ind. Cas. 698.

——S. 58—Admission of execution—Effect.

Where a mortgage, executed before the Transfer of Property Act, came into force, is admitted to have been executed, proof thereof will be dispensed with under S. 58 of the Evidence Act, even though it was effected by an unregistered instrument for more than Rs. 100. **Quaere.**—Would the defect of want of jurisdiction be cured by such admissions after the Transfer of Property Act came into force? 6 Bur. L.T. 131 = 20 Ind. Cas. 666.

——S. 58—Admission of execution.

Where, in a suit on pro-note, the defendant admitted the execution of the note and pleaded discharge, but at a later stage of the trial after the note had been admitted in evidence and marked as exhibit, took an objection that as the note had not been duly cancelled, it was inadmissible in evidence and the plaintiff's suit was not maintainable:

Held, that inasmuch as the defendant had admitted the execution of the note, the question whether the note was admissible in evidence did not arise in view of the provisions of S. 58, Evidence Act. A.I.R. 1932 Mad. 693 = 63 M.L.J. 303 = 1932 M.W.N. 793 = 36 M.L.W. 470 = 139 Ind. Cas. 486.

——S. 58—Admission of execution.

Admission of execution of a document dispenses with the necessity of proof of proper attestation.

Where the defendant mortgagor was an illiterate **pardanashin** lady.

Held, that the mere admission of her execution of the document is not sufficient to dispense with the necessity of proving the passing of consideration. 94 Ind. Cas. 558 = 1926 P.H.C.C. 117 = A.I.R. 1926 Pat. 295.

——Ss. 58 and 68—Admission of execution—Proof of attestation may be required.

Even where execution of a mortgage is admitted it is open to the Court to require proof of valid attestation. 35 Mad. 607, Rel. (1918) M.W.N. 853 = 25 M.L.T. 19 = 9 L.W. 5 = 49 Ind. Cas. 278.

——S. 58—Admission of execution—Document itself inadmissible.

Admissions of parties regarding the execution or contents of the documents themselves inadmissible in evidence, should not be acted upon when the liability is denied for such defects. (1916) 2 M.W.N. 33 = 31 M.L.J. 240 = 20 M.L.T. 44 = 35 Ind. Cas. 18.

——Ss. 58 and 68—Admission of execution.

Where the execution of a mortgage deed is admitted, production of the same is dispensed with; in such a case, the court can take no account of the validity or informality of the document, *i.e.*, attestation by one witness. 4 Bur. L.R. 182 = 11 Ind. Cas. 850.

——S. 58—Admission of execution—Effect where insufficiently stamped.

In spite of waiver of proof by an admission under S. 58, Evidence Act, a note or other instrument insufficiently stamped cannot be acted upon or degree given upon it. But where there is a cause of action complete in itself before the promissory note and independently of it, the plaintiff can prove it though the note is inadmissible.

Therefore if the plaintiff has an independent cause of action apart from the note, the admission of the loan in the written statement is, under S. 58, sufficient to waive the requirements of further proof and to enable the petitioner to succeed thereon. But if there is no such cause of action, the mere admission of the fact by the defendant cannot give him a cause of action, and that is not a matter cured by S. 58, Evidence Act, or any other section of the Act. A.I.R. 1933 Mad. 117 = 64 M.L.J. 79 = 37 M.L.W. 157 = 1933 M.W.N. 663 = 140 Ind. Cas. 833.

——S. 58—Admission of Execution—Effect where insufficiently stamped.

No proof is necessary of a document which has been admitted by other side; the fact that such a document is not properly stamped is not a ground for dismissal of a suit based upon it. 4 Bur. L.T. 171 = 11 Ind. Cas. 810.

——S. 58—Admission of execution—Validity if effected.

Proof of, may be waived by party affected by it, but validity of document is not affected thereby. 68 Ind. Cas. 383 = 2 Pat. 52 = 4 P.L.T. 239 = A.I.R. 1922 Pat. 514.

——S. 58—Admission by some of the executants—Effect of.

An admission of the executant's signature by one of his sons in a suit on a mortgage relieves plaintiff of any further responsibility of proving the mortgage deed so far as that defendant is concerned. 42 Bom. 352 = 20 Bom. L.R. 354 = 45 Ind. Cas. 555.

3. Applicability.

——S. 58—Applicability—Boundaries on three sides tallying—On spot inspection, decree-holder pointing out attached house and judgment-debtor's son agreeing it to be house in suit—Identity, held sufficiently established.

In a suit by an objector under S. 42, Specific Relief Act, even the fact that the boundaries on three sides tally is sufficient to establish the identity of the house especially when on the local inspection made by the trial Judge the decree-holder (defendant) pointed out the house which he had attached and a son of the judgment-debtor agreed that the house pointed out by the decree-holder was the one in suit. A.I.R. 1943 Pesh. 70 = 208 Ind. Cas. 366.

——S. 58—Applicability.

S. 58 makes no exception of criminal trials and the Criminal Courts, as a matter of practice, do not insist on every fact which is admitted by accused being proved by the prosecution. But, under the proviso, the practice is to insist on proof of all really essential facts. 91 Ind. Cas. 233 = 27 Cr.L.J. 57 = A.I.R. 1926 Oudh 245.

——S. 58—Applicability.

S. 58 normally relates to agreed statements of facts made between both parties to save time and expense at a trial. But where there is no agreement to admit facts, and no pleading has been put in by a party it cannot be said any such admission has been made in his pleading. 91 Ind. Cas. 20 = 49 Bom. 368 = 27 Bom. L.R. 251 = A.I.R. 1925 Bom. 231.

——S. 58—Applicability.

Divorce cases—Section does not apply. 91 Ind. Cas. 20 = 49 Bom. 368 = 27 Bom. L.R. 251 = A.I.R. 1925 Bom. 231.

4. Denial of document and subsequent admission.

——S. 58—Denial of document—Subsequent admission.

A party having once denied, can, on a reconsideration, subsequently admit the genuineness of a document and where its genuineness is admitted, the Court is not precluded from taking the document into consideration. A.I.R. 1941 Oudh 189 = 1940 O.W.N. 1344 = 1941 R.D. 6 = 1941 A.W.R. Rev. 19 = 192 Ind. Cas. 259.

5. Mortgage.

——S. 58—Mortgage—Want of consideration and legal necessity—Onus.

In suit on a mortgage executed by the great grandfather of the defendants, the onus of proof on the question whether there was consideration or whether the full consideration stated in the mortgage had, in fact passed, is wholly on the defendants and it is not for the plaintiff-mortgagee to prove this matter affirmatively; on the other hand, when the question is whether there was legal necessity for the borrowing, the onus of proving that there was, is on the plaintiff. A.I.R. 1940 P.C. 114 = 6 B.R. 799 = 1940 A.W.R. 99 = 21 P.L.T. 773 = 1940 A.L.J. 493 = 1940 M.W.N. 713 = (1940) 2 M.L.J. 452 = 52 L.W. 310 = 42 Bom. L.R. 990 = 72 C.L.J. 440 = I.L.R. (1940) Kar. (P.C.) 267 (Sup.) = 189 Ind. Cas. 15 = 42 P.L.R. 687 (P.C.).

——S. 58—Mortgage—Admission in previous litigation that property was mortgaged, whether admissible in suit for possession of that property.

Obiter.—It is doubtful whether in a suit for possession by the plaintiff, the admission by the defendant during the course of previous litigation that the property had been mortgaged to the plaintiff, can be considered. A.I.R. 1935 Lah. 279 = 37 P.L.R. 296 = 159 Ind. Cas. 385 (1).

——Ss. 58 and 92, cl. (4)—Mortgage—Registered mortgage—Subsequent oral agreement to take less—Admissions of parties.

A subsequent oral agreement to take less than is due under a registered mortgage is admissible in evidence if the oral agreement is admitted in the pleadings of the parties. No question of the admissiblity of evidence, oral or documentary arises if proof is dispensed with under S. 58 of the Evidence Act or under the provisions of the C. P. Code consequent on the admission of the parties. 42 Mad. 41 = 8 L.W. 522 = (1918) M.W.N. 719 = 35 M.L.J. 555 = 24 M.L.T. 400 = 48 Ind. Cas. 158.

6. No admission—Effect.

——S. 58—No admission—Production of, best material.

The plaintiff is not relieved of producing the best materials in support of his case, where no admission has been made by the defendants either in their written statement or at the hearing. A.I.R. 1941 Ca 1 = 72 C.L.J. 14 = 193 Ind. Cas. 578.

7. Partition.

——S. 58—Partition.

Where the defendants alleged that the plaintiff had executed certain unregistered deeds by which the inheritance of a common ancestor was partitioned, and the plaintiff in his pleadings by necessary implication admitted the said allegation.

Held, that oral partition being permissible S. 58 of the Evidence Act made evidence on this point unnecessary and therefore the provisions of Ss. 91 and 92 of the Evidence Act would not prevent defendants from relying on the partition. 76 Ind. Cas. 855 = 1 Rang. 405 = A.I.R. 1924 Rang. 155.

8. Valuation not objected to.

——S. 58—Valuation not objected to—Second appeal—Question of jurisdiction.

On second appeal to the High Court, the objection to the jurisdiction of the first court cannot be taken when it is waived in the first Court. The market value stated in the plaint **prima facie** determined the jurisdiction. It was not conclusive and binding on the plaintiffs, so as to estop them from disputing its correctness or seeking its amendment, merely because they had stated it in the plaint. It was open, however, to the defendant to rely on the statement in the plaint and dispute the jurisdiction of the Court. But as neither party raised any question as to want of jurisdiction and by their conduct and silence treated the market value sufficient to give the jurisdiction to the court, they dispensed with proof on the question by their tacit admissions, and thus the principle of law laid down in S. 58 came into operation. Consent of the parties cannot give jurisdiction where the law confers no jurisdiction. The question as to jurisdiction, where that question depends on facts to be ascertained can be waived by the parties. 35 Bom. 24 = 12 Bom. L.R. 712 = 7 Ind. Cas. 950.

——Ss. 59 and 91—Circumstances relating to mortgagee's possession of title deeds, oral evidence as to—Admissibility.

An agreement of the parties to create a mortgage (and the terms of the mortgage) cannot be proved by parole evidence while oral evidence would be admissible to prove the circumstances in which the documents of title came to be in the possession of the person who claims to be a mortgagee and the mortgagee is also entitled, and indeed called upon, to prove the factum of the mortgage or deposit. A.I.R. 1937 Rang. 69 = 14 Rang. 522 = 168 Ind. Cas. 830.

——S. 59—Fraud—Proof.

Fraud is not a matter which can ordinarily be susceptible of direct proof, but has to be judged from the conduct of the parties concerned. 40 P.L.R. 705.

——S. 59—Fraud—Proof—Circumstantial evidence.

In all cases of fraud which is not capable of proof by direct evidence, the Court has to fall back upon inferences to be drawn from circumstances established by evidence. The party alleging fraud is nevertheless bound to establish it by cogent evidence, and suspicion cannot be accepted as proof. Unless, therefore, the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud. A.I.R. 1935 All. 995 = 1935 A.W.R. 1189 = 58 All. 342 = 159 Ind. Cas. 977.

——S. 59—Oral evidence—Document not ambiguous.

Evidence of the conduct of the parties is not admissible to prove the intention when the document is not ambiguous. (1911) 2 M.W.N. 238=12 Ind. Cas. 146.

——S. 59—Scope.

Where a person deposited a number of jade baskets with other person and in a suit the nature of such deposit is in dispute, oral evidence is admissible to show whether the jade was put there for safe custody merely or by way of pledge. A. I. R. 1938 Rang. 38=174 Ind. Cas. 475.

——S. 60.

Synopsis.

1. Catalogue or price list.
2. Direct evidence.
3. Dying declaration.
4. Evidence of persons recognising one as son of so and so.
5. Evidence of General Repute.
6. Evidence of Sub-Inspector based on inquiries made in course of duty.
7. Ex parte affidavits.
8. Fact of deposing.
9. Family bard.
10. Hearsay evidence.
11. Jail identification.
12. Medical certificate.
13. Opinions and impressions.
14. Panchnama—Proof of.
15. Solicitor's books.
16. Statement of accused.
17. Statement of Counsel about relevant facts.
18. Statement of deceased persons.
19. Statement of person alive but not examined
20. Statement of witness before trial.
21. Witness not stating orally what accused was alleged to have said.

1. Catalogue or price list.

——S. 60—Catalogue or price list—Admissibility without calling as witness person issuing it—If hearsay evidence.

A catalogue or a price list is a statement put out by the sellers regarding the price at which they are prepared to sell the goods or articles mentioned in it. It contains an invitation, to make an offer to purchase at the price stated which the seller is prepared to accept. It cannot be regarded as hearsay evidence. Any person who receives a catalogue can prove it and thereby prove the statement made by the sellers regarding the price at which he would be prepared to sell. Such a catalogue is therefore admissible in evidence without the seller issuing it being called in as a witness. I. L. R. (1948) Nag. 922 = A.I.R. 1949 Nag. 282=1949 N.L.J. 279.

2. Direct evidence.

——S. 60—Direct evidence.

Under S. 67 direct evidence of handwriting is not always necessary—S. 60 does not exclude circumstantial evidence of a thing which could be seen, heard and felt. 111 Ind. Cas. 792=48 C.L.J. 32=A.I.R. 1928 Cal. 498.

——S. 60—Direct evidence.

Oral evidence must in all cases be direct including the occasion when secondary evidence is being taken under S. 63 (5) of the contents of a document so that the deponent's having read the document becomes necessary. 84 Ind. Cas. 175=2 Rang. 400=3 Bur.L.J. 172=A.I.R. 1924 Rang. 363.

——S. 60—Direct evidence—Paper transaction—Effect of—Necessity for oral evidence.

Paper transaction relating to a land are not by themselves valuable evidence of possession unless oral evidence regarding them is let in, as the documents do not prove themselves. 4 Bom.L.R. 167=12 M.L.J. 83=6 C.W.N. 386=29 C. 187=29 I. A. 24 (P.C.).

3. Dying declaration.

——S. 60—Dying declaration—Proof of.

Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by a deceased person admissible under S. 32 of the Evidence Act, and that statement is not a document made by the Magistrate but the verbal statement made by the deceased person. The only way of proving a dying declaration is by the evidence of some witness who hears it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over to him at or about the time the statement is made. 67 Ind. Cas. 577=23 Cr.L.J. 417=6 L.L.J. 115=A.I.R. 1924 Lah. 12.

4. Evidence of persons recognising one as son of so and so.

——S. 60—Evidence of persons recognising particular person on his appearance as son of so and so cannot be excluded.

The evidence given by persons who said that they had recognised after some time a particular person as the son of so and so cannot be excluded. That evidence really relates to their own perception when they saw at person and the recollection of their past perception of the said person before his disappearance. A.I.R. 1942 Cal. 498=47 C.W.N. 9=202 Ind. Cas. 551.

5. Evidence of general repute.

——S. 60—Evidence of general repute.

The fact that a person is a habitual offender may, in view of the provisions of S. 117 (4), Criminal. P. C.; be proved by evidence of general repute or otherwise, such evidence of general repute does not offend against the rule against reception of hearsay evidence or the provisions of S. 60, Evidence Act, by which it is provided that oral evidence must, in all cases whatever, be direct. A.I.R. 1934 All. 735=36 Cr.L.J. 33=3 A.W.R. 655=152 Ind. Cas. 120.

——S. 60—Evidence of general repute.

Evidence to the effect that the person adopted was known in the village as the son of the adoptive parents is inadmissible as being hearsay, to establish an adoption by repute. A.I.R. 1941 Rang. 183=196 Ind. Cas. 144.

6. Evidence of Sub-Inspector based on inquiries made in course of duty

——S. 60—Evidence of Sub-Inspector not on personal knowledge but based on inquiries made in course of duty—Admissibility.

Evidence of a Police Sub-Inspector not on his personal knowledge but as a result of some enquiries which he has made in the course of his official duty is wholly inadmissible. Similarly, the evidence that the petitioner was on the active picketing list of the thana and that " this list is maintained for the criminals who are suspected to be most active " is wholly inadmissible. The Courts have to decide matters judicially and not upon a suspicion which led the Police authorities, however, correctly, to place a person upon the suspicion list. A.I.R. 1941 Pat. 478=42 Cr.L.J. 554=22 P.L.T. 545=194 Ind. Cas. 295.

——S. 60—Evidence of Sub-Inspector on facts, which are results of investigation by predecessor-in-office—Admissibility.

Where what the Sub-Inspector states about the facts is the result of the investigation of his predecessor-in-office, his evidence amounts to hearsay and is, therefore, inadmissible. 178 Ind. Cas. 254=1938 A.W.R. 83=40 Cr.L.J. 19=1938 O.W.N. 1048=14 Luck. 302.

7. Ex parte affidavits.

——S. 60—Exparte affidavits.

Ordinary documents are not proved by mere **exparte** affidavits when the person trying to prove them does not submit himself to cross-examination. Under special circumstances affidavits under order 19 may be allowed tc be read in evidence but even then if the opposite patry **bona fide** desires the attendance the witness for cross-examination he has to appear. 89 Ind. Cas. 22=23 A.L.J. 961=6 L.R.A. Civ. 553=A.I.R. 1926 All. 161.

8. Fact of deposing.

——S. 60—Fact of deposing.

Fact of deposing might be proved by any one who has seen and heard witness. 115 Ind. Cas. 147= A.I.R. 1929 Mad. 187.

9. Family bard.

——S. 60—Family bard—Evidence of to prove relationship.

Where the evidence of a family bard to prove relationship of one family with another relates to events long before the deponent's birth, it is a mere hearsay and is inadmissible in evidence. Even if the evidence is admissible, the family bard is not a very reliable person. A.I.R. 1948 Lah. 303=40 P.L.R. 162=176 Ind. Cas. 464.

10. Hearsay evidence.

——S. 60—Hearsay evidence.

Evidence about the statement of person who is neither a witness nor an accused is not admissible. A.I.R. 1938 Cal. 399=39 Cr.L.J. 601=175 Ind. Cas. 523.

——S. 60—Hearsay evidence.

Where according to the prosecution it was the passenger who gave out that the car was plying for hire without permit and the passenger was not examined, the evidence of the prosecution was held to be hearsay and inadmissible. 1933 M.W.N. 1424.

——S. 60—Hearsay evidence—Eye-witness not identifying accused in trial—Previous statements to others about accused—If relevant.

The only eye witness to the crime alleged to have been committed by the accused did not indentify the accused as the assailant in his evidence before the trial Court; but his previous statements to other persons to the effect that the accused was the assailant were admitted in evidence, and on this evidence the accused was convicted.

Held, that secondary evidence of a hearsay character which did not corroborate any primary evidence could not be relied on to support a conviction. 112 Ind. Cas. 466=6 Rang. 581=29 Cr.L.J. 1042=11 A.I.Cr.R. 317=A.I.R. 1928 Rang. 295.

——S. 60—Hearsay evidence.

Evidence of a witness that he learnt that one of the accused is known by a certain name is hearsay evidence and is therefore inadmissible. 108 Ind. Cas. 689=9 A.I.Cr.R. 194=9 L.R.A.Cr. 27=29 Cr.L.J. 449.

——S. 60—Hearsay Evidence Witness can say he suspected accused—Not that others suspected him.

Although evidence cannot be given that an accused person has been suspected by persons other than the witness of having committed a certain offence, there is no authority for the proposition that a witness cannot be allowed to state that he personally suspected the accused of having committed a certain offence. 125 Ind. Cas. 19=31 Cr. L.J. 755=51 All. 275=1929 Cr.C. 346=A.I.R. 1929 All 650.

——S. 60—Hearsay evidence is inadmissible. 66 Ind. Cas. 513=34 C.L.J. 53.

——S. 60—Hearsay evidence.

The introduction as evidence of a hearsay statement regarding the nature of the occurrence in question and the absence from the Judge's charge to the jury of any caution against the attaching of any value thereto was reprehensible. 62 Ind. Cas. 578=25 C.W.N. 788=22 Cr.L.J. 562=A.I.R. 1921 Cal. 111.

11. Jail identification.

——S. 60—Jail identification.

Statements of witnesses at jail identification are not made on oath, and again, they are made in the course of extra-judicial proceedings. The law does not allow statements of this kind to be made available as evidence at the trial unless and until the persons who made those statements are called as witnesses. When these persons are called as witnesses then these previous statements become admissible,not as substantive evidence in the case, but merely as evidence to corroborate or contradict the statements made by these witnesses in Court, If when an identifying witness called in the Sessions Court, states there that he can identify no one, there is obvicusly nothing to corroborate and so the evidence of the previous statement, express or implied, made in the course of the identification proceedings, in the jail is not admissible. 95 Ind. Cas. 477=19 A.L.J. 947=27 Cr.L.J. 813=A.I.R. 1921 All. 215.

12. Medical Certificate.

——S. 60—Medical certificate tendered by party—Admissibility.

A medical certificate tendered by a party without the medical man giving the certificate swearing an affidavit, is the worst form of hearsay evidence, because it is merely what the doctor had told him in writing. The certificate is wholly inadmissible in evidence. A.I.R. 1950 Cal. 173.

13. Opinions and impressions.

——S. 60—Opinions and impressions.

Only what the witness actually saw and heard as to what a mob was doing and saying is admissible to prove the nature of the assembly; his opinion and impressions that the assembly appeared to be unlawful are not admissible. 105 Ind. Cas. 234=9 P.L.T. 260=28 Cr.L.J. 906=A.I.R. 1928 Pat. 98.

14. Panchnama—Proof of.

——S. 60—Panchnama, proof of—It is necessary if a panchnama is to be put in that it should be legally proved for it does not prove itself. Bom. L.R. 978= 3 Cr.L.J. 41.

15. Solicitor's books.

——S. 60—Solicitor's books.

Entries in solicitor's books of account regarding object of purchase for client are neither inadmissible nor irrelevant nor hearsay. 114 Ind. Cas. 565= 33 C.W.N. 493=31 Bom.L.R. 710=1929 M.W.N, 422=1929 A.L.J. 406 = 49 C.L.J. 335=30 M.L.W 835=A.I.R. 1929 P.C. 77=57 M.L.J. 581 (P. C.).

16. Statement of accused.

——S. 60—Statement of accused.

Statement by accused immediately after the offence is relevant but statement by another person to the accused must be proved by the person who heard it. 81 Ind. Cas. 717=6 L.L.J. 575=25 Cr.L.J. 1005=A.I.R. 1924 Lah. 733.

17. Statement of Counsel about relevant facts.

——S. 60—Statement of counsel about relevant facts.

Statement of counsel concerning relevant facts in the case cannot be accepted otherwise than in the witness-box. A.I.R. 1935 Nag. 69=17 N.L.J. 189.

18. Statement of deceased persons.

——Ss. 60, 49, 32—Statement of deceased persons.

The value of evidence admissible under Ss. 32, 49 and 60 depends on the character of the witnesses who depose to what they heard from deceased persons and also on the character of the deceased and whether they were expressing their own opinion or merely repeating hearsay. A.I.R. 1933 Sind 213=150 Ind. Cas. 266.

19. Statement of person alive but not examined.

——S. 60—Statements of person alive but not examined.

Where a person is still alive and is available for examination as a witness but has not been examined in the case, the statements by him would be no evidence against the opposite party.— A.I.R. 1943 Cal. 75=I.L.R. (1942) 2 Cal. 299=75 C.L.J. 301=46 C.W.N. 729=205 Ind. Cas. 344.

20. Statement of witness before trial.

—S. 60—Statement by witness to Police—Method of proof.

For the purpose of proving the statement made by a witness to a Police Officer, the Court should insist on the production of the writer himself, when available. A.I.R. 1942 Lah. 59=43 P.L.R. 712=43 Cr.L.J. 428=198 Ind. Cas. 796.

——S. 60, 157, 155—Statement of witness before trial, whether can be proved to contradict or corroborate his evidence.

Where a witness gives evidence at the trial, his statement at the trial is the only substantive evidence in the case, but if he has made a statement before the trial, either inconsistent or consistent with his statement at the trial, in such statement may be proved to contradict or to corroborate his evidence at the trial. A.I.R. 1935 Pesh. 165=37 Cr.L.J. 225=159 Ind. Cas. 890.

——S. 60—Statement said to have been made by witness to another person, if admissible.

Where a person is examined as a witness, a statement said to have been made by him to another is not admissible if no question is put to hin as to whether the statement had been made to the other person. A.I.R. 1934 Sind 100=35 Cr.L.J. 1332=151 Ind. Cas. 437.

——S. 60—Statement of Honorary Magistrate as to what accused's father stated or promised—Admissibility.

Where a married girl has been enticed away and the accused is tried under S. 498, I.P.C., the evidence of an Honorary Magistrate as to the nature of the statement made to him by the father of the accused or as to what he promised, is inadmissible. A.I.R. 1935 Pesh. 73=36 Cr.L.J. 1442 (1)=158 Ind. Cas. 483.

21. Witness not stating orally what accused was alleged to have said.

——Ss. 60, 160—Witness not stating orally what the accused was alleged to have said—No recollection of facts nor statement that he had reported facts correctfy—Admissibility.

Where no attempt was made by a witness to state orally before the Court what the accused in each case was alleged to have said nor did he state before the Court that although he had no specific recollection of the facts themselves, he was sure that the facts were correctly recorded in the document:

Held, that this evidence was inadmissible. A.I.R. 1938 Lah. 629=40 P.L.R. 872=39 Cr.L.J. 930=177 Ind. Cas. 707.

——S. 61—Copy of document.

That the man producing a document used the same to settle disputes between the villagers, and before him the document was in the possession of his father, does not make the document a true copy of the original (chitta). 49 C.L.J. 546—A.I.R. 1929 Cal. 459.

——Ss. 61, 64, 65—

Prosecution for breach of order under R. 56, Defence of India Rules—Order purporting to be made by District Magistrate not bearing his signature nor certificate that it was certified copy of order—conviction cannot be based on such document. A.I.R. 1945 Pat. 210=24 Pat. 143=11 B.R. 357=46 Cr.L.J. 538=26 P.L.T. 201=219 Ind. Cas. 148.

——S. 61—Writer should be called to prove writing.

The answer given by the Collector to an application as to the existence of a certain village is not evidence unless the writer of the answer is called as a witness and it cannot be used in evidence against the other party. A.I.R. 1934 Pat. 127=15 P.L.T. 73=13 Pat. 111=153 Ind. Cas. 602.

——Ss. 62, 63—Plaint held proved.

Where a copy of the plaint in a previous suit served on the defendant in that suit has been proved by the said defendant, the document is fully proved. A.I.R. 1943 Cal. 211=76 C.L.J. 203=47 C.W.N. 241=207 Ind. Cas. 34.

——S. 62—Newspaper.

One specimen of a newspaper is not a copy of another specimen of the same neswpaper of the samo date. There is no relation between them of copy and original. They are all counterpart originals, each being primary evidence of the contents of the rest. 120 Ind. Cas. 798=1930 Cr.C. 331=31 Cr.L.J. 168=A.I.R. 1930 Lah. 371.

——Ss. 62, Expl. 2, 124—Whole document with signature must have been made with one uniform process—Document privileged under S. 124—Admissibility.

To bring a document within the meaning of S. 62, Expl. 2, Evidence Act, the whole document with the signature must have been made by one uniform process. Where a document is entitled to privilege under S. 124, a copy of the document though made by one uniform process, namely, by typing on type machine but signed subsequent to the signing of the original is merely a copy of the document and not the original document

and is inadmissible in evidence to prove consent of original, the original being a privileged document under S. 124. A.I.R. 1937 Mad. 807=1937 M.W.N. 746=(1937) 2 M.L.J. 381=46 L.W. 437=177 Ind. Cas. 592.

——S. 63.

Synopsis.

1. Admissibility—Objection to.
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5. Copy of document.
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7. Discretion of trial Court.
8. Document not in existence.
9. Lost grant.
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14. Statement of witness abstracted in judgment.
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17. S. 63 (2)—Blue print of plan.
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22. S. 63 (3)—Mortgage deed.
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1. Admissibility—Objection to.

——S. 63—Admissibility—No objection taken—Objection in appeal.

When a document is tendered and no objection whatever is taken to it either as to its being secondary evidence or as to its being tendered in circumstances that would justify its being received as secondary evidence, it is too late in appeal to take the point that it should not have been received especially when it appears that if that objection had been taken, there would not have been any difficulty in setting the maters right at the time. Where no objection is taken, it must be assumed that counsel waives the objection. A.I.R. 1937 Nag. 13=I.L.R. (1937) Nag. 68=167 Ind. Cas. 190.

——S. 63—Admissibility—No objection taken in trial Court—Objection in appeal.

Admissibility of a copy of a copy of the original document—Objection regarding admissibility not raised in lower Court—Objection is not open in appeal. 84 Ind. Cas. 921=20 M.L.W. 719=35 M.L.T. 129=1914 M.W.N. 923=A.I.R. 1925 Mad. 257.

——Ss. 63, 65, 66—Admissibility—No objection in first Court—Objection in appeal.

No objection should be allowed to be taken in the appellate court to the admissibility of a document as secondary evidence, if the document had been admitted in the first court without objection. 31 C. 155.

2. Certified copy.

——S. 63—Certified copy.

A certified copy is sufficient secondary evidence under S. 63 of the existence, conditions and contents of the deed but not of its execition, which must be proved as required under S. 68. 82 Ind Cas. 306=5 L.R.A. Civ. 686=A.I.R. 1925 All. 56.

——S. 63—Certified copy.

The registration copy of a document cannot be admitted in evidence in absence of proof of loss of the original. 85 Ind. Cas. 524=21 M.L.W. 67=A.I.R. 1926 Mad. 345=47 M.L.J. 906.

3. Contents of document.

——S. 63—Contents of document.

Secondary evidence of a document is evidence of its contents by person who read the document and oral evidence as to the terms of a mortgage which have been reduced to writing is not evidence of the contents of the document. 66 Ind. Cas. 360=4 U.B.R. 80=A.I.R. 1921 U.B. 3.

4. Copy of copy.

——S. 63—Copy of copy—Admissibility.

A copy of a copy is admissible in evidence if it has been compared with the original or a copy of the original taken out by means of a mechanical process. A.I.R. 1950 Assam 17.

——S. 63—Copy of copy.

Copy of copy of document produced and admitted to record by consent—Although it cannot prove anything which under Evidence Act cannot be proved, yet it can be admitted to show contents of original. 115 Ind. Cas. 509=A.I.R. 1928 Mad. 1255.

——S. 63, Illus. (c)—Copy of a copy—Inadmissible.

A copy of a copy is inadmissible in evidence. When a document is inadmissible in evidence, no question of its construction arises and the party relying upon it must fail. 1 Pat. L.T. 47=2 U.P.L.R. (Pat.) 58=54 Ind. Cas. 941.

——S. 63—Copy of a copy.

A copy of a copy is not secondary evidence of the contents of the original. 15 M.L.J. 147=28 Mad. 257.

5. Copy of document.

——S. 63—Copy of document.

Where the Sub-Registrar being doubtful about the execution of a document brought to him for registration, prepared a copy of the same for forwarding it to District Registrar for opinion.

Held, that such a copy was secondary evidence of the document. 78 Ind. Cas. 865=A.I.R. 1924 Nag. 375.

——Ss. 63, 65, 90, 114 Copy of document—No evidence that original could not be produced—Secondary evidence—Presumption.

In a suit defendant relied on a document which had been prepared from an earlier document. The latter was not produced, though it was admittedly in existence, nor was it shown that it could not have been produced. On appeal a copy of it was filed. **Held,** that though the exhibit was admissible as secondary evidence, it was only secondary evidence of the contents of a document. There was no evidence that the document, of the contents of which the exhibit was evidence, was in fact executed in 1862 between the parties mentioned, and as the exhibit was a copy only, the presumption under S. 90 of the Evidence Act should not be made. 25 M. 674.

6. Direct evidence

——S. 63—Direct evidence.

Oral evidence must in all cases be direct including the occasion when secondary evidence is being taken under S. 63 (5) of the contents of a document so that the deponent's having read the document becomes necessary. 84 Ind. Cas. 175=2 Rang. 400=3 Bur.L.J. 172=A.I.R. 1924 Rang. 363.

7. Discretion of trial Court.

——S. 63—Discretion of trial Court.

The question whether secondary evidence was in any case rightly admitted depends largely on the discretion of the Judge of first instance and his conclusion should not be overruled by the Court of appeal except in a very clear case of miscarriage. 32 Bom.L.R. 1385=55 Bom. 103=128 Ind. Cas. 901=A.I.R. 1931 Bom. 105.

——S. 63—Discretion of trial Court.

The question whether secondary evidence was in any given case rightly admitted is one which is proper to be decided by the Judge of first instance and is treated as depending very much on jurisdiction. His conclusion should not be overruled except in a very clear case of miscarriage. 5 Bom. L.R. 708=28 Bom. 94.

8. Document not in existence.

——S. 63—Document not in existence.

Secondary evidence of a document which has not been proved to have been written by the accused or even existed, cannot be admitted. A copy of a newspaper publishing a defamatory letter cannot be used as secondary evidence to prove a letter which has not been found or even proved to have existed. 8 A.L.J. 302=12 Cr.L.J. 259=10 Ind. Cas. 832.

9. Lost grant.

——Ss. 63, 32 (2), 35, 65 and 91—Lost grant—Secondary evidence.

As Ss. 65 and 91 make it clear that when a written grant is lost, secondary evidence can be given of it only as defined by law, a translation of parwana or grant forming the enclosure to the report of a public officer is not admissible as secondary evidence of the contents of the grant under any of the Ss. 63, 32 (2) or 35. 4 L.W. 331=35 Ind. Cas. 201.

10. Oral evidence.

——S. 63—Oral evidence.

Evidence that the witness saw the document and heard it read out by some one else is only hearsay so far as the contents are concerned, and does not fulfil the requirements of S. 60. 112 Ind. Cas. 310.

——S. 63—Oral evidence.

Oral evidence to be secondary evidence of the contents of a document must be of persons who have read the document. 100 Ind. Cas. 1=45 C.L.J. 263=5 Rang. 18=54 I.A. 61=25 A.L.J. 65=38 M.L.T. 41=1927 M.W.N. 80=25 M.L.W. 342=28 P.L.R. 109=31 C.W.N. 621= 8 P.L.T. 280=6 Bur.L.J. 40=29 Bom.L.R. 800=A.I.R. 1927 P.C. 15=52 M.L.J. 376 (P.C.).

11. Plaint copy.

——Ss. 63, 62—Plaint copy.

Where a copy of the plaint, in a previous suit, served on the defendant in that suit has been proved by the said defendant, the document is fully proved. A.I.R. 1943 Cal. 211=76 C.L.J. 203=47 C.W.N. 241=207 Ind. Cas. 34.

12. Right to inspect and get certified copies.

——S. 63—Right to inspect and get certified copies. See 31 C. 284=8 C.W.N. 125.

13. Secondary evidence.

——Ss. 63, 65 and 66—Secondary evidence—Admissions—Destruction or of absence of original—Suit upon mortgage document—Forgery—Decree on—Admission.

Where a party sues to redeem a mortgage putting forward a certain document as embodying the transaction and that document is found to be a forgery, a decree cannot be given to him on the basis of the written admissions of the defendant as to the contents of the mortgage. No question of secondary evidence arises, without proof of the existence and due execution of the original. Per Spencer and Tyabji, JJ.—S. 63 of the Evidence Act does not exhaust the kinds of secondary eidence that may be adduced. Per Tyabji, J.—Having regard to Ss. 65 and 66 of the Evidence act written admissions of the cntents of documents are inadmissible without proof of the original having been destroyed or beng otherwise not available for production. (Per Sadasiva Iyer, J.) When the plaintiff putsforward a forged document as primary evidence, it cannot be held that defendants are put upon notice that they would be required to produce the counter-part of the genuine document. 28 M.L.J. 266=17 M.L.T. 170=(1915) M.W.N. 105=28 Ind. Cas. 69 (F.B.).

——S. 63—Secondary evidence—Statement in previous suit referring to document.

A statement made by a party or his authorised agent in a previous suit in which he referred to a document which was against his interest is secondary evidence of that document. 6 O.L.J. 508=53 Ind. Cas. 667.

——Ss. 63 and 65—Secondary evidence—Public document—Copy not available.

Where a certified copy of a lost public document is not available other secondary evidence of its contents is admissible. 5 Cal. 568; 6 M. 80, Foll. A register of orders issued by the Collector in charge of a Zemindari kept in the ordinary course of business may be taken to be an accurate copy of the orders issued and may be admitted as secondary evidence of such orders. 28 Ind. Cas. 808 (Mad.).

14. Statement of witness abstracted in judgment.

——Ss. 63 and 65—Statement of witness abstracted in judgment.

A statement of a witness abstracted in a judgment is not even secondary evidence of the statement and cannot be made use of in lieu of the original statement itself. 1930 M.W.N. 601=53 Mad. 952=60 M.L.J. 13=33 M.L.W. 20=129 Ind. Cas. 463=A.I.R. 1931 Mad. 207.

15. Translation of document in judgment.

——S. 63—Translation of document—Translation of document in judgment not inter partes is inadmissible as secondary evidence.

S. 63 gives an exhaustive statement of secondary evidence admissible. 70 Ind. Cas. 107=16 M.L.W. 11=1922 M.W.N. 432=31 M.L.T. 46=A.I.R. 1922 Mad. 334=43 M.L.J. 37.

16. Translation of grant contained in official letter.

——S. 63—Translation of grant contained in official letter—Whether public record—Admissibility of.

The translation of a grant contained in a letter from one official to another, does not come wit in the provision of S. 63 and cannot be admitted as secondary evidence. 26 Ind. Cas. 618 (Mad).

17. S. 63 (2)—Blue print of plan.

——S. 63 (2) —Blue print of plan.

A plan which is signed by the Executive Engineer and Sub-Divisional Officer of P. W. D. when land was transferred to the District Board, must be presumed to be accurate under S. 83, Evi. Act for the purposes of prosecution under S. 57, Punjab District Boards Act, and the measurements thereon are admissible under S. 36, Evi. Act and the blue print of the plan is secon-

dary evidence under S. 63 (2) of the Evi. Act. A.I.R. 1937 Lah. 155=17 Lah. 843=39 P.L.R. 143=38 Cr.L.J. 438=167 Ind. Cas. 573.

18. S. 63 (3)—Abstract translation.

——S. 63 3)—"Abstract translation" of copy, a mere summary—Secondary evidence—Counterfoils—When admissible.

'Abstract translation' does not come within the terms of S. 63 (3) when it does not purport to be a 'copy' or even a full and complete translation of the document, but is merely a summary of ite terms prepared for reference at the hearing of the appeal in the partition suit between the members of the family in which the points in support of which the document is sought to be produced were of no importance. It is, therefore, not a copy 'made from or compared with the original' and does not fall within cl. (3) of the section and is, therefore, inadmissible.

The counterfoils of receipts are admissible in evidence only if proof of the loss of the original receipt is given. A.I.R. 1937 Lah. 370=39 P.L.R. 602=I.L.R. (1940) Lah. 363=176 Ind. Cas. 65.

19. S. 63 (3)—Deposition

— S 63 (3)—Deposition—

Uncertified copy—Person alleged to have made it and person who compared it with original dead—Their signatures only proved by man acquainted with their handwriting— Uncer tified copy, held, cannot be said to have been proved to have been made from or compared with the original and hence was inadmissible. A.I.R. 1941 Cal. 506=45 C.W.N. 65=73 C.I.J. 159=197 Ind Cas. 45.

20. 63 (3) —Paper book.

——S 63 (3)—Paper book.

Paper-book containing translation of documents is not secondary evidence of the contents of these documents. 93 Ind. Cas. 101=43 C.L.J. 237=30 C.W.N. 259=A.I.R. 1926 Cal. 752.

21 63 (3)—Printed record of High Court.

——S. 63 (3)—Printed record of Madras High Court whether good evidence of original.

In the Madras High Court the present practice which has been going on for many years is to send to the Government Press typed copies of the record from which the printed record is made and the correcting of proofs is done in the Government Press by comparison with the typed copy and not with the original depositions. Therefore, it follows that the High Court record under the present procedure is not a copy made from or compared with the original but a copy of a copy and unless there is evidence of some comparison with the original which is not the usual practice, the inference would be that the printed record is, in the absence of consent, not good evidence of the original. A.I.R 1939 Mad. 40=48 M.L.W. 650=1938 M.W.N. 1102=(1938) 2 M.L.J. 883=I.L.R. (1939) Mad. 333=183 Ind. Cas. 751.

——S. 63—Printed copy of deposition.

Printed copy of depositions coming up to Madras High Court after Government Press took up printing of High Court papers—Depositions in English—Copy is admissible in evidence as papers are compared with original before giving final order for striking off. 115 Ind. Cas. 147=A.I.R. 1929 Mad. 187.

22. S. 63 (5)—Mortgage deed.

——S. 63 (5)—Mortgage deed—Secondary evidence—Admissions of party in prior suit.

The admission made by the mortgagee in a Cort in a previous case about the existence and contents of the mortgage deed is good secondary evidence within S 63 (5) and sufficiently proves the execution of the deed. 3 O.L.J. 379=36 Ind. Cas. 696.

23. S. 63 (5)—Scope.

——S 63 (5)—Scope.

S. 63 (5) permits oral account of the contents of a document being given by some person who has himself seen it. A.I.R. 1940 Nag. 116=1940 N.L.J. 85=186 Ind. Cas. 851.

——S. 63 (5)—Scope—Survey and Settlement Report.

Survey and Settlement Report which was based on a **jamabandi**, the original of which was not produced and which itself was not exhibited in evidence, cannot be treated as secondary evidence of the contents of the **jamabandi** statement under Cl. (5), S. 63 or under any other section of the Evidence Act. A.I.R. 1928 Pat. 284, **Reversed.** 123 Ind. Cas. 145=31 M.L.W. 352=32 Bom.L.R. 515=51 C.L.J. 502=A I.R. 1930 P.C. 45=59 M.L.J. 731 (P C.).

24. S. 63 (5)—"Seen".

——S. 63 (5)—"Seen it".

The argument that if witness has seen a document without reading it, nevertheless under S. 63 (5) he becomes qualified through knowledge that he has acquired otherwise than by reading it or seeing it in such a way that he became acquainted with its contents by so seeing it, is wrong. 84 Ind. Cas. 175=2 Rang. 400=3 Bur. L.J. 172=A.I.R. 1924 Rang. 363.

——S. 65 (5)—"Seen it" meaning of.

Mere fact of having seen the document is enough; the witness need not have read it or have been able to do so, in order to make his evidence admissible. 80 Ind. Cas. 939=22 A.L.J. 864=5 L.R.A.Civ. 720=47 All. 13=A.I.R. 1924 All. 792.

——S. 63 (5)—"Seen"—Illiterate witness.

If a document is read over to a man because he cannot read himself, and he thereupon signs it and as containing what has been read over to him, he may be said within S. 63 to have seen the contents of that document. 73 Ind. Cas. 654=A.I.R. 1923 All. 612.

——S. 63 (5)—"Seen"—Illiterate witness.

Witness unable to read the document—His evidence is not secondary evidence of the contents of that document. 71 Ind. Cas. 654=A.I.R. 1923 All. 441.

——S. 63 (5)—"Seen"—Illiterate witness.

Where the only witness in support of the mortgage is an illiterate person, and no other witnesses have been produced.

Held, that such an illiterate person could not be deemed to be one who has seen the mortgage within Cl 5 of S. 63 of the Evidence Act. 66 Ind. Cas. 557=A.I.R. 1922 All. 232.

——S. 63 (5)—"Seen"—Meaning of.

An oral account of the contents of a document given by an illiterate person, who merely saw without understanding the contents thereof, is not sufficient evidence.

"Seen" in S. 63 (5) of the Evidence Act means more than the mere sight of the document. 12 A.L.J 239=23 Ind. Cas. 11.

——Ss. 64 and 65—Deed—Exchange—Written deed—Proof—Registration.

Where the exchange between the parties is a written transaction, the transaction cannot be proved without production of the written instrument or evidence of its loss. Before any notice is taken of the instrument, it must be shown to have been registered. A.I.R. 1940 Lah. 311=42 P.L.R. 294.

——S. 64—Mortgage deed—Copy of—If sufficient evidence.

A copy of mortgage deed is not sufficient to prove mortgage. 23 Ind. Cas. 864 (All.).

——S. 64—No written record—Words used—Proof by oral evidence.

If the Court has made a record, then no other evidence is admissible except by the proof of the statement which has been reduced to writing. But where there is no written record, the prosecution is free to prove, by oral evidence, the actual words used by the witness. A.I.R. 1943 Pat. 117=21 Pat. 778=9 B.R. 236=44 Cr.L.J. 391=205 Ind. Cas. 531.

——S. 64—Objections.

Admission of secondary evidence—Objection as to mode of proof cannot be taken after Court has admitted the document. 71 Ind. Cas. 902=4 P.L.T. 135=1923 P.H.C.C. 65=1 Pat.L.R. 111=2 Pat. 414=A.I.R. 1923 Pat. 276.

——S. 64—Person producing, document, not writer nor one on whose behalf it was written—Proof.

Mere production of a document is not tantamount to proof, especia.ly when the production is by a person who is neither the writer of the document nor the person on whose behalf the document has been written. A.I.R. 1937 Lah. 593=39 P.L.R. 327=38 Cr.L.J. 1073=171 Ind. Cas. 351.

——S. 65.

Synopsis.

1. **Admissibility of secondary evidence.**
2. **Admissions.**
3. **Award—Copy of.**
4. **Bhats register.**
5. **Certified copies.**
6. **Discretion of Court**
7. **Document in possession not produced.**
8. **Evidence as to existence of document.**
9. **Evidence as to result of record.**
10. **Income-tax papers and returns.**
11. **Interpretation.**
12. **Kabuliyat.**
13. **Letters of Administration with copy of will.**
14. **Loss of documents.**
15. **Mortgage.**
16. **Objections.**
17. **Original document unstamped, etc.**
18. **Requirements of section.**
19. **Scope.**
20. **Secondary evidence.**
21. **Wills.**
22. **Miscellaneous.**

1. **Admissibility of secondary evidence.**

——S. 65—Admissibility of secondary evidence.

Befor secondary evidence can be given as to the contents of a document, it must be established that the document cannot be produced in Court. A.I.R. 1943 Pat. 218=22 Pat. 114=9 B.R. 260=202 Ind. Cas 126.

——S. 65—Admissibility of secondary evidence.

Where the exchange between the parties is a written transaction, the transaction cannot be proved without the production of the written instrument or evidence of its loss. Before any notice is taken of the instrument, it must be shown to have been registered. A.I.R. 1940 Lah. 311=42 P.L.R. 294.

——Ss. 65, 66—Admissibility of—Secondary evidence.

The only purpose of a notice under Ss. 65 and 66, Evidence Act, is to give the party an opportunity by producing the original to secure if he pleases, the best evidence of its contents, Secondary evidence as provided by S. 65, is admissible when the party offering evidence of the contents of the document cannot, for any reason not arising from his own default or neglect, produce the original document in a reasonable time. A.I.R. 1937 Cal. 99=38 Cr.L.J. 818=169 Ind. Cas. 977 (S.B.).

——S. 65—Admissibility of secondary evidence.

For the admissibility of secondary evidence and certified copy of a document, the loss of the original or that the original is in the possession of or uder the control of the opposite party, must be first proved. A.I.R. 1936 All. 422.

——S. 65—Admissibility of secondary evidence.

When a party fails to produce a document, it may be because he does not wish to produce it or he may have really lost it. Before secondary evidence of the deed can be produced, it is essential for the party to show that the document had been lost. A.I.R. 1935 Rang. 502=160 Ind. Cas. 701.

——S. 65—Admissibility of secondary evidence—Account books.

In the absence of the original account books, a summary of the result of that examination, as given by a person who had examined them for a pleader is admissible in evidence under S. 65. 83 Ind. Cas. 782=46 All. 575=22 A.L.J. 521=5 L.R.A. Civ. 785=A.I.R. 1924 All. 625.

——S. 65—Admissibility of secondary evidence—Written defamation.

In case of written defamation the Court should insist on the production of the original and should not easily admit certified copies. 81 Ind. Cas. 129=18 M.L.W. 718=33 M.L.T. 168=1923 M.W.N. 913=25 Cr.L.J. 641=A.I.R. 1924 Mad. 340=45 M.L.J. 754.

——S. 65—Admissibility of secondary evidence.

It is well settled that certified copies of registered deeds evidencing private transactions are admissible only when a case for reception of secondary evidence has been made out. S. 57, Registration Act, only shows that when secondary evidence has in any way been introduced, as by proof of the loss of the original document, a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original. 103 Ind. Cas. 752=9 L.L.J. 428=A.I.R. 1927 Lah. 817. **See also** A.I.R. 1929 Rang. 217.

——S. 65 (a) and (f)—Admissibility of secondary evidence.

Plaintiff failed to obtain the original mortgage-deed in possessiion of the defendant and therefore produced a certified copy. One of the three witnesses was dead and the remaining two on seeing the copy, could not remember whether they had attested the deed. One of the two witnesses said that the executants mentioned in the copy executed a mortgage at or about the time mentioned in the copy. Plaintiff examined another person who proved a note in the papers of plaintiff about payment of interest due on the deed. **Held,** that the copy was admissible in evidence under S. 65 (a) and (f) of the Evidence Act read with S. 57 (5) of the Regn. Act. 3 O.L.J. 482=36 Ind. Cas. 673.

——S. 65—Admissibility of secondary evidence.

Evidence as to a statement made by the executor under the Will as to the same having been burnt is admissiblo as jutsifying a party in giving secondary evidence of the Will. 97 Ind. Cas. 785=24 M.L.W. 227=A.I.R. 1926 Mad. 1003.

——S. 65—Admissibility of secondary evidence.

Suit on bond—Loss of bond alleged—Defendant denying execution—Plaintiff proving execution—Plaintiff need not prove loss of bond.—81 Ind. Cas. 570=A.I.R. 1925 Oudh 100.

——S. 65—Admissibility of secondary evidence.

Where the loss of the original has not been proved the copy cannot be accepted in evidence. 71 Ind. Cas. 495=4 Lah. 90=A.I.R. 1924 Lah. 40.

——S. 65—Admissibility of secondary evidence.

The evidence of a witness, who deposes to the loss of a deed which should be in his custody, is sufficient to allow secondary evidence. 64 Ind. Cas. 299=15 M.L.W. 104= 24 Bom.L.R. 675=9 O.L.J. 71= 30 M.L.T. 132=48 I.A. 365=27 C.W.N. 8=20 A.L.J. 961=24 O.C. 272=A.I.R. 1922 P.C. 56 (P.C.).

——S. 65—Admissibility of secondary evidence—Original with hostile person.

Where original document was with defendant's brother who was on bad terms with defendant, certified copy was held admissible. 79 Ind. Cas. 663=27 O.C. 26=11 O.L.J. 565=A.I.R. 1924 Oudh 306.

——S. 65—Admissibility of secondary evidence—Original with opposite party.

The production of a certified copy of the registered deed is sufficient proof when the original of that deed is in the possession of the opposite party. 116 Ind. Cas. 277=A.I.R. 1928 All. 394.

——S. 65—Admissibility of secondary evidence.

Proof that party against whom deed is sought to be proved appears to be in possession of it is enough. 89 Ind. Cas. 284=12 O.L.J. 354=2 O.W.N. 505= A.I.R. 1925 Oudh 504.

——S. 65—Admissibility of secondary evidence.

Where the original receipts are with the defendant and are not produced by him the plaintiff is entitled to produce in evidence copies of the Receipts they being secondary evidence of the Receipts. 68 Ind. Cas. 494= A.I.R. 1923 Nag. 32.

——S. 65—Admissibility of secondary evidence—Public document—Abstracts.

An abstract from mutation records showing the number of transfers of land in a particular tribe is admissible in evidence under S. 65 (g) for proving that members of the tribe have unrestricted powers of alienation. 78 Ind. Cas. 451=A.I.R. 1925 Lah. 231.

——S. 65—Admissibility of secondary evidence.

An entry in a public document such as a settlement record can be proved only by the original or by a certified copy. 71 Ind. Cas. 825=A.I.R. 1923 Lah. 150.

——S. 65—Admissibility of secondary evidence—Telegram.

Three months after sending a telegram it can be proved by secondary evidence. 90 Ind. Cas. 760= 26 Cr.L.J. 1602=2 O.W.N. 760=A.I.R. 1926 Oudh 161.

——S. 65 (c)—Admissibility of secondary evidence.

When the terms of a transaction have been reduced to writing, oral accounts of it are excluded entirely. But when oral evidence has to be depended upon, as for instance, when the document has been destroyed by fire, or lost in some other way, the testimony of a person who has actually read the document at some time or other is to be preferred to that of a witness who was simply present at the time when the transaction was entered into but who has not read the document. 5 Bur.L.T. 52=14 Ind. Cas. 818.

——Ss. 65 (a) and 66—Admissibility of secondary evidence.

The lower Appellate Court admitted oral evidence of a previous promissory note for which the promissory note in suit, was executed on the ground that the original note was destroyed. Th. facts on the record showed that the old note was returned to the debtor when the new one was executed. Secondary evidence of the contents of the previous note would be admissible only if notice to produce were first served on the defendants. The secondary evidence of the previous note was not admissible, as no notice was served. 4 Bur.L.T. 144=12 Ind. Cas. 861.

2. Admission.

——S. 65 (b)—Admission—Debtor's application to Debt Conciliation Board, whether admission of liability within S. 65 (b).

The statement contained in the debror's application to the Debt Conciliation Board cannot be regarded as an admission within the meaning of S. 65, Evi. Act. Under S. 6 of the Debt Conciliation Act, the statement is not to be deemed a statement of the amount admittedly due but of the amount claimed. The debtor applies to a Debt Conciliation Board with a view to having his liability cut down, and it cannot be inferred that there is any promise to pay anything or any admission of liability for antyhing. A.I.R. 1941 Nag. 95=1941 N.L.J. 134=193 Ind. Cas. 120.

——S. 65 (b)—Admission of the existence, condition and contents of mortgage in wajib-ul-arz—Proof of mortgage.

The plaintiff alleged that his paternal grandmother made a mortgage in favour of the ancestors of the defendants between 1863 and 1869 and submit to redeem on payment of the mortgage money. It appeared that in a **wajib-ul-arz** of 1870, it was sttated by those who signed the document that the share of the paternal grandmother was mortgaged in favour of the ancestors of the defendants :

Held, that the person who signed it must be deemed to have been authorised by the defendent's anoesters to sign for them and that as they had admitted in writing the existence condition and also the contents of the original, there was no difficulty in the court of the mortgage under S. 65 (*b*), Evi. Act. A.I.R. 1934 All. 529=3 A.W.R. 537=148 Ind. Cas. 1172.

——S. 65 (b) —Admissions.

Where a previous admission of a party is sought to be used against him the statement containing the admission must be put in. Court's order referring to the admission is not sufficient proof. 102 Ind. Cas. 198=28 P.L.R. 196=A.I.R. 1927 Lah. 377.

——S. 65 (c)—Admission—Execution of deed admitted but denied subsequently—Secondary evidence.

Subsequent denial of execution alters the effect of the original pleading and the plaintiff cannot succeed on the secondary evidence without proving the loss of original. 11 A.L.J. 731=21 Ind. Cas. 81.

——S. 65 (b)—Admission—Non-production of document—Admission as to sale in vendees' favour.

A person to whom property has been sold by a registered deed cannot when that deed is not produced adduce any evidence of the sale to prove his title without laying a foundation for the admission of secondary evidence with respect to it. An admission by a vendor as to sale of immoveable property in favour of vendee cannot be admitted as secondary evidence in the absence of conditions mentioned in clause (*b*) of S. 65 of the Evidence Act. 23 C.L.J. 122=34 Ind. Cas. 956.

3. Award—Copy of.

——S. 65 (a)—Award, copy of—Original with Ruling Chief.

If the award is intended to have effect in British India, it cannot be held to have no effect because it was executed in a Native State. If the original award is in the possession of a Ruling Chief, who is not subject to the process of Court, a copy of the original is admissible as secondary evidence. 2 Pat.L.W. 156=(1917) P.H.C.C. 241=42 Ind. Cas. 617.

4. Bhats register.

——Ss. 65. 64 and 32—Bhat's Register—Genealogy—Copies of—Bhat's books.

Copies of entries of genealogies in Bhat's books are not admissible in evidence where the originals are in existence but not produced The originals are admissible under S. 32 (2) and (5) of the Evidence Act as it is a recognised duty and pursuit of a Bhat to keep a genealogy of families where he officiates. 48 Ind. Cas. 375 (Nag.).

5. Certified copies.

——S. 65—Certified copies—Loss of original pleaded and copy of fered in evidence—Copy cannot be admitted unless loss of original is proved and copy is proved to be a correct copy.

In order to prove that one B was authorised to act on behalf of a Bank an extract of an alleged power-of-attorney was produced. The disappearance of the principal of the power-of-attorney or the impossibility of producing it was not however satisfactory proved. Further it was not attempted to prove who the writer of the extract was and the writer was not produced to say that it was a correct copy :

Held, that as the disappearance or the impossibility of producing the principal of the power-of-attonrey was not satisfactorily proved, the conditions for admitting the extract as secondary evidence under S. 65 were not fulfilled :

Held further, that even if it was admissible it was not proved as it was not proved who the writer was and the writer was not produced to say that it was a correct copy. A.I.R. 1946 P.C. 24=222 Ind. Cas. 195=I.L.R. (1946) Kar. P. 15=48 Bom.L.R. 292=(1946) 1 M.L.J. 123=59 M.L.W. 88=1946 M.W.N. 339 = 222 Ind. Cas. 195. (P.C.)

——Ss. 65 and 90—Certified copy—Registered mortgage-deed more than thirty years old lost—Certified copy can be admitted in evidence.

It is true when a certified copy is allowed to be produced under S. 65, no presumption can be drawn under S. 90 as to the genuineness or execution of the original and the Court should not admit a document merely on the ground that it is a certified copy of a document more than thirty years old and should call for proof of the execution of the document. But when the document is registered, such proof is to be found in the certified copy itself. The deed being registered, the certified copy bears the necessary endorsements of the Sub-Registrar before whom the executant acknowledged the execution and was duly identified. Ss. 58, 59 and 60, Registration Act, provide that the facts mentioned in the endorsements may be proved by those endorsements provided the provisions of S. 60 have been compiled with.

Hence, where a registered mortgage-deed more than thirty years old is lost, the certified copy produced under S. 65 is admissible in evidence. A.I.R. 1946 Bom. 193=47 Bom.L.R. 962=224 Ind. Cas. 169.

——S. 65—Certified copy.

Contents of a document cannot be more satisfactorily established than by producing a certified copy.

It would be a serious thing to hold that execution cannot be proved except by direct evidence. A.I.R. 1938 Nag. 152=I.L.R. (1938) Nag. 333=176 Ind. Cas. 315.

——S. 65—Certified copy of Police report—Admissibility.

A mere certified copy from the Police records does not prove itself in the sense that its contents do not require further proof before being used. Consequentially in the absence of any legal proof of this document, it unfair for the Public Prosecutor to produce the document and improper for the Judge to allow him to do so. A.I.R. 1937 Lah. 593=39 P.L.R. 327=38 Cr.L.J. 1073=171 Ind. Cas. 351.

——S. 65 (c)—Certified copy—Large number of documents to be produced and proved—Certified copies, if can be allowed.

When a large number of documents have to be produced and proved, it would be very doubtful whether a party can produce and prove them within a reasonable time. Abstract adherence to the technical proof of the originals would, therefore, be contrary to the spirit of S. 65 (*c*), Evidence Act. A.I.R. 1936 All. 119. 1935 R.D 572=1935 A.W.R. 1427=160 Ind. Cas. 1098.

——Ss. 65, 90—Certified copies—Document weeded out by Government—Certified copies—Admissibility—Government of original—Presumption.

Where certified copies of the documents, probed to have been weeded out by a Government office, have been produced in evidence, such copies are, no doubt, admissible under S. 65, Evidence Act, for the purpose of proving the contents of the original documents. But the genuineness of the original documents cannot be presumed under S. 90, Evidence Act. A.I.R. 1936 Oudh 298=1936 O.W.N. 619=12 Luck. 568=162 Ind. Cas. 527.

——Ss. 65 (e), 74 (1) (iii), 35—Certified copy—True copy of entry in register of powers of attorney—Admissibility in proof of original entry.

Every entry in the register of powers of attorney is "a public document" within the meaning of S. 74 (1) (*iii*), Evidence Act being "a document forming the act or record of the act" of an executive public officer in the discharge of a statutory duty imposed upon him. It follows that a true copy of the entry which by virtue of S. 76, Evidence Act, is a certified copy within the meaning of S. 63 (1) is admissible as proof of the original entry by virtue of S. 65 (*e*), Evidence Act. A.I.R. 1939 Cal. 569=70 C.L.J. 5=43 C.W.N. 907=185 Ind. Cas. 691.

——S. 65—Certified copy—Original in another Court. Original filed in another Court and not produceable without delaying suit—Certified copy is admissible. A.I.R. 1930 Cal. 479.

——S. 65—Certified copy.

It is well settled that certified copies of registered deeds evidencing private transactions are admissible only when a case for reception of secondary evidence has been made out. S. 57, Registration Act, only shows that when secondary evidence has in any way been introduced, as by proof of the loss of the original document, a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original. 103 Ind. Cas. 752=9 L.L.J. 428=A.I.R. 1927 Lah. 817.

——S. 65—Certified copy—Original produced in an old suit—Copy can be relied upon by Court. 76 Ind. Cas. 155=46 Bom. 32=A.I.R. 1922 Bom. 177.

6. Discretion of Court.

——S. 65—Discretion of Court—Interference.

Where the trial Court admits secondary evidence on the ground that the original has been lost, the discretion cannot be interfered with in appeal. A.I.R. 1946 Bom. 193=47 Bom. L.R. 962=224 Ind. Cas. 169.

——S. 65—Discretion of Court.

Held, that the question with regard to the use of an exhibit as secondary evidence, was not a question of fact but rather a question of procedure and the orders made by the High Court remit the suits to the Court below for re-hearing after giving the plaintiffs an opportunity of calling for the original of exhibit and considering it or, if not produced, then considering secondary evidence, if any, of the exhibit, were right. A.I.R. 1936 P.C. 258=1936 O.W.N. 669=2 B.R. 756=44 L.W. 446=38 Bom.L.R. 1128=1936 A.W.R. 717 (1) =164 Ind. Cas. 17 (P.C.).

——S. 65—Discretion of Court.

When a party fails to produce a document in Court, it may be becuase he does not wish to produce it, or it may be because he has really lost it. Before secondary evidence of the deed could be produced in Court, it is essential for the party to show that the document had been lost and where this onus has not been discharged, and the Judge of first instance decides the first point as to the admissiblity of secondary evidence, his conclusions, except in case of miscarriage, should not be disturbed. A.I.R. 1935 Rang. 502=160 Ind. Cas. 701.

——S. 65—Discretion of Court.

Whether or not sufficient proof of search for, or loss of, an original document to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of first instance and it must be treated as dependent very much on his discretion and his conclusion should not be overruled except in a clear case of miscarriage, But this rule does not apply where the Subordinate Judge, who rejected the copy of the document, was not the presiding Judge of the Court when it was admitted in evidence without objection. A.I.R. 1933 Lah. 601=34 P.L.R. 820=14 Lah. 473=144 Ind. Cas. 45.

——S. 65—Discretion of Court.

The question whether secondary evidence was in any given case rightly admitted, is one which is proper to be decided by the Judge of the first instance, and depends very much on his discretion, and his conclusion should not be overruled, except in very clear cases of miscarriage. 128 Ind. Cas. 901=32 Bom.L.R. 1385=55 Bom. 103=A.I.R. 1931 Bom. 105.

——S. 65—Discretion of Court.

The question whether the non-production is due to any other sufficient reason not arising from his own default or neglect is one of fact and depends mainly on the discretion of the Court. A.I.R. 1930 All. 550 =1930 A.L.J. 1003=125 Ind. Cas. 460.

——S. 65—Discretion of Court.

Trial Court is to decide whether or not sufficient proof of search for, or loss of, original documents for admission of secondary evidence is given. 121 Ind. Cas. 33=A.I.R. 1929 Nag. 288.

——S. 65—Discretion of Court.

What evidence is sufficient to prove loss or document is discretionary with trial Court. Discretion should not be disturbed unless there is miscarriages of justice. 113 Ind. Cas. 370=A.I.R. 1929 Sind 7.

——S. 65—Discretion of Court.

The question of the admissibility of secondary evidence is a point properly to be decided by the Judge of first instance and is treated as depending very much on his discretion. His conclusion therefore should not be overruled except in a clear case of miscarriage. 71 Ind. Cas. 568=18 P.W.R. 1923=A.I.R. 1924 Lah. 303.

——Ss. 65 (a) and 66—Discretion of Court.

Per Walsh, J.—Ss. 65 and 66 must be read together and the adverse party must be presumed to be under this impression that he would be required to produce the original so as to dispense with the necessity of a notice to produce unless the original is shown or appears to be in the possession of the person against whom the presumption is drawn. Where secondary evidence is admitted of a very old document, Court's discretion in the matter should not ordinarily be disturbed. 35 Ind. Cas. 328 (All.).

7. Document in possession not produced.

——S. 65 (c)—Document in possession not produced.

Where a document of title which is in possession of a party is not produced by him after notice to produce the sane, the party giving notice is entitled to give secondary evidence of the document under S. 65 (*c*) and S. 66, Proviso (2). 32 Bom. L.R. 1435=A.I.R. 1931 Bom. 33.

——S. 65—Document in possession not produced.

Where the defendants take all the necessary steps for the production of a document and the document is not produced by the person who is alleged to be in collusion with the plaintiff, the defendants are entitled to offer secondary evidence. 22 P.L.T. 200.

——S. 65—Document in possession not produced.

Party in possession of document cannot let in secondary evidence. 68 Ind. Cas. 653=3 P.L.T. 485=A.I.R. 1923 Pat. 111.

——S. 65 (c)—Document called for but not produced—Court bound to receive secondary evidence.

All reasonable steps to produce the documents evidencing their title as patnidars having been taken, the defendants were entitled to prove the contents of the lease by secondary evidence and the court below were held to have erred in rejecting such evidence. 49 Ind. Cas. 507 (Cal.).

——S. 65—Document in possession but not produced—Account books—Plaintiff in possession of them.

In a suit for accounts it was proved that the books of account were in possession of plaintiff. Plaintiff could not adduce secondary evidence of the account books as their loss was not proved. 56 Ind. Cas. 940(Lah.).

——S. 65 (a)—Document in possession not produced.

The uncontradicted testimony of the plaintiff's fruitless search for an original document, coupled with non-production of the document by the defendant in possession of it with knowledge that he will be required to produce it, enables the plaintiff under S. 65 (*a*) of the Act to give secondary evidence of the contents of the document. 37 Ind. Cas. 794 (All.).

——S. 65 (a)—Document in possession not produced—Proof.

Where a power of attorney was not produced by a person having proper custody thereof, the production of a Registration copy of it and admission by a witness that the power was executed is sufficient proof of it. 14 Ind. Cas. 243 (All.).

——S. 65 (e)—Document in possession not produced—Proof.

Where an acknowledgment is contained in a plaint but the plaint is not produced the same can be proved by means of a certified copy of a judgment in the suit. 82 P.W.R. 1911=180 P.L.R. 1911=11 Ind. Cas. 377.

——S. 65—Document in possession but not produced, but found inadmissible in previous uit—Secondary evidence.

Secondary evidence of a document which is not produced but which in a previous suit was found to be inadmissible as being not registered, cannot be given. 28 Ind. Cas. 853 (Mad.).

8. Evidence as to existence of document.

——S. 65—Evidence as to existence of document—Original document not produced.

Oral evidence as to the existence of a document is admissible though such evidence is in admissible to prove the contents of the document unless the non-production of the original is accounted for. 16 O.C. 185=20 Ind. Cas. 590.

9. Evidence as to result of record.

——S. 65, (e), and (g)—Evidence of record-keeper and clerks, as to general result of their examination of the records—Admissibility.

Where in order to ascertain the history of certain properties in suit, the Judge took the evidence of the record- keeper and clerks in charge of the collectorate records and registers, as to the general result of their examination of these documents and it did not appear that the documents could be conveniently examined in court.

Held, thatS. 65 (*e*), of the Evidence Act does not require that certified copies of the records should be produced in such circumstances, the case falling with in the provisions of Cl. (*g*) of that section and the Judge acted rightly under the latter clause. 11 C.W.N. 501=34 C. 392.

——S. 65 (g)—Evidence as to result of record—Duty of Court.

It is a complete abuse of the function of a Court to require a Kanungo to give oral evidence of the contents of a document such as the record of **muafi** enquiry which ought to be examined in the original by the court itself. S. 65, Cl. (*g*) does not authorise such a course. 2 Lah. L.J. 714.

10. Income-tax papers and returns.

——Ss. 65, 74 and 76—Income-tax papers.

An assessee has a right to inspect statements recorded or orders passed by Income-tax officers, and certified copies granted by the Department will, therefore, be admissible in evidence to prove the contents of those documents. There is nothing in S. 54 of the Income-tax Act which prohibits the giving of such evidence. This section merely directs officials of the Department to treat such documents as confidential and it is open to an assessee to waive that right and to give evidence. I.L.R. (1946) Nag. 433=1946 N.L.J. 406=A.I.R. 1946 Nag. 377=1947 I.T.R. 150.

——S. 65—Income-tax papers.

Profit and loss statements and statements showing details of net income filed in support of return of income furnished under S. 22, Income-tax Act are public documents with reference to S. 74, Evidence Act, of which certified copies would be admissible under S. 65 (*e*), Evidence Act. A.I.R. 1940 Mad. 768=52 M.L.W.159=(1940) 2 M.L.J. 257=1940 M.W.N. 787=I.L.R. (1940) Mad. 968=192 Ind. Cas. 548 (F.B.). (1939 M.W.N. 1237 Overruled).

——Ss. 65, 74—Incomee-tax return.

Secondary evidence of an Income-tax return made by an assessee and an order of assessment may be adduced though certified copies of such documents could not be procured in view of the provisions of S. 54 Income-tax Act. S. 65, Evidence Act is not applicable to an income-tax return as it is not a public document or a public record of a private document within S. 74. A.I.R. 1932 Bom. 291=34 Bom. L.R. 236=56 Bom. 324=137 Ind. Cas. 381.

——Ss 65 (a) (e)—Income-tax returns.

Income-tax returns are confidential. The Income tax Officer can be summoned to attend the Court, although he cannot be required to produce these documents which are classed as confidential by the Income-tax Act. Again, he cannot be described as a person legally bound to produce such documents. Income-tax return cannot, therefore, be proved by secondary evidence either under S. 65 (*a*) or S. 65 (*e*) of the Evidence Act. A.I.R. 1940 Mad. 161=50 M.L.W. 815=1939 M.W.N. 1237=I.L.R. (1940) Mad. 329=189 Ind. Cas. 722.

——S. 65—Income-tax returns.

Certified copies obtained by private persons of Income-tax Returns are inadmissible as the issue of such copies is unlawful under S. 54 of the Income-tax Act, 1922. 84 Ind. Cas. 487=3 Bur. L.J. 194=2 Rang. 391=A.I.R. 1925 Rang. 84.

11. Interpretation.

——S. 65—Interpretation—Produce—Meaning.

The word "produce" only means "procure the production or give it in evidence." A. I. R. 1930 All. 550=1930 A.L.J. 1003=125 Ind. Cas. 460.

12. Kabuliyat.

——S. 65 (c)—Kabuliyat—Original not found—Secondary evidence.

Where after search an original kabuliyat is not found, its copy is admissible in evidence. 49 Ind. Cas. 1006 (Cal.).

13. Letters of Administration with copy of Will.

——Ss. 65 (e) 66 and 74—Letter of Administration with copy of will annexed, if public document—Certified copy—No steps taken to call for production of original.

The certified copy of an order of the Probate Court to the effect that, the Letters of Administration granted to the person named, with a copy of the will annexed of the deceased testator, is admissible, the latter being a public document within S, 74 of the Evidence Act. Where it appeared that the original letters were in the possession of the parties interested in opposing the plaintiffs claim but the plaintiffs did not take steps to call upon them, to produce them. **Held,** that there being no question of the genuineness of the document, these steps should have been waived by the Court and the document admitted in evidence under S. 66 . 19 C.W.N. 1068=30 Ind. Cas. 690.

14. Loss of document.

——S 65—Loss of document.

Omission to plead loss of a document at the earliest stage of proceedings is not a ground for rejecting its secondary evidence. 103 Ind. Cas. 186=10 N.L.J. 129=A.I.R. 1927 Nag. 269.

——S. 65—Loss of document—Proof.

Whether or not sufficient proof of loss of an original document, to lay a ground for admission of secondary evidence has been given is a point proper to be decided by the Judge of first instance and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a clear case of miscarriage. 114 Ind. Cas. 307 (Oudh).

——S. 65—Loss of document.

The rule laid down in S. 65 that a certified copy is the only secondary evidence admissible when the original is a public document does not apply where the original has been lost or destroyed. 101 Ind. Cas. 289=5 Pat. 777=8 P.L.T. 510=A.I.R. 1927 Pat. 61.

——S. 65 (c)—Loss of document—Finding by court.

The question whether or not sufficient proof of search for and loss of original document has been given to lay the foundation for the admission of secondary evidence, is a point to be decided by the Judge of first instance. 9 Bur. L.T. 174=34 Ind. Cas. 153.

15. Mortgage.

——S. 65 (b)—Mortgage.

In order to avail of the provision in S. 65 (*b*) of the Evidence Act, the written admission of the contents of the document sought to be produced has to be the admission of the person against whom it is sought to be produced. A plaintiff who fails to produce the original document on which he has brought the suit and fails to prove the loss of the original cannot be permitted to produce secondary evidence on the basis of an admission of the defendant of the contents of the document. A.I.R. 1949 All. 677.

——S. 65 (b)—Mortgage.

In order to enforce a claim on a mortgage, the pliaintiff is required to produce the original bond or its copy when circumstances exist which entitle the plaintiff to produce its copy. However, where admissions are available to the plaintiff, which are made in the course of pleadings or outside pleadings which go to prove his claim, he can rest on admission alone and he need not produce and prove the original document or its copy. But the admissions must be sufficient to cover the entire claim and must relieve the plaintiff of the necessity of relying on the document or any portion of it. If the admissions are not available or if they are indefinite or insufficient, then the plaintiff can succeed only in the ordinary way, that is, in a mortgage suit, by producing the original bond or its copy. A.I.R. 1941 All. 150=1941 A.L.J. 33=1941 O.W.N. 239=1941 A.W.R.H.C. 18=195 Ind. Cas. 50.

——S. 65—Mortgage—Mortgage deed executed in England—Deed lost before registration in British India—Suit brought for recovery of money—Secondary evidence was held admissible. 105 Ind. Cas. 502=7 Pat. 99=9 P.L.T. 221=A.I.R. 1928 Pat. 134.

——Ss. 65 (a) and 66—Mortgage—Redemption suit—Oral evidence to prove mortgage deed, if admissible.

Oral evidence under Ss. 65 and 66 taken together, is admissible to prove a mortgage deed in redemption suit where the deed is in the possession of the mortgagee and is not forthcoming. 9 Bur. L.T. 52=31 Ind. Cas. 892.

——S. 65—Mortgage—Redemption suit—Secondary evidence.

Where in a suit for redemption the mortgagors relied only upon the secondary evidence of the mortgage in the shape of certain documents mentioning or admitting the mortgage, **Held** that they could not succeed. 1 O.L.J. 442=25 Ind. Cas. 816.

——S. 65 (c)—Mortgage—Suit on copy of mortgage bond—Part payment pleaded.

Where the execution of a mortgage bond is admitted but discharge is pleaded, a suit on a copy of the mortgage bond is maintainable without proving the loss of of the original. 11 A.L.J. 734=20 Ind. Cas. 955.

16. Objections.

——S. 65—Objection in appeal—Interference with discretion of trial Court—Competency.

The discretion exercised by the trial Court in admitting secondary evidence on the ground that the original is lost should not ordinarily be interfered with in appeal. It is true that in a case where the admissibility of the document is not challenged, the erroneous omission in the trial Court to object to the admission of the evidence would not make that evidence relevant; but this principle applies only where the evidence or document is **per se** irrelevant or inadmissible and no objection was taken to its admissibility. Where evidence is admitted in the trial Court without any objection to its reception and the evidence is admissible and relevant, then no objection will be allowed to be taken to its reception at any stage of the litigation on the ground of improper proof. But if the evidence is irrelevant or inadmissible, omission to take objection to its reception does not make it admissible and objection may be raised in appeal for the first time. 224 Ind. Cas. 169=47 Bom.L.R. 962=A.I.R. 1946 Bom. 193.

——S. 65—Objection.

The admission of secondary evidence cannot be challenged in appeal, when no objection had been taken in the trial Court. A.I.R. 1941 Lah. 400=197 Ind. Cas. 581. **See also** 1937 O.W.N. 386.

——S. 65—Objection.

A document which is **per se** inadmissible in evidence can be objected to at any time. If, however, the objection relates to the method of proof, that is, if secondary evidence is sought to be put in instead of the original, the objection must be taken at the earliest point of time. If the document is not inadmissible **per se** and if secondary evidence of it is sought to be tendered, the right time to object would be at the time when the document is put in and not either at the appellate stage or at the time of the argument. In order to show that search has been made for a document so as to let in secondary proof of its contents, hearsay evidence of the answers given by persons who were likely to have it in their custody ought to be received. A.I.R. 1936 Cal. 164=61 C.L.J. 588=162 Ind. Cas. 91.

——S. 65—Objection.

Where no objection is taken at the time by the other party when the secondary evidence was led, the objection can be raised for the first time in second appeal, it being only a question of formal proof. A.I.R. 1935 Lah. 628=160 Ind. Cas. 751.

——Ss. 65, 3, 5—Objection—Relevant document.

A document, which is not relevant to the issues, even if admitted without objection by the opposite party, must be discarded by the Appellate Court; on the other hand, if it is relevant to an issue but cannot be admitted unless certain conditions are first complied with, as for instance, the proof of loss of the original if the document is a copy, then the absence of an objection by the opposite party to the admission of the document, must be deemed to be tantamount to an admission of the existence of those circumstances and the document becomes admissible. A.I.R. 1935 Lah. 251=16 Lah. 782=158 Ind. Cas. 465.

——S. 65—Objection.

Where the reception of secondary evidence is in direct contravention of an imperative prohibition of law, the fact that there was no objection cannot convert irrelevant evidence into relevant evidence. The principle of acquiescence can only be applied when the secondary evidence has been given of the contents of a document which, if produced, itself could have been admitted under the provisions of the law. 94 Ind. Cas. 75=27 P.L.R. 260=A.I.R. 1926 Lah. 415.

——S. 65—Objection—Copy of document admitted in trial Court without objection—No objection is open in appeal. 88 Ind. Cas. 541=7 L.L.J. 79=26 P.L.R. 455=A.I.R. 1825 Lah. 347.

——S. 65—Objection.

Absence of objection in trial Court to secondary evidence on the ground of want of proof of loss of original precludes the objection being raised in appeal. 84 Ind. Cas. 486=3 Bur.L.J. 193=A.I.R. 1925 Rang. 113.

——S. 65—Objection.

When secondary evidence is produced in the first Court and no objection is taken either by the other side or by the Presiding Officer, it is not open to the Court of Appeal to reject that evidence. 71 Ind. Cas. 801=A.I.R. 1924 Lah. 273.

——S. 65—Objection.

When secondary evidence has once been admitted by the lower Appellate Court, the High Court sitting in second appeal cannot reject it. 79 Ind. Cas. 663=27 O.C. 26=11 O.L.J. 565=A.I.R. 1924 Oudh 306.

——S. 65—Objection—Original in the possession of one defendant—Codefendant cannot for the first time in appeal object to plaintiff producing copy. 76 Ind. Cas. 152=24 Bom. L.R. 1308=A.I.R. 1924 Bom. 170.

——S. 65—Objection—Admission of a copy without objection—Objection cannot be raised in appeal. 67 Ind. Cas. 628=3 Pat. L.J. 397=1 Pat. 606=A.I.R. 1922 Pat. 565.

——S. 65—Objection.

If no objection is taken to the admission of secondary evidence of a document by means of oral evidence such evidence could not be discarded in appeal though the secondary evidence should have been only a certified copy. 34 Ind. Cas. 942 (Cal.).

——S. 65—Objection.

Objection to admission of secondary evidence must be taken at the time, the other party produces it for admission and not at a late stage. (1916) 1 M.W.N. 9=33 Ind. Cas. 188.

——S. 65 (2)—Objection to secondary evidence—Objection on appeal.

Secondary evidence of a document should not be rejected on appeal merely on the contention that the loss of the original has not been satisfactorily proved. 15 Ind. Cas. 625 (All.).

17. Original document unstamped, etc.

——S. 65—Original document unstamped—Secondary evidence, is barred. Pak. L.R. (1950) Lah. 273=A.I.R. 1950 Lah. 154.

——S. 65—Original document unstamped—Partition deed stamped and registered duly in British India including properties in Mysore—Original in possession of party not amenable to jurisdiction of Courts in Mysore—Secondary evidence—Admissibility.

Secondly evidence cannot be given of the contents of a document which, if produced would be inadmissible. Hence a copy of a deed of partition executed and registered in British India, and duly stamped according to the law of British India but which also relates to properties in Mysore, cannot be admitted in evidence in the Courts in Mysore, the original not having been stamped duly according to the Mysore Stamp Law. The fact that, through no fault of his own, the party seeking its admission cannot produce it does not render the copy admissible. 52 Mys. H.C.R. 122.

——S. 65—Original document unstamped.

Production and presentation are not identical with admission and secondary evidence of the contents of an unstamped document, which has been lost or destroyed can, under no circumstances be allowed. A non-existent document cannot be admitted, though under certain circumstances, of which the most essential is that before its disappearance the original should have borne the necessary stamp, secondary evidence is permitted. 69 Ind. Cas. 723=5 L.L.J. 172=3 Lah. 282=A.I.R. 1922 Lah. 401.

—— S. 65—Original document unstamped.

As the written agreement of sale was not on a stamped paper, it was not open to the plaintiff to adduce secondary evidence of it even upon payment of penalty. 62 Ind. Cas. 637=45 Bom. 1170=23 Bom. L.R. 506=A.I.R. 1921 Bom. 401.

——S. 65—Original document unstamped.

If the unstamped original of an instrument is lost, oral evidence to prove its contents is inadmissible. 16 N.L.R. 68=56 Ind. Cas. 249.

——S. 65—Original document unstamped.

A claim for the value or return of goods delivered cannot be proved by an unstamped agreement between the parties. 33 Ind. Cas. 661 (Mad.).

——S. 65—Original document unstamped.

Secondary evidence is not admissible to prove the contents of an unstamped document. (1911 2 M.W.N. 166=12 Ind. Cas. 127.

——S. 65—Original document unstamped and unregistered—Secondary evidence-Admissibility.

Where by a document in writing four members of a junior branch transfer their right of management of a public temple to a member of the senior branch, and such document is admittedly unstamped and unregistered, in the absence of such instrument of transfer, other evidence in proof of such transfer is inadmissible.

Quaere:—Whether a member can rely upon such transfer as the basis of his title. 13 M.L.J. 341=27 M. 192.

——S. 65—Original instrument invalid—Deed of relinquishment requiring registration not registered—Secondary evidence of the document is not admissible Registration Act, S. 49. 101 Ind. Cas. 839=A.I.R. 1927 Nag. 214.

18. Requirements of section.

——S. 65 (c)—Requirements of the section.

Under S. 65 (*c*) of the Evidence Act, the question is not so much, whether the exact mode and time of loss of the original is proved but whether the secondary evidence, is offered owing to the inability to produce the original for reasons other than the default, or neglect of the party offering it. 31 Ind. Cas. 579 (Mad.).

19. Scope.

——S. 65—Scope and object of—Person deliberately failing to produce original—Right to benefit of.

S. 65 of the Evidence Act is designed only for the protection of persons who, in spite of their best efforts are unable, from circumstances beyond their control, to place before the Court primary evidence of a document as required by law. It is not intended to be utilised for the benefit of persons who deliberately, or with sinister or ulterior motives, refuse to produce in Court a document which is in their possession, power or control. A.I.R. 1949 All. 677.

——S. 65—Scope.

S. 76, Evidence Act, prescribes a particular form of certificate regarding certified copies, but that form is not necessary in every case. All that is required by S. 65 is that it must be a true copy of the original and there must be something to show that it was so. A.I.R. 1944 All. 114=1944 A.L.J. 118=1944 A.W.R. 91=1944 O.W.N. 58 (2)=I L.R. (1944) All. 221=214 Ind. Cas. 232.

——S. 65—Scope.

S. 65 has no reference to a case where mere secondary evidence of the documents has not been tendered but it is the document itself which is put in as secondary evidence of facts which have to be proved aliunde. Hence newspapers are not secondary evidence of facts narrated by them. 88 Ind. Cas. 22=7 L.L.J. 264=26 Cr.L.J. 1078=26 P.L.R. 566=A.I.R. 1925 Lah. 299.

——S. 65—Scope.

S. 65 does not dispense with production of existing bond. 97 Ind. Cas. 82=49 All. 78=24 A.L.J. 964=A.I.R. 1926 All. 741.

20. Secondary evidence.

——S. 65—Secondary evidence—Loss of documents after filing in Court.

Once a document is produced in Court and tendered in evidence and exhibited, the Court is responsible for

its safe keeping and if the document is lost, the plaintiff must be given another chance of producing a copy or giving secondary evidence of the contents. A.I.R 1933 Lah. 782 (1)=34 P.L.R. 657=144 Ind. Cas. 812(1).

——S. 65—Secondary evidence Document lost after it was filed in Court—Secondary evidence is allowed. 86 Ind. Cas. 552=27 Bom. L. R. 777=29 C.W.N. 965=22 M.L.W. 86=26 P.L.R. 419=23 A.L.J. 109=2 O.W.N. 256=6 L.R.P.C. 70=A.I.R. 1925 P.C. 80=49 M.L.J. 132 (P.C.).

——Ss. 65, 66—Secondary evidence—Admissibility of—Conditions—Party not filing original and denying having ever had it—Certified copy tendered by opposite party—Objection.

The only purpose of a notice under Ss. 65 and 66 of the Evidence Act is to give the party an opportunity by producing the original to secure, if he pleases, the best evidence of the contents. Secondary evidence is admissible when the party offering evidence of its contents, cannot for any reason not arising from his own default, or neglect produce the original document in reasonable time and under S. 66, the Court has absolute power, when it thinks fit, to dispense with a notice under these sections.

When one party has not filed the original document, has denied having ever had it and has given no reliable account of what happened to it, he cannot claim subsequently that the certified copy should have been rejected when tendered by the opposite party. A.I.R. 1936 P.C. 15=38 P.L.R. 19=43 M.L.W. 107=1936 A.L.J. 84=62 I.A. 85=1936 O.W.N. 10=1936 A.W.R. 45=19 N.L.J. 29=38 Bom.L.R. 330=1936 M.W.N. 22=2 B.R.207=40 C.W.N. 226=63 C.L.J. 29=70 M.L.J. 206=60 Ind. Cas. 29 (P.C.).

——S. 65—Secondary evidence—Documents in previous case—Attested copies to be properly exhibited—Otherwise evidence is unsustainable. 38 P.L.R. 231.

——Ss. 65 and 91—Secondary evidence.

In a suit for registration of a bond, the lower Courts found that the money was advanced to enable the defendant to pay to the plaintiff's mistress partly in satisfaction of her decree and partly to prevent her from taking criminal proceedings against him :

Held, that it was doubtful whether in the circumstances of the case, and having regard to the provisions of Ss. 91 and 65, Evidence Act, it would have been proper to allow any secondary evidence regarding the nature of the alleged agreement to have been given in these proceedings. A.I.R. 1933 Cal. 196=56 C.L.J. 413=142 Ind. Cas. 520.

——Ss. 65 and 66—Secondary evidence in criminal cases—Fact of accused having corresponded with individual in foreign place.

Even in a criminal case where secondary evidence has been adduced in place of primary evidence, the provisions of Ss. 65 and 66 of the Evidence Act are applicable and must be complied with before such secondary evidence is admitted.

In order to establish that the accused were in correspondence with a particular individual in a foreign place, it is not incumbent upon the prosecution to establish that any of the letters were in fact written by any particular individual of that name. It is enough to show that some person living in the foreign place was in conspiracy with the accused and correspondence was passing between them. A.I.R. 1933 All. 690=1933 A.L.J. 799=34 Cr.L.J. 967=55 All. 1040=145 Ind Cas. 481.

——S. 65—Secondary evidence—Copies of letters of conspirators intercepted and reposted—Admissibility of.

In a conspiracy case, copies of letters from the accused to his co-conspirators which are intercepted and re-posted are admissible in evidence. The original letters need not be produced. Further, from the fact that when the addresses of these letters were arrested and tried, the letters were not in their possession, it can be assumed that the letters have been destroyed and in that case, secondary evidence such as copies, may be accepted under S. 65, Evidence Act. A.I.R. 1933 All. 498=35 Cr.L.J. 768=148 Ind. Cas. 833.

——S. 65—Secondary evidence.

Under S. 65 of the Evidence Act, and upon general principles, a party ought not to be allowed to defeat his opponent by force of a document which he has in his possession and will not produce. A.I.R. 1933 Mad. 451=37 M.L.W. 672=64 M.L.J. 676=1933 M.W.N. 672=144 Ind. Cas. 27.

——S. 65—Secondary evidence—Copy transcribed from copy not compared with original.

A copy transcribed from a copy of an original document but not compared with the original is not even secondary evidence of the original.

Where a record-room was burnt during the Mutiny of 1857, and the plaintiff, in a suit for declaration of his **talabi brahmatter** rights to a certain **mauza**, had produced in evidence certain certified copies prepared rom a register of **sarsikan** papers in the Manbhum Collectorate:

Held, that the register now available in the Manbhum Collectorate was to be treated as the original document and the entries therein could be proved by certified copies thereon. A.I.R. 1932 Pat. 157=11 Pat. 569=138 Ind. Cas. 419.

——S. 65—Secondary evidence—Copy of list attached to plaint.

A copy of a list attached to a plaint obtained from some record in the Revenue Court is not covered by any of the clauses of S. 65, Evidence Act, and is not admissible as secondary evidence. A.I.R. 1931 Oudh 136=7 O.W.N. 1079=14 R.D. 664=129 Ind. Cas. 331.

——S. 65—Secondary evidence—Copy of list attached to plaint filed in Revenue Court—Admissibility in evidence.

It is doubtful whether a copy of a list attached to a plaint obtained from some record in the Revenue Court is admissible in evidence. 7 O.W.N. 1079=129 Ind. Cas. 331=14 R.D. 664=A.I.R. 1931 Oudh 136.

——S. 65—Secondary evidence.

A document cannot be treated as secondary evidence under S. 65 (*b*) of the Act, unless it has been made by the person against whom it is proved or by his representative-in interest. 20 Ind. Cas. 62 (Oudh).

——S 65—Secondary evidence admitted without objection and utilised by the Court—Power of Board to reject it.

It is not open to the Board to reject in second appeal secondary evidence of a deed which had been admitted in the lower Court without any objection and which had also utilised by the Court in arriving at a decision. 1947 A.W.R. (Rev) 128

——S 65—Secondary evidence.

Absence of original not explained—Secondary evidence of the contents was not admissible. 62 Ind. Cas. 444 (Cal.).

——S. 65 (g)—Secondary evidence—Evidence must be given by person who has examined documents and made search for them.

The insistence by the Legislature on the presence in the witness-box of a person who had examined the documents or of some one "who is skilled in the examination of the documents" is intended to afford an opportunity to the opposite party to find out the train by means of the cross-examination of such a witness

Secondary evidence under S. 65 cannot, therefore, be given by a person who has not examined the documents. A.I.R. 1946 All. 227=227 Ind. Cas. 269=47 Cr.L.J. 641.

——S. 65—Secondary evidence—Presumption.

Where a copy is admissible under the provisions of S. 65, Evidence Act, a presumption of correctness under the provisions of S. 90 of the Act can be drawn in respect of the copy as well. A.I.R. 1941 Pesh. 89=197 Ind. Cas. 633.

——S. 65—Secondary evidence—Presumption.

Where the original document having been lost, its copy is admitted under S. 65 as secondary evidence of the original, the only presumption that can be drawn under S. 90, Evidence Act is that it is the correct copy of the original document. A.I.R. 1941 Oudh 433=1941 O.W.N. 699=1941 R.D. 387=1941 A.W.R. (Rev.) 408=16 Luck. 778=194 Ind. Cas. 855.

——S. 65, 90—Secondary evidence—Presumption.

S. 90, Evidence Act, clearly requires the production to the Court of the particular document in regard to which the Court may make the statutory presumption. If the document produced is a copy admitted under S. 65, Evidence Act, as secondary evidence, and it is produced from proper custody and is over thirty years old, then the signatures authenticating the copy may be presumed to be genuine.

Held, on evidence positive and otherwise, that the genuineness of the will in question was sufficiently established and the widow had authority to adopt. A.I.R. 1935 P.C. 132=1935 A.L.J. 847=39 C.W.N. 1057=1 B.R. 761=1935 O.W.N. 759=1935 M.W.N. 768=16 P.L.T. 699=37 Bom.L.R. 805=37 P.L.R. 614=69 M.L.J. 225=42 L.W. 231=1935 A.W.R. 879=57 All. 494=62 I.A. 180=156 Ind. Cas. 864 (P.C.) (Impliedly overrules

(1) A.I.R. 1919. All. 232=51 Ind. Cas. 275.
(2) 22 All. 294.
(3) 5 Cal. 886=6 Cal. L. Rep. 199.).

——S. 65—Secondary evidence—Prosumption—Certified copy of document relied upon—Before any presumption under S. 90 can be made party relying must lay foundation by leading secondary evidence under S. 65. A.I.R. 1930 All. 550=1930 A.L.J. 1003=125 Ind. Cas. 460.

——Ss. 65 (c) and 90—Secondary evidence—Presumption.

Secondary evidence is admissible to prove the contents of a document the original of which is not possible to be produced with all due deligence and the Court is entitled to raise a resumption under S. 90 regarding the same on the production of a certified copy. 5 O.L.J. 219=46 Ind. Cas. 344.

——Ss. 65 (c), 76 and 79—Secondary evidence—Presumption of stamp.

Where the original of a compromise petition filed in Court has been destroyed and a duly stamped copy issued by the Court is produced as secondary evidence the original must be presumed to have been duly stamped. Moreover the compromise petition is admissible as the evidence of an oral mortgage recited therein, although the petition is not stamped as a mortgage. 38 All. 494=18 Bom.L.R. 904=14 A.L.J. 1099=20 M.L.T. 447=24 C.L.J. 504=(1916) 2 M.W.N. 548=21 C.W.N. 265=5 L.W. 153=1 P.L.W. 90=43 I.A. 264=39 Ind. Cas. 11 (P.C.).

——S. 65—Secondary evidence—Previous convictions.

Secondary evidence under S. 65 (c), Evidence Act can be given of records of the previous convictions of the accused which have been destroyed. A.I.R. 1941 Sind 173=I.L.R. (1941) Kar. 308=43 Cr.L.J. 12=197 Ind. Cas. 98.

——S. 65—Secondary evidence.

Party responsible for destroying identity of a document cannot, in justice and equity, be allowed to adduce secondary evidence of its contents. A.I.R. 1940 Pat. 245=5 Cut.L.T. 45=7 B.R. 20=22 P.L.T. 666=190 Ind. Cas. 377.

——S. 65—Secondary evidence.

Under S. 65 of the Evidence Act, one of the cases in which secondary evidence may be given of the existence condition or contents of a document is when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved. A.I.R. 1937 Oudh 391=1937 O.W.N. 719=13 Luck. 334=168 Ind. Cas. 799.

——S. 65—Secondary evidence—Transaction in nature of relinquishment—Agreement to relinquish unregistered but enforceable under the doctrine of part performance—Secondary evidence of its contents may be given if it is lost. A.I.R. 1929 Rang. 181.

——S. 65 (c)—Secondary evidence.

Strict proof of the loss of the document is necessary before allowing secondary evidence. 32 Ind. Cas. 399 (All.).

——S. 65 (e)—Secondary evidence.

When a public document is destroyed or lost, any secondary evidence is admissible. 43 Cal. 973=20 C.W.N. 576=32 Ind. Cas. 774.

——S. 65—Secondary evidence—Gift.

A petition presented to a Collector by a donor admitting a gift is secondary evidence of a very strong kind of the gift. 25 Ind. Cas. 852 (Cal.).

——S. 65 (b)—Secondary evidence—Loss of orginal—Proof of Registration copy—Alternative pleas.

When the original document is not proved to have been lost no secondary evidence thereof (including a registration copy) is admissible. The statement of a witness that he heard of the loss from the plaintiff's predecessor in title many years ago, is admissible in evidence. The defendants being strangers to the deed can put the plaintiff to proof of the loss and alternatively to plead discharge. 11 A.L.J. 255=18 Ind. Cas. 878.

——S. 65 (f)—Secondary evidence—Registration office copy of sale deed—When admissible.

A registration office copy of a sale deed is inadmissible in evidence under S. 65 (*f*) of the Evidence Act to prove the contents of the original sale deed. But such a copy will be so admissible in evidence if a case is made out for reception of secondary evidence. 11 Ind. Cas. 50 (All.).

——S. 65 (e) and 74—Secondary evidence—Returns in the custody of Registrar of Joint Stock Companies, if admissible

Secondary evidence of returns filed with the Registrar of Joint Stock Companies is admissible as such returns constitute the public records of private documents within S. 74 (2) of the Evidence Act. 45 Cal. 169=21 C.W.N. 1161=26 C.L.J. 459=19 Cr.L.J. 530=45 Ind. Cas. 338 (F.B.).

——S. 65—Secondary Evidence Distinction between admissibility and manner of proof—Secondary evidence cannot be ad-mitted when primary evidence is not admissible. 95Ind. Cas. 444=8 L.L.J. 158=27 P.L.R. 268.

——S. 65—Secondary evidence—Inadmissible primary evidence.

Where primary evidence of the contents of a document is inadmissible secondary evidence of that

primary evidence can be in no better position. 66 Ind. Cas. 153=A.I.R. 1922 Lah. 354.

——S. 65—Secondary evidence—Inadmissible primary evidence.

Secondary evidence can never be admitted as a substitute for inadmissible primary evidence, but it is admissible to prove the fact for which the document, if available, might have been admitted as primary evidence. 5 N.L.R. 70=2 Ind. Cas. 244.

21. Wills.

——S. 65—Wills.

Bona fide impossibility of producing original must be proved before secondary evidence as to contents of a will can be adduced. 88 Ind. Cas. 249=1925 M.W.N. 232=A.I.R. 1925 Mad. 1005.

——S. 65—Wills.

One of the attesting witnesses to a will deposed to its due execution. He stated that after the death of the testator the original will came into the possession of D who was the brother of Mt. R. the legatee and who acted as her Mukhtar. He further deposed that D was dead and that no other members of the family either of R or of her husband were now in existence.

Held, that a sufficient foundation had been laid for the admission of secondary evidence. 75 Ind. Cas. 387=21 A.L.J. 495=45 All. 618=4 L.R.A. Civ. 294=A.I.R. 1923 All. 551.

——S. 65 (c)—Will in possession of the opposite party.

Where the will was either lost or stolen or was in the possession of the opponent, the Registration office copy is admissible in evidence. 19 C.W.N. 929=13 A.L.J. 801=17 Bom.L.R. 609=2 L.W. 645=(1915) M.W.N. 500=22 C.L.J. 172=110 P.W.R. 1915=29 M.L.J. 307 =18 M.L.T. 54=93 P.R. 1915=11 P.L.R. 1916=29 Ind. Cas. 807 (P.C.).

22. Miscellaneous.

——S. 65—Miscellaneous—Book accepted by Privy Council as authoritative—Copy of issue of same edition.

Privy Council accepted the Persian edition of the Jowahar Faridi as authoritative. A copy of the same which was an issue of the same edition was produced in a subsequent suit:

Held, that the printed edition of that year should be accepted in the case. A.I.R. 1942 Lah. 142=44 P.L.R. 476=200 Ind. Cas. 684.

——S. 65—Miscellaneous.

According to S. 65 of the Evidence Act the loss of the original must be proved not only in a case where the document is being enforced in a suit but also where it is produced merely as a piece of evidence. 122 Ind. Cas. 751.=1930 A.L.J. 765=A.I.R. 1930 A 529.

——S. 65—Miscellaneous—Use of exhibit as.

Held, that the question with regard to the use of an exhibit as secondary evidence, was not a question of fact but rather a question of procedure and the orders made by the High Court to remit the suits to the Court below for re-hearing after giving the plaintiffs an opportunity of calling for the original of exhibit and considering it or, if not produced, then considering secondary evidende, if any, of the exhibit, were right. A.I.R. 1936 P.C. 258=1936 O.W.N. 669=2 B.R. 756=44 M.L.W. 446=38 Bom. L.R. 1128=1926 A.W.R. 717 =164 Ind. Cas. 17 (P.C.).

——S. 65—Miscellaneous Registration Act, S. 49—Secondary evidence of partition-deed inadmissible—Oral evidence can be adduced to prove lawful origin of possession. 102 Ind. Cas. 696=5 Rang. 154=A.I.R. 1927 Rang. 203.

——S. 65—Miscellaneous.

A party entitled to produce and producing secondary evidence of a document is not relieved from the duty cast upon him by law namely of proving the execution of the original. 71 Ind. Cas. 568=18 P.W.R. 1923=A.I.R. 1924 Lah. 303.

——S. 65—Miscellaneous—Judgment.

Statements of persons who merely heard judgment pronounced are not admissible in evidence. What is required is an oral account of the contents of the judgment or decree by some one who had read the one or the other. 77 Ind. Cas. 258=4 U.B.R. 135=A.I.R. 1923 Rang. 113.

——S. 65—Miscellaneous—Written statement.

Where an acknowledgment in the written statement in a previous suit is relied on the statement itself or a certified copy thereof must be proved and neither the plaint nor the decree can be admitted as secondary evidence of the same. 63 Ind. Cas. 490=3 U.P.L.R. (All.) 179.

——S. 65 (c)—Miscellaneous—Lost grant—Translation—Copy of.

As Ss. 65 and 91 makes it clear that when a written grant is lost, secondary evidence can be given of it only as defined by law, a translation of **parwana** or grant forming the enclosure to the report of public officer, is not admissible as secondary evidence of the contents of the grant under any of the Ss. 65, 32 (2) or 35. 4 L.W. 331=35 Ind. Cas. 201.

——S. 66—Absence of notice—Effect.

Where a party has not been asked to produce the original of a document it is not open to the other party produce certified copies of the original and they would not be admissible. 1949 R.D 22.

——S. 66—Absence of notice—Effect.

Under S. 66 of the Evidence Act secondary evidence may not be given unless the party proposing to give it as previously given to the party in whose possession or power the document is, such notice to produce it as is prescribed by law or as the Court considers reasonable The omission to give notice to the persons said to possess the original is a fatal objection to the admission offisecondary evidence. 123 Ind. Cas. 197.=A.I.R. 1930 Mad. 742.

——S. 66—Adverse party.

Pro forma defendant is not necessarily " adverse party' '. 118 Ind. Cas. 663=1929 A.L.J. 1091=A.I.R. 1929 All. 680.

——S. 66—In previous litigation document held to be in plaintiff's father's possession, when last heard of—Notice to plaintiffs to produce it.

Where no reason appears for supposing that a document is in the possession of the defendant, and in the previous litigation, the document when last heard of was held to be in the possession of the plaintiffs' father a notice to produce served upon the plaintiffs would be a mere formality. A.I.R. 1943 P.C. 83=1943 A.L.J. 292=47 C.W.N. 607=1943 O.W.N. 334=56 M.L.W. 593=1943 A.W.R. 14=I.L.R. (1943) Kar. (P.C.) 69 Sup.=46 Bom.L.R. 220=(1943) 2 M.L.J. 51=10 B.R. 7=207 Ind. Cas. 553 (P.C.).

——S. 66—Notice to produce document dispensed with—Secondary evidence allowed—No objection in trial Court—Objeetion in Appellate Court.

Under S. 66, Evidence Act, a notice to produce the document must previously have been given to the party in whose possession or power the document is before giving secondary evidence of its contents, but such notice is not essential to reader secondary evidence

admissible in certain cases, one of whch is whlen, from the nature of the case, the adverse party must know that he will be required to produce it, and another of which is, where the Court thinks fit to dispense with it. The objection should be raised at the time of the reception of the evidence, and no objection should be allowed to be taken in the Appellate Court as to the admissibility of secondary evidence which was admitted in evidence in the trial Court without any objection. A.I.R. 1936 Rang. 277=163 Ind. Cas. 408 (2).

——S. 66—Notice when necessary—Plaintiff suing on pro-note transferred to him under settlement deed —Note not produced but alleged to be in possession of widow of transferor—Widow on that account joined as defendant but not given notice und r S. 66—Settlement deed cannot be admitted as secondary evidence of pro-note. A.I.R. 1930 Mad. 742. = 123 Ind. Cas. 197.

——S. 66—Notice when necessary.—Redemption suit—Mortgagee denying existence of mortgage deed—Notice is not necessary. 97 Ind. Cas. 348=6 Pat. 102=1926 P.H.C.C. 286=A.I.R. 1926 Pat. 512.

——S. 66—Notice when necessary.

The second proviso to S. 66 does not apply in a case against a mortgagee and notice to produce must be given before secondary evidence can be given of the mortgage. 2 U.B.R. (1907-08), Evidence, 13, Foll. 84 Ind. Cas. 373=2 Rang. 397=A.I.R. 1925 Rang. 7.

——S. 66—Notice when necessary.

In a redemption suit plaintiffs alleged in the plaint that the original mortgage-deed was with the defendants, and asked the Court to have the deed summoned from defendants. The defendants denied in their statement the existence of the alleged deed. **Held,** that the plaintiffs, could give secondary evidence of the deed and that under the circumstances of the case the Court might, in the exercise of the discretion given by S. 66, dispense with the issue of a notice to produce. 3 O.L.J. 379=36 Ind. Cas. 696.

——S. 66—Production of copy of notice by render —Non-summoning of original—If makes it inadmissible.

Where a document sought to be summoned is itself a notice sent by one party to the other and a copy of the notice is produced by the sender, under S. 66 of the Evidence Act, it is not obligatory to summon production of the original notice. The non-summoning of the original notice would not make a copy of it inadmissible. A.I.R. 1950 Mad. 657=1950 M.W.N. 290=(1950) 1 M.L.J. 314.

——S. 66—Scope.

Oral evidence of contents of letter inadmissible under S. 66 cannot become admissible by subsequent dispensing with notice. 50 C.L.J. 593=1930 Cr.C. 209=A.I.R. 1930 Cal. 209.

——S. 66—Service of notice.—Pardanashin woman living with her brother—Summons served on brother constitutes notice such as is required by S. 66. 118 Ind. Cas. 663=1929 A.L.J. 1091=A.I.R. 1929 All. 680.

——S. 66, Proviso Cl. (2)—Document produced from custody of person ascerting title—Whether important in considering question of *benami*.

The fact that the documents of title were produced from the custody of certain persons is of importance in considering a question of **benami**, but it cannot be said that a Judge, in considering a question of this character, is bound to come to the conclusion, in the event of a document being produced from the custody of the person asserting that title, that his case is made out. A.I.R. 1936 Pat. 136=2 B.R. 324=17 P.L.T. 366=161 Ind. Cas. 331 (2).

——S. 66, Proviso Cl. (2)—Party objecting to admission of secondary evidence—Original in possession of party objecting—Applicability of proviso 2 of S. 66—Notice.

Where a party alleges that no evidence was adduced by the other party nor were the facts proved which would justify the Court in admitting as secondary evidence a copy of an original document and it is found that the original is in possession or control of the party making the objection and it fails to produce it, sub-cl. (2) of the proviso to S. 66, Evidence Act, applies and no notice to the party to produce the original is necessary. A.I.R. 1936 Pat. 129=2 B.R. 327=161 Ind. Cas. 465.

——Ss. 67 and 78—Conveyance of property needs no attestation in N.-W. F. Province—Proof.

In the N.-W. F. Province, a conveyance of property does not require to be attested and hence S. 68, Evidence Act has no application. Hence admission of the execution of the document by the executant is sufficient to prove execution under S. 67, Evidence Act. A.I.R. 1942 Pesh. 83=204 Ind. Cas. 327.

——S. 67—Documents signed by professional identifiers—Court's duty pointed out.

The Courts and all officers who have to receive documents on which signatures are identified should remember that they are not bound to accept the identification merely because the nature of the identifier's profession entitles him to perform identifications. It is very easy for any officer in that position to become acquainted with the fact that such and such **mukhtear** whose name he frequently sees on papers of identification has really no other business, and in those circumstances, the presumption is that he is merely a professional identifier whose identification should not be accepted. A.I.R. 1937 Pat. 133=3 B.R. 310=17 P.L.T. 951=38 Cr.L.J. 411=16 Pat. 121=167 Ind. Cas. 668 (S. B.).

——S. 67—Document which needs no attestation.

Where a document is admissible without attestation, some evidence of its execution by the executant should be given, e.g., he signed it or made his thumb impression or any other mark. 7 O.L.J. 207=2 U.P.L.R. (J.C.) 82=23 O.C. 72=56 Ind. Cas. 328.

——S. 67—Handwriting—Circumstantial evidence.

Per Carnduff, J.—Handwriting may be proved under S. 67 by circumstantial evidence. 37 Cal. 467=14 C.W.N. 1114=11 Cr.L.J. 453=7 Ind. Cas. 359.

——S. 67—Handwriting—Proof of.

The test of genuineness of a signature is the general character of writing which is permanent and not mere comparison in the formation of particular letters. The best and the most proper evidence of handwriting is that of a person who has seen the person write often and has formed an opinion as to its character. 3 Ind. Cas. 291 (Cal.).

——S. 67—Intercepted letters—Copy of—Admissibility.

The execution or authorship of a copy of intercepted letter as in the case of any other document is a question of fact and may be proved like any other fact. The question whether the contents could be acted upon

must be determined on a consideration of other evidence in the case, documentary and oral. A.I.R. 1937 Cal. 99=38 Cr.L.J. 818=169 Ind. Cas. 977 (S.B.).

——S. 67—Kind of proof required.

S. 67 makes proof of execution of a document something more difficult than proof of matter other than the execution of a document. 107 Ind. Cas. 564= A.I.R. 1928 All 303.

——S. 67—Kind of proof required.

Ss. 60 and 67 are somewhat ambiguous, but it was never intended by S. 67 that direct evidence of handwriting was always necessary. The section merely stated with reference to deeds what was the universal rule in all cases, that the person who makes an allegation must prove it and lays down no new rule as to the kind of proof to be given. 111 Ind. Cas. 792=48 C.L.J. 32=A.I.R. 1928 Cal. 498.

——S. 67—Kind of proof required—Signatures attributed to accused persons—Hand writing must be proved. 83 Ind. Cas. 22=7 L.L.J. 234=26 Cr. L.J. 1073=23 P.L.R. 566=A.I.R. 1925 Lah. 299.

——S. 67—Kind of proof required.

Section does not require any special kind of proof of execution. 77 Ind. Cas. 798=18 N.L.R. 85=A.I.R. 1922 Nag. 227.

——S. 67—Plaint.

A plaint is a private document and must be proved by direct evidence. 61 Ind. Cas. 177=8 O.L.J. 27= A.I.R. 1921 Oudh. 81.

——S. 67—Proof of copy of original—Proof of signature of executant in copy—If proof of contents of original.

In the case of secondary evidence of contents of an original, in order to show that it is an exact copy of the original it is necessary to prove that either it was prepared by a uniform process or it was compared with the original by some witness, who can give evidence to that effect. In such a case proof of signature of executant in the copy would not amount to proof of contents of the original. A.I.R. 1850 All. 696.

——S. 67—Proof of signature—Illiterate witness—Competency to prove signature.

An illiterate witness cannot prove a signature because he cannot identify the handwriting or signature which is essential for the proof of the signature. 1948 R.D. 461.

——S. 67—Proof of signature of attesting witness—Inference of proper execution and attestation—Scope.

The signature of attesting witness, when proved, is evidence of everything upon the face of the document including the fact that he saw the executant make his mark.

S. 67, Evidence Act, is not confined to the proof of the handwriting of the executant but also applies to the proof of the signature of an attesting witness. A document was written by a document writer and executed by a marksman. There were also two attesting witnesses besides the writer. One of them gave false evidence and was discredited. Of the other two one was dead and the other one could not be produced. A witness was called to prove that the signature of one of the attesting witnesses was his:

Held, that the document was sufficiently proved. A.I.R. 1934 Mad. 365=1934 M.W.N. 384=39 M.L.W. 571=66 M.L.J. 712=57 Mad. 662=149 Ind. Cas. 257.

——S. 67—"Proved".

Definition of "proved" in S. 3, Evidence Act, should be read with Ss. 67 and 68, Evidence Act. A.I.R. 1944 Oudh 40=1943 O.W.N. 425=1943 A.W.R. C.C. 147=19 Luck. 443=210 Ind. Cas. 300.

——S. 67—Registration endorsements—Whether can serve as substantive evidence of execution—Admission of execution before Sub-Registrar—Registration Act, S. 60.

The certificate of registration has an evidentiary value attached to it by S. 60 of the Registration Act. But it is made admissible only for the purpose of proving that the document has been duly registered and that the fact mentioned in the endorsements made under Ss. 52 and 58 of that Act has occurred as there mentioned. Under S. 58, the registering officer has to endorse the signature of the person admitting the execution of the document. There the certificate of registration proves the admission of execution by the person who purported to execute the document. The ceryificate may be considered for the purpose of corroboration, but it cannot serve as substantive evidence of execution. If it is accepted as substantive evidence of execution that would deprive S. 90 of the Evidence Act of all its significance. The admission of execution is good evidence against the executant and his representatives but it would not be binding on third parties. Mere proof of admission of execution does not satisfy the requirements of S. 67 of the Evidence Act which provides that the signature of the executant must be proved to be in his handwriting. A.I.R. 1942 Nag. 84=I.L.R. (1942) Nag. 661=1942 N.L.J. 214=200 Ind. Cas. 194.

——S. 67—Registration endorsements—If proof of execution.

The effect of registration endorsement is not to prove execution as required by S. 67, Evidence Act, but only to prove an admission made by the executant to the Registrar or Sub-Registrar in solemn circumstances, and the Sub-Registrar's certificate is admissible not to prove execution of the deed but merely to prove admission of execution. The evidence of admission is not by itself sufficient to prove execution of the deed. A.I.R. 1941 Oudh. 529 = 1941 O.W.N. 906=1941 A.W.R. 274=196 Ind. Cas. 787.

——S. 67—Registration endorsement—If proof of execution.

Registration endorsement, though not a conclusive proof of the fact of execution of deed, may be treated as a sufficient proof. A.I.R. 1940 Nag. 382=1940 N.L.J. 437=193 Ind. Cas. 41.

——S. 67—Registration endorsement—Value of.

The registration endorsement is no conclusive proof of the fact of execution of a document and the Court must be satisfied that the mark or signature denoting execution was actually fixed to the document by the person professing to have executed it. 5 O.L.J. 191= 46 Ind. Cas. 279.

——S. 67—Scope.

Direct evidence that for some time before his death a person had reached a state of imbecility—The production after his death of documents executed during the period of imbecility and bearing his signatures does not of itself have conclusive force. A.I.R. 1939 P.C. 249 =6 B.R. 1=44 C.W.N. 66=I.L.R. (1940) Kar. (P.C.) 1 (Sup.)=183 Ind. Cas. 662 (P.C.).

——S. 67—Thumb impression—Proof of.

The definition of 'sign' in the General Clauses Act does not apply to S. 67, Evidence Act. If a mark is

taken to cover a thumb-impression in the definition of "sign", it cannot be extended to include the proog of a thumb-impression being the same as the proof of hand-writing. A.I.R. 1934 All. 390=154 Ind. Cas. 405.

——S. 67—Thumb marks.

Thumb marks are not exempt from the provisions of S. 67, Evidence Act. A.I.R. 1934 Mad. 558=1934 M.W.N. 443=40 M.L.W. 277=151 Ind. Cas. 990.

——S. 68.

Synopsis.

1. Account book.
2. Admission of execution.
3. Applicability.
4. Attesting witness.
5. Attestation.
6. Attestator alive but unable to testify.
7. Attestor denying execution.
8. Bonds.
9. Certified copy.
10. Death of attesting witnesses.
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14. Muhamedan law—Gift deed.
15. Note by attestor.
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17. Oral evidence.
18. Principal and collateral purpose.
19. Provisions are mendatory.
20. Retrospective effect of 1926 Amendment.
21. Sale deed.
22. Scope.
23. Will.
24. Miscellaneous.

1. Account book.

——S. 68—Account book.

Account book is not document required by law to be attested. 121 Ind. Cas. 819=1930 Cr. C. 54=51 All. 864=31 Cr. L. J. 356=A.I.R. 1930 All. 38.

2. Admission of execution.

——Ss. 68, 70—Admission of execution—Attesting witness, if to be called to prove execution—Interpretation of S. 70.

The admission of genuinenes s of the document is the same thing as an admission of execution.

Where, far from the execution of the mortgage deed in suit being specifically denied, it was expressly admitted by the defendant and his counsel on the date of issues, it is not necessary for the plaintiffs to call an attesting witness in proof of its execution so far as defendant is concerned. S. 70, Evidence Act, would be fully applicable and the admission of execution by defendant should be accepted as sufficient proof as against him without any further proof of attestation.

To interpret S. 70, Evidence Act, to mean that in spite of the admission of a party to an attested document of its execution by himself, its valid attestation must be proved in every case, if the document is one required by law to be attested would completely nullify it. If the admission of execution cannot dispense with proof of attestation, then there was no need at all for the enactment of the section. A.I.R. 1936 Oudh 270=1936 O.W.N. 354=12 Luck. 109=161 Ind. Cas. 605.

——S. 68—Admission of execution.

Under the law, as it now stands, it is not necessary to call an attesting witness in proof of the execution of any document not being a will which has been registered in accordance with the provisions of the Indian Registration Act unless its execution by the person by whom it purports to have been executed is specifically denied. 04 Ind. Cas. 344=1 L.C. 268=A.I.R. 1927 Oudh 535.

——Ss. 68 snd 70—Admission of execution—Minor parties—Admission by adults—Effect of.

A mortgage was executed by the manager of a joint Hindu family on his own behalf and on behalf of a minor. The admission of execution by the manager does not relieve the mortgagee of the necessity of calling an attesting witness to prove execution as against the minor and although the minor would be liable to discharge the debt incurred for a famly necessity, yet in the absence of proof of execution as against him, the debt would not create a lien on the property. **Per Atkinson, J.**—Where a party to an attested document admits its execution a third party is not bound by such admission. An admission under S. 70 of the Evidence Act, is admissible in evidence eventhough not made in the course of legal proceedings pending before a Court but antecedent to the institution of legal proceedings. 4 Pat. L.J. 511=53 Ind. Cas. 79.

——Ss. 68 and 71—Admission of execution.

The existence of an admission of an execution in the registration endorsoment, does not relieve the party propounding the document from compliance with S. 68 of the Evidence Act. But the endorsement is the best available evidence of execution and is admissible under S. 71 of the the Evidence Act. Whether such an endorsement by itself is sufficient subject to the provisions of S. 68 to prove execution is a question of fact to be determined on the merits of each case. 13 N. L.R. 197=42 Ind. Cas. 715.

——S. 68—Admission of execution—Proof of attestation—If necessary.

Admission of execution in the written statement is sufficient to dispense with proof of attestation as required by S. 68 of the Evidence Act. 3 Pat. L.W 269=42 Ind. Cas. 91.

——Ss. 68 and 70—Admission of execution by a party.

Where a document is required by law to be attested, the admission by a party to it of its execution dispenses with the necessity of proving its execution as against him, but as against persons other than the party making the admission, the document is inadmissible in evidence until it has been proved by attesting witnesses in the manner prescribed by S. 68 of the Act. **(Newbold, J., contra).** 44 Cal. 345=20 C.W.N. 1044=24 C.L.J. 175=34 Ind. Cas. 362.

——S. 68—Admission of mortgage bond—If proof of execution.

Admission of mortgage bond in evidence without objection is not proof of execution or attestation.

101 Ind. Cas. 277=8 P.L.T. 7=A.I.R. 1927 Pat. 181.

3. Applicability.

——S. 68—Applicability—Conditions of.

S. 68, Evidence Act, only applies when execution of a document has got to be proved. Where execution has not got to be proved, it is not necessary to call any attesting witness, unless it is expressly contendep that the attesting witness has not witnessed the execution of the document in question. I.L.R. (1946) Bom. 146=225 Ind. Cas. 372=48 Bom. L.R. 83=A.I.R. 1946 Bom. 304.

——S. 68—Applicability—N.-W. F. Province.

In the N.-W. F. Porvince, a conveyance of property does not require to be attested and hence S. 68, Evi-

dence Act, has no application. A.I.R. 1942 Pesh. 83=204 Ind. Cas. 327.

——S. 68—Applicability—Punjab.

There is no law in force in the Punjab requiring a deed of adoption or gift to be attested by witnesses and this, by itself, would preclude the operation of S. 68, Evidence Act. A.I.R. 1939 Lah. 414=187 Ind. Cas. 865.

——S. 68—Applicability—Punjab.

There is no law which requires the attestation of a sale-deed so far as Punjab is concerned. S. 68 therefore has no application to sale-deeds in that province. 114 Ind. Cas. 62=10 Lah. 447=A.I.R. 1929 Lah. 1.

——S. 68—Applicability—Punjab.

S. 68 applies only to cases where a document is required to be attested. There is no rule of law in force in the Punjab which requires bahi entry to be attested at all. S. 68 has therefore no applicability to such a document. 108 Ind. Cas. 57=A.I.R. 1928 Lah. 148.

——S. 68—Applicability.

Dawson-Miller, C. J.—A document executed in England and requiring to be attested under the English Law but not requiring to be attested under Indian Law, relating to property in India may be proved only by proving the signature of the executant. 111 Ind. Cas. 57=7 Pat. 520=A.I.R. 1928 Pat. 304.

——S. 68—Applicability—Mortgage bond—Suit as on simple money bond—Proof of attestation.

A document which purports to be a mortgage, but is not a mortgage owing to non-compliance with the provisions of S. 59, T. P. Act, regarding attestation, is not a document which is required by law to be attested within the meaning of S. 68, Evi. Act, It is admissible to prove the personal covenant to pay contained therein and it is not required by law to be attested.

A writer of a deed who has not signed it as witness but has as a matter of fact, been a witness of execution is a competent attesting witness. A.I.R. 1933 Sind 257=146 Ind. Cas. 694.

——Ss. 68 and 72—Applicability—Mortgage—Invalid attestation—Personal liability.

An invalid attestation of a mortgage though it prevents the deed from being enforced as a mortgage, does not render it inadmissible in evidence as a simple bond. 13 A.L.J. 533=29 Ind. Cas. 363.

——S. 68—Applicability—Mortgage deed inadmissible for want of attestation—Admissibility for proving personal obligation.

A document which is intended to be a mortgage but is not operative as such, because not duly attested, is admissible in evidence as a money bond. S. 68 of the Evidence Act has no application to such a case. 4 C.L.J. 510.

——S. 68—Applicability—Mortgage deed—Attesting witness not called—Whether admissible as a money bond.

The rule that where an attesting witness is necessary to the validity of an instrument, a person who was such witness must be called if alive capable of giving evidence and subject to the process of the court, applies, whatever the purpose for which the instrument is produced be. S. 68 applies only to cases where an instrument required by law to be attested bears the necessary attestation and not to cases where the instrument itself does not bear the necessary attestation. It is impossible to view the question of execution with reference to a particular covenant in the document as severable from the execution of the document itself as a whole. Where a mortgage deed which was required by law to be attested by two witnesses, was put in evidence but no attesting witness though alive and capable of giving evidence was called: **Held,** that the deed was inadmissible in evidence for the purpose of proving the personal covenant to pay. 17 M.L.J. 213=2 M.L.T. 175=30 M. 251.

4. Attesting witness.

——Ss. 68 and 69—Attesting witness—Comparison of signature if warranted.

The Court cannot compare the signature of an attesting witness on a bond with his agreed signature This procedure of proving the signature of an attesting witness is unwarranted by law. A.I.R. 1949 Kut. 3=50 Cr.L.J. 964.

——S. 68—Attesting witness unable to prove document—If can be proved by other evidence.

Under S. 63, Evidence Act what is necessary is that an attesting witness, if available, should be called in evidence. If he is not able to prove the document, there is no bar to its being proved by other evidence. A.I.R. 1941 Oudh 284=16 Luck. 615=1941 A.W.R. (C.C.) 98=1941 O.W.N. 249=193 Ind. Cas. 161.

——S. 68, Proviso—Attesting witness hostile: whether ground for not producing him.

The fact that one of the attesting witnesses has turned hostile is no sufficient ground for not producing him. If he turns hostile, the party producing him can obtain Court's permission to cross-examine him A.I.R. 1941 Oudh 89=1940 O.W.N. 1077=1940 A.W.R. (C.C.) 446=191 Ind. Cas. 215.

——S. 68—Attesting witness—His evidence not accepted as reliable—S. 68, if complied with.

Where a person purporting to have been an attesting witness, is called at the trial for the purpose of proving the execution of the mortgage deed, but his evidence has not been accepted as reliable the provisions of S. 68, Evidence Act cannot be said to be complied with. A.I.R. 1939 P.C. 117=41 P.L.R. 593=1939 M.W.N. 867=41 Bom.L.R. 1047=1939 O.W.N. 450=(1939) 2 M.L.J. 762=I.L.R. (1938) Kar. (P.C.) 222 (Sup.)=50 M.L.W. 58=1939 A.L.J. 492=20 P.L.T. 565=1939 A.W.R. 69=5 B.R. 592=43 C.W.N. 669=181 Ind. Cas. 216 (P.C.).

——S. 68—Attesting witness—Meaning.

An "attesting witness" in S. 68 of the Evidence Act has the same meaning as an "attesting witness" under S. 59 of the Transfer of Property Act. 62 Ind. Cas. 97=48 Cal. 61=A.I.R. 1921 Cal. 208.

5. Attestation.

(a) Meaning of.
(b) Presumption.
(c) Proof.
(d) Scribe.
(e) Validity of.

(a) Meaning of.

——S. 68—Attestation, meaning of.

An attestor must have seen the executant sign the document. Mere acknowledgment by executant before the attestor is insufficient. 45 Cal. 748=4 I.A. 94=4 Pat. L.W. 349=16 A.L.J. 409=34 M.L.J. 545=27 C.L.J. 548=22 C.W.N. 697=20 Bom.L.R. 587=23 M.L.T. 383=(1918) M.W.N. 382=8 L.W. 176=45 Ind. Cas. 1 (P.C.). (Reversing 14 C. W. N. 165=3 Ind. Cas. 311.).

——S. 68—Attestation, meaning of.

An attestor must have seen the executant sign the document. Mere acknowledgment by executant before attestor is insufficient. 37 All. 474—42 I.A. 163=13 A.L.J. 809=19 C.W.N. 991=17 Bom. L.R. 617=18 M.L.T. 85=2 L.W. 639=29 M.L.J. 159=

22 C.L.J. 165=(1915) M.W.N. 709=30 Ind. Cas. 366 (P.C.).

——S. 68—Attestation, meaning of.

Where the witnesses attesting a deed never saw the executant actually signing the deed but merely heard her acknowledge the execution, there is no due attestation of the deed. 11 A.L.J. 757=21 Ind. Cas. 83.

——S. 68—Attestation, meaning of.

Attestation means the witnessing of actual execution of document and not of mere acknowledgment of execution by executant. The attestor must have seen the executant sign the document. Mere acknowledgment by executant before attestor is insufficient. 35 Mad. 607=39 I.A. 218=16 C.W.N. 1009=23 M.L.J. 321=12 M.L.T. 338=(1912) M.W.N. 935=10 A.L.J. 259=14 Bom.L.R. 1034=16 C.L.J. 596=16 Ind. Cas. 250 (P.C.).

(Affirming 31 Mad. 215=18 M.L.J. 219=3 M.L.T. 300).

——S. 68—" Attestation ", meaning of.

The word " attest" means to bear witness to a fact. Attestation is not a matter of spirit and intention but a matter of form. Neither a witness who sees execution without signing nor a witness who signs without seeing execution comes within the category of an attesting witness. A writer who signs his name in token of being the scribe of a mortgage-deed does not attest the deed merely by subsequently seeing the mortgagor affix his signature. 6 N.L.R. 152=8 Ind. Cas. 1119.

(b) Presumption.

——S. 68—Attestation—Presumption—Document scribed, executed and attested with same ink.

If a document has been scribed, executed and attested with the same ink, a presumption of due attestation is permissible in law according to the well-known maxim **" Omnia praesumuntur rite et solemniter esse acta donee probetur in contrarume "**. I.L.R. (1947) Nag. 649=A.I.R. 1948 Nag. 155.

——S. 68—Attestation—Presumption.

Where a deed is attested by more than two witnesses and one of the attesting witnesses proves its due execution and attestation and on his evidence, it is marked as an exhibit without objection, from the mere fact that another attesting witness who is subsequently examined does not formally prove attestation, it cannot be presumed that he did not, in fact, attest the deed. A.I.R. 1939 Pat. 555=5 B.R. 613=181 Ind. Cas. 572.

(c) Proof.

——S. 68—Attestation—Proof of.

Where a document is attested by marginal witnesses at least one of them should be produced on the analogy of S. 68 of the Evidence Act even though it may not be clear whether the document was required by law to be attested or not ; when a document is in question, and has been attested by marginal witnesses, the mere statement of the scribe will not be sufficient to prove it. 1948 R.D. 306.

——S. 68—Attestation—Proof—One of attesting witnesses not speaking to attestation by other attesting witnesses.

No doubt only one attesting witness need be called if that attesting witness speaks to attestation by the other attesting witnesses. But if he does not do so, it is necessary to prove that the deed was properly attested by those other attesting witnesses. Where it is impossible to call any attesting witnesses and where all that can be proved is their handwriting, it will be presumed until the contrary is shown, that the persons who were reported to have signed were in fact attesting witnesses. A.I.R. 1941 Rang. 122= 195 Ind. Cas. 221.

——S. 68—Attestation—Proof—Document admitted without objection.

An attesting witness must either see the executant sign or he must receive from the executant an acknowledgment that the executant has signed the deed. Further, the attesting witness must sign the deed in the presence of the executant. These requisites must be established by any evidence before attestation can be said to have been proved.

A bond is not mortgage bond unless it is attested by two witnesses. Whether the mortgagor objects of not, the mortgagee, in order to succeed, must establish that there was a mortgage bond by producing the bond in Court and by proving it according to law under S. 68, Evidence Act. The mere fact that the document was admitted in evidence without objection does not absolve the mortgagee from establishing that there was a valid mortgage. A.I.R. 1938 Cal. 702=42 C.W.N. 1055=178 Ind. Cas. 992.

——S. 68—Attestation—Proof of.

The question as to the mode in which a mortgage or a gift can be legally effected ought not to be confounded with the question as to how the mortgage or deed of gift should be legally proved. The absence of attestation invalidates the deed. Where the executant of the document does not admit its execution the document has to be proved in accordance with the provisions of Ss. 68 and 69 of the Evidence Act which relates to the mode of proof. 1930 A.L.J. 623=125 Ind. Cas. 507=A.I.R. 1930 All. 669.

——S. 68—Attestation—Proof.

One of three attesting witnesses called but resiling—Document can be proved by other evidence. 116 Ind. Cas. 726=49 C.L.J. 16=33 C.W.N. 248=A.I.R. 1929 Cal. 188.

——S. 68—Attestation—Proof.

Attesting witness not remembering at distance of time place of execution or order of attestation is no reason for disablehaving hisevidence which is formally sufficient to prove execution and attestation. 119 Ind. Cas. 405=3 Pat. 450=10 P.L.T. 379=A.I.R. 1929 Pat. 422.

——S. 68—Attestation—Proof.

Suit on mortgage—Execution of mortgage admitted but attestation denied—Plaintiff not examining any attesting witness (one being dead, the other's whereabouts not known)—Mortgage was held not proved. 109 Ind. Cas. 576=A.I.R. 1928 Nag. 244.

——S. 68—Attestation—Proof.

The production of one attesting witness satisfies the requirements of S. 68 of the Evidence Act and from a mere failure to do more than is required of the mortgagee and to produce both the witnesses even if he knows where the other is, it cannot be inferred that the mortgagee is intentionally keeping back the other and that therefore his evidence would damage the plaintiff's case. 76 Ind. Cas. 772=A.I.R. 1923 Nag. 322.

——S. 68—Attestation—Proof.

T. P. Act, S. 59—Mortgage—Attestation—Witness denying seeing executant sign—Witness found to be false—Attestation was held proved. 76 Ind. Cas. 522=1 Rang. 121=A.I.R. 1923 Rang. 254.

——S. 68—Attestation—Proof.

S. 68 of the Evidence Act does not in any way affect the requirements of S. 59, T. P. Act.

There may be cases where all the attesting witnesses are dead, when the requirements of the law would be satisfied by any evidence which would show that the document was executed in the presence of two attesting witnesses. 71 Ind. Cas. 390=14 M.L.W. 563=A.I.R. 1921 Mad. 701.

——S. 68—Attestation—Proof.

All that Ss. 68 and 69 do is to impose a particular mode of proof and to require that certain documents shall be proved in a particular way and in no other way, that is to say, if one attesting witness is alive execution and attestation cannot be proved by other witnesses without calling the attesting witness, and if no attesting witness is available then similarly S. 69 says that execution and attestation cannot be proved by other evidence unless the handwriting of at least one attesting witness is proved. 69 Ind. Cas. 284=14 M.L.W. 344=1921 M.W.N. 747=A.I.R. 1912 Mad. 472=41 M.L.J. 305.

——S. 68—Attestation—Proof.

Execution of mortgage-deed must be proved at least by one attesting witness. 65 Ind. Cas. 64=4 U.B.R. 78=A.I.R. 1921 U.B. 1.

——Ss. 68 and 69—Attestation—Proof of.

It is not necessary that two attesting witnesses should be called when two are alive nor that even assuming that only one need be called he should at least be made to prove that another attesting witness besides himself saw the execution. 39 M.L.J. 463=(1920) M.W.N. 512=28 M.L.T. 213=58 Ind. Cas. 801=60 Ind. Cas. 554.

——Ss. 68 and 90—Attestation—Proof of.

Mere proof or admission of the genuineness of the signature of the executant of a document does not dispense with the proof of its proper attestation if the document is one required by law to be attested. The facts that a document is more than thirty years old and is registered and the genuineness of the signature of its executant on it, is admitted, may go to raise a presumption as to the genuineness. But such a presumption does not exclude the right, of the person against whom the document is set up to rebut that presumption by showing that it was not properly attested and was, therefore inoperative. 7 O.L.J. 22=55 Ind. Cas. 501.

——S. 68—Attestation—Proof of.

The fate of a document is not necessarily at the mercy of attestors and the Court can hold attestation proved though the attestors repudiate their signature or say they attested in the absence of the executant. 5 O.L.J. 667=48 Ind. Cas. 538.

——Ss. 68 and 70—Attestation—Proof of—Admission by executant—Proof as against third parties.

Admission of execution of an attested document by the executant or by a person representing his interest is sufficient proof of its execution against the person making such admission. As against the other parties the document must be proved in accordance with S. 68 of the Evidence Act. 22 C.W.N. 444=44 Ind. Cas. 984.

——Ss. 68 and 71—Attestation—Proof of.

If a mortgagor does not execute the mortgage deed in the presence of attesting witnesses, proper attestation as required by S. 59 of the T. P. Act cannot be presumed. In such a case the evidence of some other person cannot prove the due attestation required by law under S. 71 Evidence Act. 3 O.L.J. 164=34 Ind. Cas. 397.

——S. 69—Attestation—Proof.

Deposition of a witness that one of the executants had himself written the document and the two executants had signed, the names of the two attesting witnesses were written with their permission by the executant who had written the document, is sufficient to prove that the document had been duly executed and attested where the attesting witnesses are dead or deny or are illiterate and do not remember the attestation. 11 A.L.J. 400=19 Ind. Cas. 789.

—S. 68—Attestation, proof—Mortgage—Attesting witnesses.

To prove due execution of a mortgage it is sufficient if one of the attesting witnesses proves its execution as also attestation by himself and some of the other attesting witnesses who are dead. S. 68 of the Evidence Act does not make it necessary to call two attesting witnesses to prove execution. 18 C.L.J. 43=16 Ind Cas. 379.

——S. 69—Attestation—Proof.

Where the executants of a document are marksmen and the attesting witnesses are dead, presumptive or other evidence of execution is not admissible if the provisions of the section for proving the attestation of one witness and the signature of the executant are not complied with. A deed with marks of executants and signature of attestor is not proved by merely identifying the handwriting of the latter. 35 All. 364=11 A.L.J. 379=19 Ind. Cas. 121.

(d) Scribe.

——S. 68—Attestation—Scribe—Signature of scribe—When can be regarded as attestation.

The signature of a scribe may itself in certain circumstances be regarded as an attestation which stands duly proved by his evidence. The decision in 41 Mad. 535, stands unaffected by the decision of the Judicial Committee in A. I. R. 1925 P. C. 89. It is a question in each case which turns upon its own circumstances whether a scribe can or cannot be regarded as an attesting witness. A scribe may be an attesting witness as well as the writer. But the fact that he signed as an attesting witness must be duly proved. 63 M.L.W. 1004=(1950) 2 M.L.J. 262.

——S. 68—Attestation—Scribe.

An attesting witness is one who signs as a witness and does not cover a mere scribe. A.I.R. 1942 Bom 291=44 Bom. L.R. 643=204 Ind. Cas. 275.

——S. 68—Attestation—Scribe.

Where the only available attesting witness to a mortgage denies his attestation when examined under S. 68 (before it was amended by Act 31 of 1926), the deed may be proved by calling its writer under S. 71 to depose to the execution of the deed by the mortgagor and to its attestation by the two witnesses. 105 Ind. Cas. 769=29 Bom. L.R. 1425=A.I.R. 1927 Bom. 655.

——S. 68—Attestation—Scribe.

Where one of the witnesses to a mortgage deed is dead and the other witness, when the document is read over to him, is unable to say whether that was or was not the document which he attested, it is open to the plaintiff to prove execution of the deed by a person who was present at the time of the execution and for that purpose he can examine the scribe. 90 Ind. Cas. 630=A.I.R. 1926 Cal. 318.

——S. 68—Attestation—Scribe.

Ordinarily a scribe or writer of the document is not intended to be and is not an attesting witness. And attesting witness is one who has seen the deed executed

and signs it as a witness. 44 Bom. 405=22 Bom.L.R. 136=55 Ind. Cas. 616.

——S. 68—Attestation—Scribe.

The evidence of the scribe of a mortgage deed who signed the deed in the usual way without attesting it as a witness, is not sufficient to prove the deed. An attesting witness is a witness who has seen the deed executed and has signed it as a witness. 35 All. 254=11 A.L.J. 260=19 Ind. Cas. 451.

——S. 68—Attestation—Scribe.

The scribe cannot be an attesting witness, though he was present at the time of execution. Admission of execution by party to document is admissible to prove the execution of the document by himself. 14 C.W.N. 1046=7 Ind. Cas. 735.

——S. 68—Attestation—Scribe—T. P. Act, S. 59

A writer of a document who signs his name at the end of the body but above the executant's signature is not an attesting witness within the meaning of S. 68 of the Evidence Act. 5 N.L.R. 3=1 Ind. Cas. 179.

——S. 68—Attestation—Scribe—Transfer of property.

A person who is present and witnesses the execution of a deed, and whose name appears on the document though he is therein described merely as the writer of the deed, is a competent witness to prove the exeeution of the deed. He need not be described in the deed as an attesting witness. 5 C.W.N. 454.

(e) Validity of.

——Ss. 68 and 71—Attestation—Validity of—When does not arise.

Ss. 68 and 71 of the Evidence Act deal with the manner in which execution may be proved by witnesses and have no bearing on the question whether the attestation was according to law. If a document on the face of it purports to have been attested by attesting witnesses, and it is not denied that they were attesting witnesses, the question of valid attestation does not arise or if it be considered to arise, the maxim "Omnia Praesumuntur rite esse acta" comes in. 13 N.L.R. 121=42 Ind. Cas. 299.

6. Attestator alive but unable to testify.

——S. 68—Attestor alive but unable to testify.

S. 68 requires at least one attesting witness to be called to prove the execution of a document even though he may not be able to prove the document or may have forgotten everything about it or may deny its execution atogether. In order to prove a document to have been signed by a witness or to have been in his handwriting, it should be shown to him and he should be questioned directly upon that point. A marksman is an attesting witness within the meaning of S. 59 of the Transfer of Property Act and S. 68 of the Evidence Aet. 12 A.L.J. 1114=26 Ind. Cas. 84.

7. Attestor denying execution.

——Ss. 67 and 71—Attestor denying execution.

A document can be proved by other evidence if the only living attesting witness who is illiterate, denies its execution. 26 Ind. Cas. 500 (All.).

——S. 68—Attestor not admitting his co-attestor to have signed the deed.

It is enough if one attesting witness proves execution and attestation, after seeing executant sign, though he does not say whether he saw the other attesting witnesses sign it. 4 O.L.J. 65=39 Ind. Cas. 274.

8. Bonds.

——S. 68—Bonds.

A bond is not required by law to be attested and as such S. 68 of the Evidence Act would not be applicable to it. The fact that it is attested would not affect the question. 1948 O.W.N. 85=A.I.R. 1948 Oudh 258=1948 A.W.R. (C.C.) 77.

——Ss. 68, 72—'Bond' does not require attestation—S. 72, and not S. 68 applies.

The definition of 'bond' in S. 2 (5), Stamp Act, is not exhaustive, nor is it proper to infer from this definition of 'bond' which deals with stamp matters only, that it is required by law to be attested. A bond as such, is not an instrument required by law to be attested Therefore, it is S. 72 of the Evidence Act which applies in the case of bond and not S. 68. A.I.R. 1940 Nag. 240=1940 N.L.J. 70=188 Ind. Cas. 638.

9. Certified copy.

——S. 68—Certified copy of registered deed.

Where, when a certified copy of a registered deed of gift is produced, a party challenging the deed does not specifically deny that it is the copy of the deed, in such a case, under Proviso to S. 68, Evidence Act, the production of an attesting witness is not essential. A.I.R. 1939 Lah. 414=187 Ind. Cas. 865.

——S. 68—Certified copy—Deed.

Presumption as to genuineness from certified copies cannot be made in absence of evidence of execution; nor can registration endorsement prove execution. A.I.R. 1936 All. 422.

——S. 68—Certified copy.

A certified copy is sufficient secondary evidence under S. 63 of the existence, conditions and contents of the deed but not of its execution, which must be proved as required under S. 68. 82 Ind. Cas. 306=5 L.R.A. Civ. 686=A.I.R. 1925 All. 56.

10. Death of attesting witnesses.

——S. 68—Death of attesting witnesses.

Executant of document denying execution—Attesting witnesses either dead, or hostile or not available—Signatures of attesting witnesses proved—there is nothing to prevent Court from holding execution proved. A.I.R. 1930 Mad. 770=125 Ind. Cas. 231.

——S. 68—Death of attesting witnesses.

Mortgagor, scribe and attesting witnesses dead—In view of amended definition of attestion and varied mode of proving attested document as amended by S. 68 proof of probability of execution is sufficient. 120 Ind. Cas. 91=A.I.R. 1929 Sind 235.

——S. 68—Death of attesting witnesses.

Where all the attesting witnesses to a mortgage deed are dead and the signature of one of the attesting witnesses is proved to be in the handwriting of the witness and the signature of the mortgagor is proved to be his, the mortgage deed is sufficiently proved in the absence of contrary evidence. 39 All. 241=15 A.L.J. 164=38 Ind. Cas. 694.

——Ss. 68 and 69—Death of attesting witnesses.

When the attestation of the witnesses is proved to be in their handwriting in cases the attesting witnesses are dead, and the signature of the executant of the mortgage deed is in his handwriting, a presumption of the due execution of the deed arises, which the other side must rebut. 39 All. 112=15 A.L.J. 167=38 Ind. Cas. 651.

——S. 68—Death of attesting witnesses.

The attesting witnesses of a mortgage deed were dead. It was proved that the mortgagor had executed it and that it had been returned to him when a sale deed was executed. But he failed to produce it though called upon. In the above circumstances the execution of the mortgage deed was established in view of S. 89 irrespective of the provisions of S. 58. 4 O.L.J. 365=41 Ind. Cas. 171.

11. Denial of execution.

——S. 68—Denial of execution—Attestation not specifically challenged—One attesting witness speaking to attestation by himself—Another in presence of executant.

Where only the execution of a mortgage is denied, but its attestation is not specifically challenged, it is sufficient if one of the attestors is called and he proves that the document was attested by himself and the other witness and that the mortgagor was present when they both attested the deed. That is enough to prove the attestation under S. 68, Evidence Act; when the witness is not cross-examined regarding the details of the attestation, it is not necessary for him to set forth each of the details of attestation as required by S. 3, T. P. Act. The law will assume that when the witness swears that the deed was attested he means "attested according to the forms required by law." If the other side wants to challenge that statement, it is their duty, quite apart from raising it in their pleadings, to cross-examine the witness along those lines. When that is not done the plaintiff relying on the deed is entitled to assume that the mode of attestation is not being attacked and therefore it is enough for their witness merely to formally prove attestation. I.L.R. (1950) Nag. 321=1950 N.L.J. 197=A.I.R. 1950 Nag. 83.

——S. 68, proviso—Denial of execution by executant—If necessary.

The words "specifically denied" in the proviso to S. 68, Evidence Act, mean specifically denied by the party against whom the document is sought to be used and not only by the executant thereof. It is not correct to hold that it is only when the executant of a document required to be attested specifically denies the attestation thereof that it becomes necessary to prove the document was duly attested. Hence the calling of an attesting witness cannot be dispensed with unless its execution is admitted by the defendant in the suit. The denial is to come from the party who is entitled to dispute or is interested in disputing its execution. I.L.R. (1948) Nag. 621=A.I.R. 1949 Nag.149=1949 N.L.J. 340.

——S. 68—Denial of execution.

Where there is a denial of execution of a registered lease, and a marginal witness, though he did not know the language in which the executant had signed it, proves due execution, it will be sufficient proof of execution. 1948 R.D. 53.

——S. 68—Denial of execution.

In a suit on a mortgage, where one of the mortgagors denies execution of the mortgage-deed, it is incumbent on the plaintiff to call at least one of the attesting witnesses to prove execution if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. Allegation that mortgagee was a sharer and nominal transaction entered into in order to defeat the creditors does not amount to a denial of execution. A.I.R. 1944 Mad. 121=(1944) 1 M.L.J. 28=57 M.L.W. 7=1944 M.W.N. 33=212 Ind. Cas. 379 (F.B.).

——Ss. 68, Proviso 70—Denial of execution.

The admission of execution contemplated by S. 70, Evidence Act and the failure to make a specific denial of execution contemplated by the proviso to S. 68, relate only to the person who has actually executed or purported to have executed the document; that is to say, the person who is in a position to admit or deny execution; and it is manifestly implicit that such person must be a party to the suit. Hence, an admission of execution of a document by a defendant who was not a party to the document cannot obviate the necessity of complying with S. 68, so far as the other defendants are concerned. A.I.R. 1944 Sind 61= I.L.R. (1943) Kar. 420=212 Ind. Cas. 561.

——S. 68—Denial of execution.

The words "specifically denied" used in the proviso to S. 68, Evidence Act, mean that the denial in question should relate to the specific document which is sought to be denied and that the denial should be unqualified so as to leave no doubt that the execution of the particular document is denied by the person against whom it is sought to be used. It is not necessary that the denial to be called a specific denial must be a denial as regards its proper attestation, that is, a denial of the validity thereof on the ground that it was not properly attested. A.I.R. 1944 Oudh 99=209 Ind. Cas. 622.

——S. 68—Denial of execution.

The words "specifically denied" in the Proviso to S. 68 of the Evidence Act mean specifically denied by the party against whom the document is sought to be used. The proviso is not intended to restrict the specific denial to the person by whom the document purports to have been executed. Hence, where the party against whom the document is sought to be used denies its execution, it is necessary to call an attesting witness even if the executant has not come forward to deny the execution.

An admission of execution by the executant is binding on the executant's successor-in-interest when the latter founds his title to the property in suit upon a document which contains such admission. A.I.R. 1943 Oudh 416=19 Luck. 365=1943 O.W.N. 382= 211 Ind. Cas. 18.

——Ss. 68. Proviso and 70—Denial of execution.

The words "specifically denied" used in the Proviso to S. 68, Evidence Act, do not mean more than this that the denial in question should relate to the specific document which is sought to be denied and that the denial should have no room for doubt that the particular document is denied by the person against whom it is sought to be used. The proviso does not lay down that the denial should be contained in the written or oral pleadings.

In a mortgage suit, the plaintiffs had given details of the mortgage but the defendants in their written statement simply replied "not known". In additional pleas, they alleged that even if the execution of the mortgage deed were proved the suit was liable to be dismissed as certain heirs of the mortgagor were not made parties. On the date of issue, however, the execution of the mortgage was definitely denied:

Held, that there was "specific denial" within the meaning of the proviso to S. 68. A.I.R. 1943 Oudh 218=19 Luck. 183=1943 O.W.N. 105=207 Ind. Cas. 72.

——S. 68, Proviso—Denial of execution.

The word "execution" as used in the Proviso to S. 68 of the Evidence Act in the case of a mortgage bond means and includes not only the signature of the executant but the whole series of facts or formalities which are necessary to give the document validity as a mortgage. Consequently, the denial of execution includes the denial of attestation also. 1941 Oudh 89= 1940 O.W.N. 1077=1940 A.W.R.(C.C.) 446=191 Ind. Cas. 215.

——S. 68—Denial of execution.

Where the defendant in a suit on a mortgage, denies in his written statement, the execution of the document and states that it was not genuine, the execution is "specifically denied" within the meaning of the proviso to S. 68, Evidence Act and it is, therefore, incumbent on the plaintiff to produce at least one attesting witness. A.I.R. 1941 Oudh 89=1940 O.W.N. 1077=1940 A.W.R.(C.C.) 446=191 Ind. Cas. 215.

——S. 68—Denial of execution—Defendant not admitting execution—His pleader contesting execution and attestation—Execution, held specifically denied.

The defendant, in a mortgage suit pleaded in his written statement that he did not admit the execution

of the mortgage deed, and at the trial, the Pleader who appeared for him " hotly contended that the execution and due attestation of the mortgage bond in a suit was not proved against his client ;"

Held, that in these circumstances the execution of the mortgage deed must be held to be specifically denied by the defendant within the meaning of Proviso to S. 68, Evidence Act. A.I.R. 1939 P. C. 117=1939 O.W.N. 1939 450=1939 A.W.R. 69=M.W.N. 867=41 Bom.L.R. 1047=5 B.R. 592=43 C.W.N. 669=50 M.L.W. 58=(1939) 2 M.L.J. 762=I.L.R. (1939) Kar. (P.C.) 224 (Sup.)=1939 A.L.J. 492=20 P.L.T. 565=41 P.L.R. 598=181 Ind. Cas. 216 (P.C.).

——S 68—Denial of execution.

Where attestation according to law was clearly denied, but the signing of the document required to be attested was not so denied, it was held that it was necessary to call at least one of the attesting witnesses to prove execution. 62 C.L.J. 25=40 C.W.N. 151.

——Ss. 68, 71—Denial of execution—Mortgage-deed—Execution and attestation denied—Execution, how to be proved.

If the execution or attestation of a mortgage-deed is denied, under S. 68, Evidence Act, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness left and subject to the process of Court and capable of giving evidence. The necessary conditions for a witness attesting the deed are : (1) that he has seen the executant sign or affix his mark to the instrument or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, and (2) that he has signed the instrument in the presence of the executant. If these two conditions are fulfilled by a witness, there can be no doubt about his being an attesting witness. A.I.R. 1936 All. 712=1936 A.W.R. 887=1936 A.L.J. 1262=165 Ind. Cas. 498.

——S. 68, Proviso—Denial of execution by alleged executant—Marginal witnesses.

If any of the defendants to a suit denies that any of the alleged executants executed the bond, the plaintiff must produce one of the marginal witnesses to prove the document.

Where it was proved that the defendants executed a simple bond and it also appeared that payment of any consideration money beyond a sum of Rs. 50 was not established :

Held, that the defendants were not precluded from urging that no consideration passed. A.I.R. 1932 All. 320=1932 A.L.J. 207=140 Ind. Cas. 115.

——S. 68—Denial of execution.

Mere fact that mortgagor does not admit genuineness of mortgage is not sufficient to put mortgagee to proof of attestation. 119 Ind. Cas. 405=8 Pat. 450=10 P.L.T. 379=A.I.R. 1929 Pat. 422.

12. Executant himself scribe.

——Ss. 68, 69, 70—Executant himself scribe—Not competent to testify as attesting witness.

Admission of execution is of no avail if attesting witness is alive. 14 C.W.N. 1046=7 Ind. Cas. 735.

13. Execution.

——Ss. 68, 71—" Execution ", meaning of—Attesting witness turning hostile—Mortgagee can give evidence to prove attestation by others.

S. 71, Evidence Act, is one of the exceptions to the rule relating to proof of documents, required by law to be attested, which is laid down in S. 68, Evidence Act. The rule in S. 68 is stringent and it cannot be relaxed except under circumstances provided for in the Act itself. One of such exceptional circumstances is to be found in S. 71.

The same meaning must be given to the word ' execution ' in S. 71 as in S. 68, Evidence Act. In the case of a document which is not valid without attestation, execution not only means signing by the executant but it means and includes attestation as well. Hence it would be necessary to call an attesting witness under S. 68 not merely to prove the signature of the executant but to prove attestation as well and if such witness turns hostile, he is entitled to prove attestation of the instrument by other evidence. This other evidence would include his evidence also even though he is not the grantor of the instrument. A.I.R. 1940 Cal. 189 =I.L.R. (1939) 2 Cal. 479=43 C.W.N. 1084=187 Ind. Cas. 718.

——S. 68—Execution—Express denial of attestation.

The word ' execution ' as used in the proviso to S. 68, Evidence Act, in the case of a mortgage bond which under the law requires attestation, means and includes not only the signature of the executant but the whole series of acts or formalities which are necessary to give the document validity as a mortgage. This includes attestation, and where attestation is expressly denied the mortgagee is not exonerated from the duty of complying with the provision of S. 68, by calling an attesting witness. A.I.R. 1939 Cal. 688=69 C.L.J. 454=43 C.W.N. 1025=187 Ind. Cas. 644.

——S. 68—Execution—Meaning.

Word " execution " not only means signing by executant but also the attestation of his signature by the witnesses as required by S. 59, T.P. Act. I.L.R. (1937) 1 Cal. 507=41 C.W.N. 306.

——S. 68—" Execution "—Proof of attestation—Necessity—Production of both attesting witnesses—Necessity.

The word ' execution ' used in S. 68 of the Evidence Act includes attestation as required by law and in the case of documents, required by law to be attested, not only the signature has to be proved but it has also to be proved that the document was duly attested. It is not necessary to produce both the attesting witnesses. But it is certainly essential to produce some evidence to show that there was such a second attesting witness also. 1948 R.D. 211 (2)=1948 A.W.R. (Rev.) 132.

——S. 68—Execution—No admission.

Where a mortgagee sues to enforce his mortgage and the execution and attestation of the deed are not admitted, the mortgagee need prove only this much that the mortgagor signed the document in the presence of an attesting witness and one man attested the document, provided the document, on the face of it, bears the attestation of more than one person. But if the validity of the mortgage be specifically denied, then it must be proved by the mortgagee that the mortgage-deed was attested at least by two witnesses. A.I.R. 1932 All. 527=1932 A.L.J. 653=54 All. 1051=139 Ind. Cas. 1 (F.B.).

——S. 68, Proviso—Execution—No specific denial of—Formal proof—Not essential.

Where there is no specific denial of the execution of a registered Kabuliyat, it is unnecessary to prove the document formally according to the proviso to S. 68 of the Evidence Act. 1949 R.D. 193.

——S. 68—' Execution '—Meaning—No denial of execution—Necessity to call attesting witness.

The word " execution " in S. 68 of the Evidence Act includes attestation as required by law. Where the document is registered and its attestation not denied, it is not necessary to call an attesting witness. 224 Ind. Cas. 125=1945 A.W.R. (H.C.) 398=1945 A.L.J. 537 (2)=A.I.R. 1946 All. 178.

——S. 68—Execution—No denial of execution of deed—Execution and attestation, if can be proved by other evidence.

Where execution of a document is not denied its execution and attestation can be proved by other evidence, and it is unnecessary to call any of the attesting witnesses. A.I.R. 1940 Rang. 184=190 Ind. Cas. 413.

——S. 68—Execution—Neither denial nor admission of document—Proof.

Where the execution of a document required by law to be attested is neither admitted by a party nor its execution specifically denied, the law requires the proof of the document in a less formal manner. It has to be proved but not necessarily by the examination of an attesting witness. I.L.R. (1937) 1 Cal. 507=41 C.W.N. 306.

——S. 68—Execution—No denial or admission.

It is not necessary that a marginal witness should be produced to prove the execution of a mortgage if the execution is not admitted but is not specifically denied. A.I.R. 1935 All. 781=1935 R.D. 310=1935 A.W.R. 759=1935 A.L.J. 1072=156 Ind. Cas. 45.

——S. 68—Execution—No denial—Mortgage-deed, if requires legal proof.

Where the mortgage-deed is a registered document and its execution is not denied by the executant, it cannot be said that the mortgage-deed was not legally proved and it is not necessary to call the attesting witnesses to prove it. A.I.R. 1937 Oudh 149=1936 O.W.N. 1113=1936 R.D. 533=12 Luck. 681=165 Ind. Cas. 404.

——S. 68—Execution—No denial.

It is unnecessary to prove due attestation where the validity of the deed of gift has not been specifically denied on the ground that it had not been attested in the manner required by law. A.I.R. 1934 All. 507=1934 A.L.J. 817=3 A.W.R. 302=152 Ind. Cas. 146.

— S. 68, Proviso—Execution—No denial—Proof T. P. Act, S. 59—Effect.

The meaning and effect of S. 68, Evi. Act, is that in the case of a mortgage within S. 59, T. P. Act, it is incumbent upon the party relying upon it to prove the due execution of the mortgage by adducing the evidence of at least one attesting witness in that behalf as laid down in S. 68, Evi. Act, provided that unless its due execution, that is to say, its signature by the mortgagor in the presence of two attesting witnesses is specially denied, the execution of the mortgage deed in the form required by law may be proved **aliunde** by adducing other evidence in that behalf.

The proviso to S. 68 only removes the necessity of calling an attesting witness to prove the execution of the documents therein referred to and does not purport to relieve the party of the necessity of proving a mortgage in the form prescribed under S. 59, T. P. Act. A.I.R. 1933 Rang. 6=11 Rang. 26=141 Ind. Cas. 700.

——S. 68, Proviso—Execution—No denial.

A registered deed, the execution of which is not specifically denied anywhere by the defendants can be admitted in evidence under the Proviso to S. 68, Evidence Act, without calling the attesting witness to prove its execution. A.I.R. 1933 Lah. 378=147 Ind. Cas. 847.

——S. 68—Execution—No denial of—Proof of attestation—If essential.

Where the execution of a document is not specifically denied, it is not strictly necessary for the party proving the document to call an attesting witness in proof of the execution of it. 111 Ind. Cas. 287=52 Bom. 219=30 Bom.L.R. 565=A.I.R. 1928 Bom. 267.

——S. 68—Execution—No denial—Proof of attestation—If essential.

Examination of the attesting witness is not necessary when execution is not specifically denied. 104 Ind. Cas. 622=A.I.R. 1927 Pat. 403.

——S. 68—Execution of deed by Pardhanashin lady.

A deed was executed by a Pardhanashin lady behind the **paradha** while the attesting witnesses were sitting out and they attested the deed. **Held,** though the attestors did not see the executant sign, the deed was properly attested. 14 C.W.N. 165=3 Ind. Cas. 316.

(Reversed on Appeal 45 Cal. 748=45 Ind. Cas. 1 (P.C.).)

——S. 68—Execution by Pardhanashin Lady.

Especially in the case of a pardanashin lady executing a mortgage-deed the attesting witnesses need not actually see the executant sign or make mark. If it is shown that a pardanashin lady admitted that she was the executant and the deed was taken behind the **pardha** for her signature and after it was signed by her, the signatures of the attesting witnesses who were present there were then made there is sufficient proof of attestation. 56 Ind. Cas. 247 (Nag.).

[But see 45 Cal. 748 (P.C.).]

——S. 68—Execution by Pardanashin lady.

Where the witness did not see the executant a **pardanashin** lady, but saw her signing the deed behind the pardha and where the other witnesses knew her by voice.

Held, the deed is properly attested. 60 Ind. Cas 173=3 U.P.L.R. (Pat.) 14.

——S. 68—Execution—Registration endorsement, if can be treated as sufficient proof.

The Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution but it is certainly open to the Court, to treat it as sufficient proof. A.I.R. 1940 Nag. 382=1940 N.L.J. 437=193 Ind. Cas. 41.

14. Mohamadan Law—Gift deed.

——S. 68—Muhamadan Law—Deed of gift.

A deed of gift by a Mahomedan can be admitted in evidence though it does not satisfy S. 68. 38 All. 212=14 A.L.J. 119=35 Ind. Cas. 14.

15. Note by attestor.

——S. 68—Note by attestor.

An attesting witness noted near his signature that he attested the deed at the request of the executant.

Held, that the ordinary meaning of such a note by an attesting witness would certainly be that he had not seen the executant with his own eyes execute the receipt, but had attested it at his request upon an admission by the latter of the genuineness of his signature. 80 Ind. Cas. 717=4 L.R.A. (Civ.) 458=A.I.R. 1924 All. 256.

16. Object of Ss. 68 and 69.

——Ss. 68 and 89—Object of sections.

If the provisions of the sections as to proof of document which by law has required to be attested were complied with, the document must be considered proved in the absence of evidence to the contrary. The law does not require that some witness must prove that document was signed in the presence of witnesses. 39 All. 109=14 A.L.J. 1041=38 Ind. Cas. 175.

17. Oral evidence.

——S. 68—Oral evidence.

Where an attestor denies having witnessed the execution of a document, it is open to the parties to

let in other oral evidence to show that the attestor did, as a matter of fact, see the execution and was an attesting witness. 67 Ind. Cas. 87 (Cal.).

18. Principal and collateral purpose.

——S. 68—Principal and collateral purpose.

S. 68, Evidence Act, does not intend to express that a document required by law to be attested should not be used as evidence for any purpose until one attesting witness at least had been called. S. 68 does not apply to the case of a document which is merely to be proved for the purpose of an admission. The mere fact that a document requires to be executed with attestation and that attestation must be proved for the purpose of giving legal effect to the document does not have any bearing on the question as to what proof should be given of the document where it is tendered merely to prove an admission in writing. A.I.R. 1939 All. 269=1939 A.L.J. 142=I.L.R. (1939) All. 366=1939 A.W.R. 236=181 Ind. Cas. 612.

——S. 68—Principal and collateral purposes.

No distinction should be drawn between documents which are the basis of the suit and those whose production is required for collateral purposes so far as their admissibility in evidence is in question. A.I.R. 1924 Oudh 255, Foll. 81 Ind. Cas. 189=A.I.R. 1826 Oudh 266.

——S. 68—Principal and collateral purposes.

There is no distinction between documents which are the basis of a suit and those whose production is required for a collateral purpose so far as their admissibility in evidence is in question. The direction in S. 68, Evidence Act is mandatory and draws no such distinction. 79 Ind. Cas. 725=10 O.L.J. 525=A.I R. 1924 Oudh 255.

——S. 68—Principal and collateral purposes.

S. 68 of the Evidence Act applies not only to cases where the document is attempted to be enforced to prove the legal right or relation it creates, but in a case where such document is sought to be proved for a collateral purpose.

This view is also supported by the imperative and stringent wording of S. 68 which does not permit the use of the instrument as evidence for any purpose whatsoever unless and until it is proved in strict accordance with the provisions of the section. The rigour of the English Law on which the present section is founded has been to a certain extent lessened by the proviso as contained in S. 70 of the Evidence Act. The enactment of this proviso clearly indicates that the Indian Legislature intended to provide only one exception to this inflexible rule and no other. 68 Ind. Cas. 86=27 C.W.N. 134=35 C.L.J. 473=A.I.R. 1922 Cal. 160.

——S. 68—Principal and collateral purpose.

When the provisions of S. 68 Evidence Act are not complied with, a document cannot be used as evidence at all as a document either requiring attestation or in fact attested; but this does not prevent it from being used in evidence as something else or for any other purpose. S. 68 is subject to the limitation, *viz.*, that if the document were tendered in some other proceeding for the purpose of proving the handwriting of the scribe, it could not be objected to upon the ground that no attesting witness being called to prove it, it could not be used in evidence at all. The word "called", in S. 68 means tendered for the purpose of giving evidence. 16 A.L.J. 121=44 Ind. Cas. 596.

19. Provisions are mandatory.

——S. 68—Provisions are mandatory.

S. 68 of the Evidence Act has to be read as mandatory and is certainly not permissive or enabling. It lays down the necessary requirements which the Court has to observe in order that a document can be held to be proved. It cannot be said that the only mandatory provision of the section is that one attesting witness has to be called and that once that is done, any lacuna in the evidence can be filled up by calling witness other than the attesting witnesses. Such a construction is untenable. The whole principle underlying S. 68 is that execution of the will must be proved by at least one attesting witness that it is only an attesting witness who is entitled to prove the execution of a document, such as, a will. It is a concession that the Legislature has made, and if that concession does not result in complying with the mandatory requirements of S.68, then the only proper method is to call the other attesting witness so that both the attesting witnesses are before the Court, and the due execution of the will (or other document) is proved by the two attesting witnesses, which requirements are necessary before a will can become a valid document. 51 Bom. LR. 246=A.I.R. 1949 Bom. 266.

——S. 68—Provisions are mandatory.

S. 68 of Evidence Act, is mandatory.

The words "Indian Registration Act, 1908" used in the proviso to S. 68, Evidence Act, are not confined to the provisions of that particular Registration Act but also previous Registration Act. A.I.R. 1939 Pat. 47=5 B.R. 65=178 Ind. Cas. 198.

——S. 68—Provisions are mandatory.

The provisions of S. 68, Evi. Act. are mandatory. A.I.R. 1932 Mad. 148=34 M.L.W. 663=135 Ind. Cas. 532.

——S. 68—Provisions are mandatory.

Where no attempt is made to prove a mortgage-deed either by calling in an attesting witness or even by putting any question to the scribe of the deed, who was examined as a witness, regarding the attesting witnesses or attestation, the document cannot be used as evidence. 115 Ind. Cas. 450=1929 A.L.J. 588=A.I.R. 1929 All. 389.

——S. 68—Provisions mandatory.

The provisions of S. 68 are mandatory and they are not controlled by S. 90.

The mere fact that the only surviving attesting witness is considered hostile by the party does not relieve him from the duty of examining him as a witness. Nor is it enough that summonses and warrants had been issued upon the witness and the witness had failed to appear, but the processes of the Court such as are mentioned in O. 16, R. 10, C. P. Code, have all got to be exhausted. 98 Ind. Cas. 147=31 C.W.N. 215=A.I.R. 1927 Cal. 102.

——S. 68—Provisions are mandatory.

Failure to call as witnesses, any of the persons who had attested mortgage-deed where it was not shown that they had died or were not subject to the process of the Court or were incapable of giving evidence, was held to be fatal. 82 Ind. Cas. 306=5 L.R.A. Civ. 686=A.I.R. 1925 All. 56.

——S. 68—Provisions are mandatory.

Provisions are imperative—Likelihood of witness proving hostile is no ground for not examining him. 63 Ind. Cas. 266=2 P.L.T. 614.

——S. 68—Provisions are mandatory.

So long as there is a witness and subject to the process of the Court, no document which is required by law to be attested shall be used in evidence until one such witness has been called. The fact that when called, he will prove hostile, does not absolve the plaintiff from doing his duty. The section is imperative. 1 Pat. L.J. 369=2 Pat. L.W. 353=38 Ind. Cas. 604.

20. Retrospective effect of 1926 Amendment.

——S. 68—Retrospective effect.

The Proviso added to S. 68, Evidence Act, by Act XXXI of 1926 is retrospective in its operation. A.I.R. 1933 Mad. 432=37 M.L.W. 677=1933 M.W.N. 141 (2)=147 Ind. Cas. 464.

——S. 68—Retrospective effect.

Amendment added by Act XXXI of 1926 is retrospective. 121 Ind. Cas. 858=30 M.L.W. 677=A.I.R. 1929 Mad. 881=57 M.L.J. 588.

21. Sale deed.

——S. 68—Sale deed—Attesting witnesses need not be examined.

It is not necessary under S. 68 to examine the attesting witnesses as a sale deed is not a document which requires attestation. 10 Ind. Cas. 64 (Oudh).

22. Scope.

——S. 68—Scope.

S. 68 has nothing to do with the question about the legality or validity of the instrument itself as an effective document of title if there has been no proper attestation as required by law. A.I.R. 1930 All. 669=1930 A.L.J. 623=125 Ind. Cas. 507.

——S. 68—Scope.

The question of the validity of a mortgage bond is distinct from that of the necessity of proving it by an attesting witness. 66 Ind. Cas. 906=34 C.L.J. 498=26 C.W.N. 951=A.I.R. 1921 Cal. 276.

23. Will.

——S. 68—Will—Proof.

S. 68, Evidence Act, makes an important concession to those who wish to prove and establish a will in a Court of law. Although S. 63 of the Succession Act requires that a will has to be attested by two witnesses, S. 68 of the Evidence Act permits the execution of the will to be proved by only one attesting witness to be called. But it is important to note that at least one attesting witness should be in a position to prove the execution not the will. If that attesting witness can prove the execution of the will, the law dispenses with the evidence of the other attesting witness. But if that attesting witness cannot prove the execution of the will, then his evidence has to be supplemented by the other attesting witness being called to prove the execution. But the execution of the will, as required by S. 63, Succession Act, does not merely mean the signing of it by the executant (testator or testatrix) or putting his or her thumb-mark on the document, it means all the formalities required and laid down by S. 63, Succession Act; if the one attesting witness who is called does not therefore prove the attestation of the will by the other attesting witness, his evidence would fall short of the requirements of S. 68, Evidence Act. 47 Bom. L. R. 709, foll. 51 Bom. L. R. 245=A.I.R. 1949 Bom. 266.

——S. 68—Will—Proof.

Where a will is attested by two witnesses not in the presence of each other but at different times, upon the acknowledgment by the testator of his signature, the will can only be admitted to proof on the evidence of both the attesting witnesses and not of only one of them. [Scope and applicability of S. 68, Evidence Act, discussed.] I.L.R. (1946) Bom. 295=A.I.R. 1946 Bom. 12=47 Bom. L.R. 709=222 Ind. Cas. 450.

——S. 68—Will.

The will of an Indian Christian being governed by the Succession Act, is a document required by law to be attested and if there is at least one witness alive subject to the process of the Court and capable of giving evidence, it cannot be used as evidence until he has been called to prove its execution. If an attesting witness is available, the fact that when called he will prove hostile does not excuse the party producing the document from the duty of calling him A.I.R. 1932 Mad. 148=34 M.L.W. 663=135 Ind. Cas. 532.

——S. 68—Will—Proof.

Although where an instrument requiring attestation is subscribed by several witnesses, it is in general sufficient to call only one of them (Evidence Act, S. 68) in the case of Wills, it is desirable that all capable of being called should be exmined to remove all suspicion of fraud. 59 Ind. Cas. 814=33 C.L.J. 34=A.I.R. 1921 Cal. 677.

24. Miscellaneous.

——S. 68—Miscellaneous — Documents required to be attested—Proof of.

Under S. 68 of the Evidence Act, it is not necessary that an attesting witness should prove execution of a deed. It is sufficient that he is called and if he does not recollect or denies the execution, the document can be proved by other evidence. A. I. R. 1942 Oudh 201=1941 O.W.N. 1298=1941 A.W.R. (Rev.) 1109=197 Ind. Cas. 686.

——S. 68—Miscellaneous.

The *patwari* was an attesting witness to the sale-deed and admittedly helped the parties, that is, the vendors and the vendees to execute the sale deed on fraudulent consideration:

Held, that being a party to a fraudulent transaction, he could not be considered a very satisfactory witness to prove that the price entered in the sale-deed was incorrect. A.I.R. 1938 All. 204=1938 A.L.J. 128=1938 A.W.R. 60=175 Ind. Cas. 140.

——S. 68—Miscellaneous.

Although it is not incumbent on the plaintiff to examine an attesting witness he can prove it by other evidence. In the absence of evidence in proof of attestation, the document cannot be said to be proved to have been duly attested. A.I.R. 1936 All. 169=1936 A.W.R. 57=1936 A.L.J. 297=160 Ind. Cas. 73.

——S. 68—Proviso — Miscellaneous — Whether overrides general provisions of law.

S. 68, Evidence Act, merely provides a special rule

relating to the proof of documents required to be attested. The new proviso is merely an exception to that special rule. It is not intended to override the general provisions of the law as to proof of documents relied upon by the parties. A.I.R. 1934 Lah. 282=149 Ind. Cas. 1109 (1).

——Ss. 68 and 69—Miscellaneous — Proof of attested documents — Amendment to S. 68—Omission to examine attestor—Death of attestor before appeal.

Where, in a suit upon a mortgage bond, it appeared that one of the attesting witnesses was alive and was not examined in the trial Court to prove the execution of the bond, but it was found that the plaintiff was not to blame as he had taken sufficient steps to examine him and before the case was heard on appeal, the witness died:

Held, that whether under the amendment to S. 68 or under S. 69, Evidence Act, it was open to the plaintiff to prove the document by other means and therefore, his own evidence was sufficient to prove the document.

Quaere.—Whether and if so, how far, the amendment to S. 68, Evidence Act, is retrospective. A.I.R. 1933 Mad. 612=144 Ind. Cas. 89.

——S. 68—Miscellaneous.

The enquiry for an attesting witness must be strict, diligent, honest and satisfactory. It should be made at the residence of the witness and of the relative who may have information. Where, an attesting witness is out of the jurisdiction of the Court, however, the document can be proved by other evidence. 61 Ind. Cas. 637=13 Bur.L.T. 114.

——S. 68—Miscellaneous.

A document creating charge on immoveable property and attested by two witnesses can be proved under S. 68 of the Evidence Act by one attesting witness only, if alive; but the proof can be rebutted by an opponent if he succeeded in proving that the other, though dead, did not really see its execution. S. 59 of the T. P. Act dealing with the validity of a document cannot be interpreted to provide the mode of proof of execution in derogation of the requirements of the Evidence Act. An appellate Court must call for clearer proof of attestation of a document if required as per discretion left to it under S. 58 proviso of Evidence Act and R. 5 of O. 8, of the C. P. Code; and should not decide without such proof that the document has not been proved when the plaintiff does not examinne all the attesting witnesses. (1910) M.W.N. 512=28 M.L.T. 213=39 M.L.J. 463=58 Ind. Cas. 801.

——S. 68—Miscellaneous—Document attested by three witnesses—Proof by one witness—Sufficiency.

Where a mortgage deed, which ought to be attested by two witnesses, was attested by three, proof by one of such witnesses is sufficient proof of the document. 6 C.W.N. 395=29 C. 355.

——Ss. 69 and 71—Applicability.

In a case where attesting witnesses are not before the Court, S. 71, Evidence Act, has no application. In such a case, it is the duty of the plaintiff to exhaust all the processes of Court in order to compel the attendance of any of the attesting witnesses, and when the production of any such witnesses is not possible either legally or physically, the plaintiff can avail himself of provisions of S. 69, Evidence Act. A.I.R. 1939 Cal. 688=69 C.L.J. 454=43 C.W.N. 1025=187 Ind. Cas. 644.

——S. 69—Applicability — Conditions.

In order that S. 69 may be applied, mere taking out of the summons or the service of the summons upon an attesting witness or the mere taking out of warrant against him is not sufficient. It is only when the witness does not appear even after all the process under O. 16, R. 10, C. P. Code, which the Court considered to be fit and proper had been exhausted that the foundation will be laid for the application of S. 69. The party must move the Court for the processes, when the witness summoned by him has failed to obey the summons, but when the party does move the Court, but the Court refuses the process asked for, S. 69 can be invoked. A.I.R. 1945 Cal. 350=49 C.W.N. 377.

——S. 69—Applicability—Condition.

In order that the case may attract the operation of S. 69, it must be proved that "no such attesting witness can be found." Before a party is entitled to rely upon S. 69, he must ask the Court to exhaust all processes of the Court as laid down in paras. 2 and 3, R. 10, O. 16 and 27 C.W.N. 60, (Notes), Rel. on. 110 Ind. Cas. 756=7 Pat. 312 =A.I.R. 1928 Pat. 356.

——S. 69—"Can be found", interpretation of.

The words "can be found" are not very appropriate and must be interpreted to include not only cases where the witness cannot be produced because he cannot be traced but cases where the witness, for reasons of physical or mental disability or for other reasons, which the Court considers sufficient is no longer a competent witness for the purpose as is provided by S. 68. A.I.R. 1946 All. 178=1945 A.L.J. 537 (2)=1945 A.W.R. (H.C.) 398=224 Ind. Cas. 125.

——S. 69—Scope.

Court making presumption under S. 90—No further proof of facts is necessary. A.I.R. 1944 Cal. 241 =I.L.R. (1943) 1 Cal. 392=47 C.W.N. 359=215 Ind. Cas. 124.

——S. 69—Witness present at time of execution —Attestator's name mentioned and his signature identified—Held, mortgage was proved.

In a mortgage suit, the execution of the mortgage deed was denied by the defendants-appellants. The mortgagor, the mortgagee and all the attesting witnesses had died before the institution of the suit. The only evidence produced to prove due execution of the mortgage-deed was that of the son of the mortgagee, who stated: "I was present at the time of the execution of the mortgage-deed. R.S. and R.A. attested the deed. The scribe was A, petition-writer. R.S. (executant) signed in my presence and that of the attesting witnesses." The witness also identified the signature of the attesting witnesses; but he did not say that they had signed in his presence.

Held, that all requirements of S. 69, Evidence Act, were made out and the mortgage was proved. A.I.R. 1935 All. 527=1935 A.W.R. 542=157 Ind. Cas. 693.

——S. 69—Death of attesting witnesses.

Transfer of Property Act, S. 59—Attestors dead —Their handwriting proved—Attestor should be presumed to have seen execution. 101 Ind. Cas. 498= A.I.R. 1927 Mad. 662=53 M.L.J. 216.

——S. 69—Death of attesting witnesses.

The names of two out of the four attesting witnesses to a mortgage, were written by the scribe who also signed the document himself.

Held, that it being necessary to prove the deed of mortgage after the death of all the attesting witnesses and the scribe, it was sufficient to prove the handwriting of the scribe. 34 All. 615=10 A. L.J. 217=16 Ind. Cas. 392.

——S. 69—Document "legally proved"—Appellate Court, whether should interfere.

When a Court of First Instance comes to a finding as to a document having been "legally proved", an Appellate Court should be very slow to interfere with the finding especially when no objection has been taken to its admissibility at the time of hearing. 32 Ind. Cas. 760 (Mad.).

——S. 69—Document not enforceable as a mortgage—Collateral purpose.

A document though not enforceable as mortgage may be used for a collateral purpose unconnected with the mortgage, *viz.*, to prove the ratification of leases. 18 O.C. 168=31 Ind. Cas. 728.

——Ss. 69, 67 and 68—Proof of mortgage deed—Attesting witnesses, absence of, not accounted for—Procedure.

Proof of execution of a mortgage deed can be had only from the attesting witnesses; and until the absence of such witnesses has been satisfactorily accounted for, evidence could not be admitted to prove their signatures, and through that, the deed. 11 Ind. Cas. 225 (Oudh.).

——S. 69—Signature—Proof of.

The section requires proof of the signature of the executant. This may be proved indirectly by a contemporaneous admission of the execution made by the executant or by other relevant facts such as his subsequent conduct just as well as by the evidence of a witness who directly swears to his signature. An admission recorded by a Sub-Registrar in his registration endorsement can be accepted in evidence. 20 O.C. 18=38 Ind. Cas. 605.

——S. 70—Admission by party to executed document. See T. P. ACT, S. 59. 7 C.W.N. 384.

——S. 70—Admission of execution—If must be by party in course of trial.

The admission referred to in S. 70, Evidence Act, is not confined to an admission by a party in course of the trial of the suit in which a document is tendered in evidence.

An admission by the deceased mortgagor of the execution of the mortgage-deed, in a deed of further charge, held was sufficient proof of the mortgage-deed in a suit on the mortgage against the heirs of the deceased mortgagor and that it was not necessary for the plaintiff to tender formal proof of the attestation of the mortgage-deed. A. I.R. 1943 Oudh 218=1943 O.W.N. 105=19 Luck. 183=207 Ind. Cas. 72.

——S. 70—Admission of execution—If to be in course of trial.

S. 70 relates to admission in the course of proceedings in which the document is produced. 101 Ind. Cas. 277=8 P.L.T. 7=A. I. R. 1927 Pat. 131.

——S. 70—Admission of execution — If must be in course of trial.

The executant's admission need not have been made during the civil proceedings, but may be an admission made antecedent to the institution of legal proceedings. 77 Ind. Cas. 362=1 Rang. 557 =A.I.R. 1924 Rang. 139.

——S. 70—Admission by one out of three executants—Insufficient.

An admission in a later deed by one out of three parties to a document, is insufficient to prove execution. 35 All. 364=11 A. L. J. 379=19 Ind. Cas. 121.

——S. 70—Admission of execution—Effect.

An admission in pleadings as to the execution of document dispenses with the necessity of proof of execution even though such document was one required by law to be in a certain form or proved in a certain way such as a mortgage-deed. A.I.R. 1944 Sind 61=I.L.R. (1943) Kar. 420=212 Ind. Cas. 561.

——S. 70—Admission of execution—Effect.

Shah, Ag. C. J.—(*Crump, J. dissenting*)—where the defendant admits the execution of the mortgage bond and there is no evidence or plea that the attestations were not proper, the mortgagee need not prove attestation.

Per *Crump, J.*—The word "execution" means that the party affixing his signature has signified his assent to the contents of the document and if a party admits that he has done this then he admits execution. Such admission however will not be taken to mean an admission not only of the signature of assent by him, but also that all the legal formalities, such as due attestation, have been complied with as required by the statute requiring attestation. 76 Ind. Cas. 73=47 Bom. 137=24 Bom.L.R. 1296 =A.I.R. 1923 Bom. 90.

——S. 70—Admission of executant—Effect.

It must be proved according to law as against strangers unless S. 58, Evidence Act applies to the case and relieves the plaintiffs from the burden of proving attestation. 74 Ind. Cas. 150=2 Pat. 317=A.I.R. 1923 Pat. 436.

——S. 70—Admission of execution—Effect.

Even in case of a document requiring attestation, where admission by a party to the suit of the execution is on record, the attestaion need not be proved. 64 Ind. Cas. 11=44 All. 127=19 A.L. J. 855=A.I.R. 1922 All. 153.

——S. 70—Admission of execution—Effect.

Proof of attestation is not necessary where execution is admitted by defendant. 62 Ind. Cas. 540=1922 P.H.C.C. 42=6 P.L.J. 465=2 P.L.T. 752=A.I.R. 1922 Pat. 70.

——S. 70—Admission of execution — Effect against co-executants—Attestation.

Where there are two executants to a mortgage deed, attestation may be according to law in respect of one of them but not in respect of the other. Where execution is admitted the question of due attestation does not arise; if it does arise, the maxim *omnia praesumuntur rite esse acta* comes in, unless there is evidence that attestation is not according to law. 47 Ind. Cas. 9 (Nag.).

——Ss. 70 and 71—Admission of execution, what is—What interest passes.

The admission referred to in S. 70, Evidence Act is an admission made in the course of the proceedings in which the document is produced. 13 N.L.R. 197=42 Ind. Cas. 715.

——S. 70—Admission of execution—Effect.

Per Woodroffe and Chatterjee, JJ.—*Per* Newbould, J. *contra*.—S. 70 must be read as a proviso to S. 68. S. 68 must be read subject to the provision of the subsequent sections; where an executant admits execution of an attested document, the document is admissible as against persons other than the executant without proof by an attestor but such admission will not *prove* the document as against other persons. 44 Cal. 345=20 C.W.N. 1044=24 C.L.J. 175=34 Ind. Cas. 862.

——S. 70—Admission of execution, what is.

The admission referred to in S. 70 only refers to admission made in the course of the trial. Any admission which can be availed of under S. 70 is only against the party himself. If a party has to prove a document he must prove its execution in all cases, *i.e.*, that it was signed by the executant irrespective of the question as to whether it requires to be attested or not. 19 O.C. 23=34 Ind. Cas. 281.

——S. 70—Admission made for purpose of dispensing with proof at trial, and evidentiary admission—Distinction.

The admission conemplated under S. 70 is an admission made for the purpose of or having reference to the suit made either in the pleadings or during the course of the trial. From the scheme of the Evidence Act, it is clear that the Legislature contemplates a distinction between admissions made for the purpose of dispensing with proof at the trial and evidentiary admissions. The scope and purpose of the two classes of admissions are distinct. The one relates to relevancy and the other relates solely to proof at the trial. A.I.R. 1938 Mad. 43=46 L.W. 610=I. L. R. (1938) Mad. 523=176 Ind. Cas. 309

——S. 70—Before Registrar.

The admission referred to in S. 70 of the Evidence Act must be an admission made by a party in the proceedings in which the document is produced and is intended to be proved. The certificate of admission of execution endorsed by the registering officer upon a gift deed registered by him cannot be used as an admission of execution within the meaning of S. 70, Evidence Act. The admission must be an admission about the due execution of the document which would include an admission as to its proper attestation. Nor can the statement made by the executant before the Sub-Registrar at the time of the registration of the deed be regarded as an admission about its due attestation. 50 Bom.L.R. 260=A.I.R. 1948 Bom. 322.

——S. 70—Before Registrar.

S. 70 of the Evidence Act, refers only to cases where the admission is by a party to the suit made in the suit itself, and has no application where an admission made to the Sub-Registrar at the time of registration is sought to be proved in a suit to which the executant is not a party. A.I.R. 1941 Oudh 529=1941 A.W.R. C.C. 274=1941 O.W.N. 906 =196 Ind. Cas. 787.

——S. 70—Before Sub-Registrar.

Per Jack, J.—Suit on mortgage bond—Defendant admitting execution before Sub-Registrar but averring that he would not have done so had he known it to be mortgage is no admission of execution under S. 70. *Mitter, J.*, contra. 49 C. L. J. 347=A.I.R. 1929 Cal. 441.

——S. 70—Before Registrar.

Admission must be in the proceedings—Admission of execution before the registering officer is not sufficient. 109 Ind. Cas. 576=A.I.R. 1928 Nag. 244.

——S. 70—Before Registrar.

Admission referred to in section must be other than that required by Registrar in registration. 93 Ind. Cas. 660=18 S.L.R. 282=A.I.R. 1926 Sind 88.

——S. 70—Before Registrar.

The admission referred to in S. 70 of the Evidence Act is an admission in the course of the suit itself, for example made in the pleadings or by a party himself in his examination. The certificate endorsed by a Registering Officer upon a document which requires registration is evidence that all the provisions of the Registration Act have been duly performed, and is no evidence of admission, of execution made by the executant. 38 All. 1=13 A.L.J. 881=30 Ind. Cas. 576.

——S. 70—Before Registrar.

Admission in S. 70 of the Act related only to the admissions of the parties in the course of the trial of a suit. An admission of execution before a registering officer at the time of registration does not come within the purview of the section. 27 C. 190, Foll. 1 C. W. N. C.C. 22 not Foll. 7 N.L.R. 85=11 Ind. Cas. 689.

——S. 70—By representative.

An admission by the representative of a party to an attested document of its execution by the party cannot be treated as an admission of the party to an attested document of its execution by himself. 74 Ind. Cas. 178=38 C. L. J. 114=A.I.R. 1924 Cal. 415.

——S. 70—'Execution,' meaning of — Attestation means due attestation.

The execution contemplated by S. 70 is not a mere signing of the document, but a due execution or execution in accordance with what the law requires for a particular document. What S. 70 says is that there must be an admission of a party to the attested document. 'Attesed' in that section means duly attested. So, if a question of attestation is put in issue, it is incumbent upon the person who wants to prove the document to prove that the document has been duly attested before S. 70 can be relied on. A.I.R. 1938 Mad. 43=46 L.W. 610=I.L.R. (1938) Mad. 523 =176 Ind. Cas. 309.

——S. 70—Execution and attestation.

The execution of a document is one thing, and the attesting of it as required by law is quite another thing. A document required by law to be attested must be proved to have been signed by the executant thereof in the presence of the attesting witnesses; and admission by the executant under S. 70 of the Evidence Act, of his signature on the document does not dispense with the proof of its attestation as required by law. The proof

of execution is required by the provisions of the Evidence Act. A.I.R. 1936 All. 169=1936 A. W.R. 57=1936 A.L.J. 297=160 Ind. Cas. 73.

——S. 70—Invalid document.

S. 70 cannot and does not affect to render valid, document which, it is apparent from the evidence before the Court, is invalid in law:

A mortgage was duly executed and attested but the Sub-Registrar finding a technical defect had the document re-executed by the mortgagors in his office. This re-execution was duly registered though not re-attested. In a suit upon the mortgage the mortgagor admitted execution.

Held, that in spite of the admission the document did not amount to a mortgage and, therefore, was not an instrument creating a mortgage upon which the plaintiff could base his claim. 105 Ind. Cas. 28=45 C.L.J. 577=A.I.R. 1927 Cal. 926.

——S. 70—Invalid document.

Admission by the executant of execution is not sufficient to validate a mortgage-deed which has not been duly attested as required. 104 Ind. Cas. 386 =5 Rang. 561=6 Bur. L.J. 88=A.I.R. 1927 Rang. 233.

——S. 70—Pardanashin lady—T. P. Act, S. 59.

Where the persons who signed a mortgage-deed executed by a *pardanashin* lady, as witnesses were not present at the execution of the deed, but the *pardanashin* lady admitted that she had executed the mortgage-deed.

Held, that notwithstanding her admission, the mortgage deed was void even as against her. The words of S. 70 of the Evidence Act apply only to a document duly attested. 89 Ind. Cas. 659=23 A. L.J. 815=2 O.W.N. 641=6 P.L.T. 575=27 Bom. L.R. 1144=42 C.L.J. 148=22 M.L.W. 373=1925 M.W.N. 728=52 I.A. 362=3 Pat. L.R. 296=5 Pat. 58=30 C.W.N. 364=A.I.R. 1925 P.C. 203 =49 M.L.J. 240 (P.C.).

——S. 70—Witnesses not present.

Where the mortgagor admitting his having signed the mortgage document but denied his having done so in the presence of attestors:

Held, that such admission does not amount to an admission of due execution within the meaning of S. 70.

Per *Richardson, J.*—Where an admission of *execution* is unqualified it may well be equivalent to an admission of due execution or a waiver of proof of due execution, but not where the admission is of the signature, coupled with the denial of his having done so in the presence of attestors.

Per *Suhrawardy, J.*—S. 70 provides an exception to the rule in S. 68, *viz.*, where the executant admits that a document was *executed* by him, *i.e.*, executed according to law, no further proof of execution is necessary. It thus qualifies S. 68 of the Act but does not affect or control S. 59 of the T. P. Act. The word *'execution'* in S. 70 is used in the sense of due execution or execution in a way in which a particular document is required to be executed. 70 Ind. Cas. 532=36 C.L.J. 373=27 C.W.N. 263= A.I.R. 1923 Cal. 149.

——S. 71. See also EVIDENCE ACT, SS. 68 AND 69.

——S. 71—Scope—Cases in which S. 71 can be called in aid.

S. 71 of the Evidence Act provides that if the attesting witness to a document denies or does not recollect the execution of the document, its execution may be proved by other evidence. This is a sort of safeguard introduced by the Legislature to the mandatory provisions of S. 68. S. 71 can only be requisitioned when the attesting witnesses who have been called fail to prove the execution of the will by reason of their denying their own signatures, or denying the signature of the testator, or having no recollection as to the execution of the will or other document. It has no application to a case where there is no question of any attesting witness denying or not recollecting the execution of the document, or where one attesting witness who is called fails to prove the execution of the will and other attesting witnesses are available who could prove the execution if they were called. 51 Bom. L.R. 245 =A.I.R. 1949 Bom. 266.

——S. 71—'Execution', meaning of — 'Other evidence'—What is.

The word 'execution' in S. 71, Evidence Act, means not only signing by the executant, but also includes attestation as well. So, where, an attesting witness called by the plaintiff turns hostile, the plaintiff is entitled to prove attestation of the instrument by other evidence as laid down in the section. This other evidence would include his evidence also even though he is the grantee of the instrument. A.I.R. 1940 Cal. 189=I.L.R. (1939) 2 Cal. 479=43 C. W.N. 1084=187 Ind. Cas. 718.

——S. 71 — Applicability of—Registration proceedings, whether can be relied upon to prove due execution or attestation—Evidence, requisite.

S. 71, Evidence Act, is applicable only where the attesting witness "denies or does not recollect the execution of the document."

Assuming that it would be legitimate to look at the proceedings relating to the registration of the mortgage deed for the purpose of proving the due execution and attestation thereof, evidence should be given to prove the necessary and material facts which are necessary in order to comply with the provisions of the T. P. Act. A.I.R. 1939 P.C. 117=20 P.L.T. 565=41 P.L.R. 598=1939 M.W.N. 867=I.L.R. (1939) Kar. (P.C.) 222 Sup.=(1939) 2 M.L.J. 762=43 C.W.N. 669=50 L.W. 58=1939 A.L.J. 492=1939 A.W.R. 69=5 B.R. 592=1939 O.W.N. 450=41 Bom. L.R. 1047=181 Ind. Cas. 261 (P. C.).

——Ss. 71 and 69—Applicability of S. 71—Summons against attesting witness—Failure to appear —Further evidence.

In a case where the attesting witnesses are not before the Court, S. 71, Evidence Act, has got no application. In such cases, it is the duty of the plaintiff to exhaust all the processes of the Court in order to compel the attendance of any one of the attesting witnesses and when the production of such witnesses is not possible either legally or physically, the plaintiff can avail himself of the provisions of S. 69. When the plaintiff has simply taken out summons against the attesting witness and on his failure to appear, has done nothing further later on, other evidence under S. 71 cannot be let in. A.I.R. 1939 Cal. 688 =62 C.L.J. 454=43 C.W.N. 1025=187 Ind. Cas. 644.

——S. 71—Execution of documents by pardanashin lady—Proof of.

It is the conscious execution and not the mechanical execution of a document, that must be established in the case of a document executed by a *pardanashin* lady. A.I.R. 1939 Nag. 159=1939 N.L.J. 275 =I.L.R. (1941) Nag. 418=182 Ind. Cas. 763.

——S. 71—Execution, when can be proved aliunde under.

Where the execution of a document is in question, it is incumbent upon the plaintiff to call at least one of the attesting witnesses, and if that witness denies or does not recollect the execution may be proved *aliunde*. Other attesting witnesses need not be called. A.I.R. 1938 Pat. 301=4 B.R. 370=19 P.L. T. 234=173 Ind. Cas. 983.

——S. 71—Scope of — Evidence of attestation—Admissibility.

There is nothing in the Evidence Act, to preclude a party from adducing as witnesses to the execution of the deed, any persons who happened to be present when the deed was executed and actually saw it signed by the executant and by the attesting witnesses. S. 71 does, it is true, permit the evidence of the executant of the deed in certain circumstances. It does not however, have the effect of rendering his evidence or that of other witnesses inadmissible in different circumstances. A.I.R. 1937 All. 273= 1937 A.L.J. 161=1937 A.W.R. 115=168 Ind. Cas. 988.

——Ss. 71 and 68—T. P. Act, S. 3—Mortgage-deed.

The signatures of three persons appeared in a mortgage deed as attesting witnsses. One of them, who was called to prove the deed, stated that the executant had not put her thumb impression on the mortgage-deed in his presence and that he merely put his signature on the mortgage-deed as the *karinda* of the lady asked him to do so. The plaintiff also gave evidence that the executant put her thumb impression in his (plaintiff's) presence and in the presence of the two other witnesses:

Held, (i) that the first witness who was called, although he signed as an attesting witness, was not an attesting witness, within the meaning of S. 3, T. P. Act;

(*ii*) that the evidence of the plaintiff was not sufficient for the purpose of S. 3, T. P. Act, because the plaintiff did not state that these attesting witnesses made their signatures in the presence of the executant;

(*iii*) that the plaintiff's evidence was not admissible under S. 71, Evidence Act, as no attesting witness had been called. A.I.R. 1931 All. 411=1931 A.L.J. 342=131 Ind. Cas. 557.

——S. 71—One witness hostile—Others if to be called before other evidence.

Jack, J.—Where out of two attesting witnesses one is produced but turns hostile, other evidence becomes admissible under S. 71, and the plaintiff is not bound to produce the other, though alive, whom there are grounds for him to believe to be hostile: A.I.R. 1929 Cal. 188, Rel. on.

Mitter, J.: (*Obiter*).—It is not intended by enacting S. 71 to differ from the rule of English Law that the evidence of the other witnesses should not be introduced unless the absence of the other attesting witness is satisfactorily explained in the case where one of the two attesting witnesses had been called and has denied execution. 49 C.L.J. 347= A.I.R. 1929 Cal. 441.

——S. 71—Evidence of scribe—'Other evidence'.

Where it was found by the Courts below that the attesting witnesses had been won over and gave evidence hostile to the plaintiff and the plaintiff examined the writer of the deed to prove execution under S. 71 and his evidence was accepted:

Held, that the contention that it is necessary that this witness should have been able to swear that both the attesting witnesses were present when the executant signed the deed and that they witnessed it is untenable. 17 A.L.J. 141 and A.I.R. 1922 Pat. 415, Foll. The law provides that the attesting witnesses, if available, must be called and that in their absence no other evidence to prove execution shall be accepted: If they are dead or have been won over by the other side the person claiming under the document is allowed to prove it as best as he can. It is sufficient if he can prove execution by any evidence that may be available. 74 Ind. Cas. 969=A.I.R. 1924 All. 217.

——S. 71—Proof of execution.

S. 71 does not require execution in the presence of the attesting witnesses to be proved. 17 All. 141, Foll. 74 Ind. Cas. 839=A.I.R. 1924 All. 149.

——S. 71—Witness not recollecting.

Mortgage—One attesting witness dead — Others having no recollection—Document can be proved by other evidence. 70 Ind. Cas. 298=1 Pat. 154=A. I.R. 1922 Pat. 415.

——S. 71—Execution of a document—Attestation—Other evidence when allowed.

Execution and attestation of a document may be proved by other evidence when the attesting witnesses are hostile and say that they signed a blank paper. 48 Ind. Cas. 624 (Cal.).

——S. 71—Mortgage — Execution — Recital of receipt of consideration — Auction-purchaser, if bound by.

The execution of the mortgage having been proved in the manner provided by S. 71 of the Evidence Act and on the face of it the bond appearing to have been executed in the presence of more than one person, the mortgage was good. The acknowledgment of the receipt of consideration in the bond was binding on the auction-purchaser. 41 All. 250=17 A.L.J. 141=52 Ind. Cas. 830.

——Ss. 72 and 73—Bond—Proof of execution—Denial of execution — Attestators not called Evidence of plaintiff and comparison of signatures—Sufficiency.

Where the execution of a bond sued upon is denied by the executant (defendant), it is for the plaintiff suing on it to prove the bond, by examining one of the several persons who have attested the execution of the bond. The plaintiff's own evidence is not sufficient, when there is an attesting witness alive who can be called. Mere production of evidence that the signatures of the executant and of the attesting witnesses on the bond are really there, is not sufficient as that cannot amount to proof of execution of the bond by the defendant-executant. Nor would a comparison of the signature of the defendant on the bond with his alleged signatures in the books of accounts be

conclusive or decisive for purposes of finding in favour of the plaintiff. A.I.R. 1950 Kut. 17.

——S. 72—Bond—Proof of—S. 68 not applicable, only S. 72.

A bond is not an instrument required by law to be attested. Therefore, it is S. 72, Evidence Act, which applies in the case of bond and not S. 68, Evidence Act. A.I.R. 1940 Nag. 240=1940 N. L.J. 70=188 Ind. Cas. 638.

——S. 72—Receipt—Proof of.

The executant of a receipt need not be examined where the payer has sworn to the payment. 82 Ind. Cas. 974=A.I.R. 1925 Cal. 452.

——S. 73.

Synopsis.

1. Comparison, proof by.
2. Comparison, value of.
3. Scope.
4. Thumb impressions.

1. Comparison, proof by.

——S. 73—Signature — Comparison of—Power of Court.

The Court has power to compare the alleged genuine signature with admittedly genuine signature to come to a conclusion from it. 120 Ind. Cas. 335=A.I.R. 1930 Nag. 27.

——S. 73—Comparison of handwrting—Proof by —When resorted to.

It is only where other evidence is not available and the handwriting has not been proved by independent evidence to be the handwriting of a particular person, that it is necessary to have recourse to the provisions of S. 73 to see whether by comparison it can be determined whether the document was written by that person or not. 92 Ind. Cas. 442=53 Cal. 372=42 C.L.J. 504=27 Cr.L.J. 266 =A.I.R. 1926 Cal. 139.

——S. 73—Handwriting — Comparison of.

It is not fair to compare the free handwriting spread over a folio page of a will with plenty of space, and a post card in which a writer has to condense all he wishes to say in a small space. The writing must necessarily be far more cramped and naturally various letters in the post card writing would differ from the writing which is not cramped. 80 Ind. Cas. 189=A.I.A. 1922 Bom. 296.

——S. 73—Scope — Comparison if limited to signed documents.

S. 73 of the Evidence Act is not limited to such documents only as are signed or contain some intrinsic statements of the identity of the writer. Any document alleged by a party to be in the handwriting of a particular person may for purpose of proof be compared with other writing or signature admitted or proved to the satisfaction of the Court to have been made or written by that person. 35 M.L.J. 608=(1918) M.W.N. 715= 24 M.L.T. 477=8 L.W. 625=48 Ind. Cas. 68.

——S. 73—'Purports' — Handwriting — Comparison—Anonymous document

The word 'purports' in S. 73 of the Evidence Act means alleged. It is not necessary that the writing which is in dispute must itself in terms express or indicate that it was written by the person to whom it is attributed. When an anonymous writing is produced and ascribed by the prosecution to a particular person then the case for the prosecution is, that having regard to the admitted documents and the comparison between them and the disputed writing, the prosecution alleges that the disputed document purports to have been written or made by the accused. An anonymous writing ascribed to a particular person may therefore be compared under S. 73 of the Evidence Act. 14 Bom. L. R. 310=13 Cr.L.J. 505=15 Ind. Cas. 649.

2. Comparison, value of

——S. 73—Comparison scope of—Reliability.

In applying the provision of S. 73 of the Evidence Act, it iis important not to lose sight of its exact terms. It does not sanction the comparison of any two documents but requires that the writing with which the comparison is to be made or the standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed and next the writing to be compared with the standard or in other words, the disputed writing must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was writte by that person. A comparison of handwriting is at all times, as a mode of proof, hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. A comparison of writings has consequently been deemed a mode of ascertaining the truth which ought to be used with very great caution. Although from the dissimilarity of signatures a Court may legitimately draw the inference that a particular signature is not genuine because it varies from an admittedly genuine signature, yet resemblance of two signatures affords no safe foundation that one of them is genuine. 66 Ind. Cas. 774=49 Cal. 235=26 C.W.N. 113=34 C.L.J. 373=A.I.R. 1922 Cal. 12.

——S. 73—Comparison of signatures — Adjudication based solely on such proof—If error in law—Second appeal.

If a signature to a document is denied by the executant, a comparison of signatures is one of the admissible modes of proving hand-writing and although in absence of other evidence such proof would be regarded as hazardous and inconclusive, it cannot be regarded as an error in law to base the conclusion on such proof alone and a Court of second appeal is not entitled to set aside a finding based on such comparison. 11 M.L.T. 424= 14 Ind. Cas. 741.

——S. 73—Handwriting — Comparison of—Value as evidence.

Proof of comparison of handwriting is always hazardous and inconclusive and especially when the comparison is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. 22 W.R. 272, Rel. upon. 37

Cal. 467=14 C.W.N. 1114=11 Cr.L.J. 453=7 Ind. Cas. 359.

——S. 73—Signature disputed — Comparison—Reliability of.

Genuineness of a signature disputed—Mere comparison of admitted signatures without expert advice or microscopic examination is dangerous. 111 Ind. Cas. 169=28 M.L.W. 737=A. I. R. 1928 P.C. 277 (P.C.).

3. Scope.

——S. 73—Scope of—Court, if can compare disputed signatures with those admitted.

S. 73 of the Evidence Act clearly authorises Courts to compare the disputed signature or writing of a person with signatures and writings which have been admitted or proved to the satisfaction of the Court to have been made or written by that person. A.I.R. 1937 Oudh 170=1936 O. W.N. 1167=12 Luck. 606=165 Ind. Cas. 523. (*See also* 22 Ind. Cas. 627).

——S. 73—Scope of—Judge presiding cannot delegate to another Magistrate not sitting as Court to take writing from accused.

Obiter.—Where S. 73, Evidence Act, says that the Court may direct any person present in Court to write, it must mean that where the accused is in Court, the Judge presiding in that Court may there and then ask him to write something for the purpose of enabling Court to compare his writing with some other writing, and that the procedure of delegating to another Magistrate not sitting as a Court, to take such a writing from the accused when the accused is not in Court nor standing his trial in Court does not come within the provisions of the section. A.I.R. 1935 Cal. 308=36 Cr.L.J. 921=39 C.W.N. 986=156 Ind. Cas. 396.

——S. 73—'Any person'—If refers to an accused person.

Obiter.—(Per *Lort-Williams, J.*) It is doubtful whether S. 73, Evidence Act, refers to an accused person at all.

Section 73, Evidence Act, includes an accused person. A.I.R. 1935 Cal. 308=36 Cr.L.J. 921 =39 C.W.N. 986=156 Ind. Cas. 396.

——S. 73—Scope — Comparison of handwriting by Judge.

Section 73 does not sanction the comparison of any two documents, but requires that the writing with which the comparison is to be made, or he standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed, and next, the writing to be compared with the standard or, in other words, the disputed writing must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was written by that person. The section does not specially state by whom the comparison may be made, though the second paragraph of the section dealing with a related subject expressly provides by way of contrast that in that particular connection the Court may make the comparison. A comparison of handwriting is at all times as a mode of proof, hazardous and inconclusive. A. I. R. 1925 Oudh 41=11 O.W.N. 1589=10 Luck. 423 =152 Ind. Cas. 1042.

——S. 73—Specimen signature of accused taken while in Police custody—Admissibility.

Where, at the instance of a Police Officer, a specimen signature of an accused was taken in the course of the investigation and while the accused was in Police custody:

Held, that the signature would be admissible in evidence when the forgery charged against the accused is being tried. A.I.R. 1932 Bom. 406=56 Bom. 304=34 Bom.L.R. 598=33 Cr. L. J. 666 =138 Ind. Cas. 708.

——S. 73—Inadmissible document — Relevancy and admissibility for comparison.

Documents, not admissible in evidence otherwise, but signatures on which are admittedly the executants' become admissible under S. 73 for the sole purpose of comparison to decide the genuineness. (1914) M.W.N. 240=1 L.W. 136=22 Ind. Cas. 627.

4. Thumb impressions.

——S. 73—Applicability — Criminal trial—Taking specimen thumb impression of accused under Court's direction—Permissibility — Cr. P. Code, S. 342.

Section 342, Cr. P. Code, does not make S. 73 of Evidence Act inapplicable to criminal trials. The taking of specimen thumb impression of the accused under the direction of the Court is in strict compliance with S. 73 and S. 45 (*ill.*) (*c*) of the Evidence Act and also S. 5 of the Identification of Prisoners Act XXXIII of 1920. 83 C.L.J. 397 =A.I.R. 1950 Cal. 66=51 Cr.L.J. 376.

——S. 73 — Thumb-impression of accused—Taking of and use at the trial.

The practice of taking the thumb impression of the accused in the course of a trial and using it against him is inconsistent with the principle of a fair trial and has to be severely condemned. 1 P. 242, foll. A.I.R. 1950 T.C. 5.

——S. 73—Previous conviction sought to be proved by fingerprints taken in previous trial—Evidence as identity of prints—mode of taking evidence and presumptions in respect of these fingerprint entries indicated. A.I.R. 1938 Mad. 858 =1938 M.W.N. 595=48 M.L.W. 639=40 Cr.L. J. 355=180 Ind. Cas. 431.

——S. 73 — Thumb-impression of accused—Taking of.

A Court can direct an accused person to give his thumb impression in Court. A.I.R. 1924 Rang. 115 (F.B.), Foll. 106 Ind. Cas. 212=6 Pat. 623=8 P.L.T. 847=28 Cr.L.J. 1028=9 A. I. Cr. R. 173=A.I.R. 1928 Pat. 103.

——S. 73—Thumb-impression on a deed compared with others not shown to be of executant—Evidence of expert is of no value. 101 Ind. Cas. 187=8 A.I. Cr. R. 4=8 P.L.T. 393=28 Cr. L.J. 411=A.I.R. 1927 Pat. 408.

——S. 73 — Thumb-impression of accused—Taking of.

Section 73 specifically distress that any person present in Court may be directed to make a finger impression for the purpose of comparing it with any finger impression alleged to have been his. There is no exception made in favour of an accus-

ed person. Secton 342, Criminal Procedure Code, does not prohibit the taking of the finger impression from an accused. (10 B.L.T. 32, *Overruled*).

Per *Young, Offg. C.J.*—Such a direction is specifically allowed by the Evidence Act and S. 342, Cr.P. Code, does not operate to prevent it.

Per *Heald, J.*—There is no possible connection between S. 73, Evidence Act and S. 342 of the Cr.P. Code.

Per **May Oung, J.**—There is nothing in common between the power to examine the accused under S. 342, Cr. P. Code, and the power to take his finger impression under S. 73, Evidence Act unless it can be held that by directing the accused to make his finger impression the Court is, in effect, compelling him to provide evidence against himself. 83 Ind. Cas. 668=1 Rang. 759=2 Bur.L.J. 270 =26 Cr.L.J. 108=A.I.R. 1924 Rang. 115 (F. B.).

——S. 73—Criminal trial—Thumb impression of accused taken in Court for comparison—Conviction based on such comparison by expert—Is highly irregular.

There is no law by which an accused person can be, either by words or by gestures or by exposing himself to certain physical treatment, made to implicate himself in the crime with which he is charged. When he is on trial such an idea is highly repugnant to all thoughts of the proper administration of justice in this or in any other British country. 68 Ind. Cas. 958=1 Pat. 242=3 P.L. T. 526=1922 P.H.C.C. 46=23 Cr.L.J. 638=A. I.R. 1922 Pat. 73.

——S. 73—Proceedings under S. 476, Cr. P. Code—Accused asked to make a thumb impression.

Proceedings in inquiries under S. 476, Cr.P.C. being judicial proceedings and the person against whom they are directed being in the position of an accused person, to examine such a person as a witness in the course of such proceedings, is *ultra vires* except that he can only be examined under S. 342, Cr. P. Code, but he cannot properly be asked questions merely to elicit a statement as a foundation for ordering his prosecution nor can he be compelled to make any thumb impressions under S. 73 of the Evidence Act. 17 Cr.L.J. 316= 10 Bur.L.T. 32=35 Ind. Cas. 492.

——S 74.

Synopsis.

1. Public documents under.
2. Documents not falling under.
3. Miscellaneous.

1. Public documents

(a) Chittas.
(b) Crop-cutting reports.
(c) Dakhalnamah.
(d) Depositions.
(e) Income-tax records.
(f) Khasra papers.
(g) Letters of officers.
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(i) Notice under S. 107, Cr. P. Code
(j) Orders and order sheets.
(k) Pedigrees.
(l) Phant.
(m) Probate.
(n) Records of acts.
(o) Registers in offices.
(p) Reports of officers.
(q) Statements recorded by officers.
(r) Survey and settlement records.
(s) Village papers.
(t) Wajib-al-arz.

(a) Chittas.

——S. 74—Chittas — When public documents.

Chittas, prepared for a public purpose such as the distribution of revenue on the shares, or assessment and settlement of revenue on the share belonging to the Government, are public documents while if they are prepared to ascertain Government's share in the lands without prejudice to the rights of **bahali** shares they are private. Probative value of **chittas** depends on evidence in different cases. 19 C.W.N. 1015=31 Ind. Cas. 695.

——S. 74—Chittas prepared during partition of Taluq, admissibility of.

Chitta prepared for the purpose of distributing the public revenue on a partition of an estate are public documents and admissible as evidence of the state of affairs then existing. 10 Ind. Cas. 287=15 C.W.N. 515.

——S. 74—Chittas—Proof.

Chittas are not admissible in evidence unless strictly proved. 8 Ind. Cas. 715 (Cal.).

(b) Crop-cutting reports.

——S. 74—Crop-cutting reports.

Crop-cutting report of Collector prepared under S. 40, Bengal Tenancy Act, falls under S. 74. 102 Ind. Cas. 391=8 P.L.T. 74=A.I.R. 1927 Pat. 167.

——S. 74—Crop-cutting report of Deputy Collector under S. 40, Bengal Tenancy Act, is public document and admissible to prove quantity of crops cut. 4 Cal. 79, Rel. on. 95 Ind. Cas. 966=7 P.L.T. 671=A.I.R. 1926 Pat. 436.

(c) Dakhalnamah.

——S. 74—Dakhalnamah.

A **dakhalnamah** is a public document and its copy is admissible without proof. 13 A.L.J. 935, Foll. 98 Ind. Cas. 471=7 L.R.A. Cr. 173 =27 Cr.L.J. 1351=A.I.R. 1927 All. 52.

——S. 74—Dakhalnama — Admissibility of.

A **dakhalnama** is a public document and its copy is admissible without proof. 13 A.L.J. 935=30 Ind. Cas. 830.

——S. 74—Dakhalnama—Public document.

A **dakhalnama** is a public document and a copy thereof is admissible in evidence without proof. 25 Ind. Cas. 529 (All.).

(d) Depositions.

——S. 74—Depositions.

Depositions of witnesses taken by an officer of the Court are public documents within the meaning of that term as used in S. 74. 101 Ind.

Cas. 289=5 Pat. 777=8 P.L.T. 510=A.I.R. 1927 Pat. 61.

——S. 74—Deposition of witness—Public document—Certified copy, proof by.

The deposition of a witness is part of the acts of an official tribunal within the meaning of S. 74 of the Evidence Act, and a statement made in it can be proved by a certified copy. (1902) 2 C. L.J. 218.

(e) Income-tax records.

——Ss. 74, 76, 77—Certified copies of assessment order—Admissibility.

An assessment order is a public document within the meaning of S. 74, Evidence Act. There is no provision under the Income-tax Act, which gives an assessee a right to inspect the records of the Income-tax Department. Therefore, the assessment order does not fall within the ambit of S. 76 and it follows that if the assessee has no right to inspect it, he has no right to demand a certified copy of it under the section. Accordingly such copies are not, under S. 77, certified copies which may be produced in proof of the contents of public documents or parts of the public documents of which they purport to be copies. A.I.R. 1940 Cal. 187=I.L.R. (1939) 2 Cal. 394=43 C.W.N. 1169=188 Ind. Cas. 37. But see (1940) 2 M.L.J. 257=A.I.R. 1940 Mad. 768=I.L.R. (1940) Mad. 869.

——Ss. 74 and 65 (e)—Profit and loss statement and statement showing details of net income filed in support of return of income furnished under S. 22, Income tax Act, whether public documents — Certified copies, if admissible under S. 65 (e).

The record of an income-tax case must be regarded as the record of the acts of the Income-tax Officer in making his assessment and therefore, any document properly on the record is just as much a public document as the final order of assessment. Hence, a profit and loss statement and a statement showing the details of net income, filed by an assessee in support of his return of income furnished under S. 22, Income-tax Act, are public documents with reference to S. 74, Evidence Act, of which certified copies would be admissible under S. 65 (e), Evidence Act. A.I.R. 1940 Mad. 768=52 L.W. 159=(1940) 2 M.L.J. 257=1940 M.W.N. 787=I.L.R. (1940) Mad. 969=192 Ind. Cas. 548 (F.B.).

(f) Khasra papers.

——Ss. 74 and 77—Khasra papers — Nethersole settlement — Certified copy produced at a later stage.

The Khasra of Nethersole settlement in Sambulpore Dt. is a public record and a certified copy of it may be accepted though filed at a late stage. 23 Ind. Cas. 604 (Cal.).

——S. 74—Khasra Papers.

Khasra papers are admissible and are important on the point of possession. 1 Ind. Cas. 205 (Cal.)

(g) Letters of officers.

——S. 74—Letters of officers.

Letters from the Controller of the Military Accounts acknowledging attachment is a public document. 114 Ind. Cas. 502=5 O.W.N. 886 =A.I.R. 1928 Oudh 488.

(h) Mortgage-deeds.

——S. 74 (2)—Mortgage-deed duly registered.

A mortgage-deed is a public document because public records of mortgages are kept in British India.

Certified copies can be produced in proof of its contents under S. 77. A.I.R. 1945 Bom. 319=47 Bom.L.R. 116=219 Ind. Cas. 427.

(i) Notice under S. 107, Cr. P. Code.

——S. 74—Notice under S. 107, Cr. P. Code—Whether a public document — When admissible as evidence.

A notice under S. 107 of the Cr. P. Code is a public document under S. 74 of the Evidence Act, but is not admissible as evidence without proof that the parties mentioned in it are the parties concerned in question at issue. 18 C.W.N. 644=23 Ind. Cas. 529.

(j) Orders.

——S. 74—Order of competent authority fixing price under R. 81, Defence of India Rules, is public document.

It is well settled that the orders of the competent authority fixing the price of kerosene oil under R. 81, Defence of India Rules are public documents; they can be proved by the production of the original orders or by certified copies thereof. A.I.R. 1946 Pat. 123=1945 P.W.N. 243.

——Ss. 74 and 114 (e)—Order sheet—Presumption as to.

An order-sheet is a public document being a record of acts of a public judicial officer and the presumption is that it is genuine. The Court would require evidence and not mere suggestion to justify its rejection. A.I.R. 1937 Pat. 534 =4 B.R. 141=39 Cr.L.J. 103=172 Ind. Cas. 237.

——S. 74—Order sheets of courts.

Order sheets of Courts, being public documents, require no formal proof and each successive execution, proceeding being in continuation of the previous one, it is not necessary to mark the order sheets of a previous proceeding as exhibits. A.I.R. 1933 Pat. 658=13 Pat. 86=15 P L.T. 407=147 Ind. Cas. 101.

(k) Pedigrees.

——S. 74—Pedigree contained in estate note-book prepared under U. P. Court of Wards Act, 1912, is public document—Presumption as to correctness of such document—Extent of, stated.

A pedigree contained in an estate note-book prepared under S. 332 of the Court of Wards Manual prepared under the U. P. Court of Wards Act, 1912, is an official document pre-

pared by public authority in pursuance of a statutory duty. Such document is evidence though not conclusive evidence of the facts stated therein. The fact that such document does not show the sources on which the Court of Wards based its findings and that "the assumption of charge file" on which the pedigree purports to be founded is not produced in Court, is not of weight against a public document. The Court must assume that the Court of Wards did its duty to the best of its ability, and based the pedigree on material of the accuracy of which it was satisfied and in the absence of any reason for supposing the document to be incorrect it must be accepted as accurate. A.I.R. 1946 P.C. 103=50 C.W.N. 729=59 M.L.W. 483=1947 O.W.N. 5=I.L.R. (1946) Kar. (P.C.) 111=(1946) 2 M.L.J. 235=1946 O.A. (P.C.) 135=1946 A.W.R. (P.C.) 135=1946 M.W.N. 497 (P.C.).

——S. 74—Pedigree.

If it can be shown that the law requires that entries dealing with ownership of land should be included in pedigree tables then such pedigree tables are properly part of the revenue records and constitute an entry in a public document which is prima facie evidence of the truth of its contents. 103 Ind. Cas. 182=29 P.L.R. 675=A.I.R. 1928 Lah. 214.

——S. 74—Pedigree signed by Patwari, Lambardar and Settlement officers and filed in 1871.

A pedigree filed before the settlement Court in 1871 signed by the Patwaris and two lambardars. now dead, appearing in the pedigee itself and by the settlement officer himself, must under the circumstances by accepted as a public document. 18 Ind. Cas. 250 (Oudh).

(l) Phant.

——Ss. 74 and 76—Public document—Phant filed by a patwari—Admissibility.

A phant which is a statement showing the division of land and filed by a patwari in Court is a public document under S. 74 (1) (iii) of Evidence Act as it is a record of the act of a public officer and can be admitted in evidence on production of a certified copy thereof under S. 76 of the Act. 1948 R.D. 472.

(m) Probate.

——Ss. 74 (1) (iii) and 65 (e)—Probate of will if a public document—Secondary evidence, if admissible.

A copy of the probate of a will with the necessary endorsement of the Court granting it, is a public document within the meaning of S. 74 (1) (iii) which may be proved by secondary evidence under S. 65 (e). 11 Ind. Cas. 261 (Sind).

(n) Records of acts of officers.

——S. 74—Records of acts of Collector—Book of—Copies of communications.

A book maintained in the Collector's Office according to the official practice, and containing the copies of the communications sent by the Collector to the various subordinate officers is a public document within meaning of S. 74, Evidence Act, and a certified copy produced from such a book is admissible. A.I.R. 1940 Mad. 273=1939 M.W.N. 841.

——S. 74—Record of acts of officers.

Under S. 74, Evidence Act, documents forming records of the acts of public officers are public documents, but they do not furnish proof of all facts to which they refer. 105 Ind. Cas. 353=A.I.R. 1928 Nag. 93.

(o) Registers in offices.

——Ss. 74, 35, 114, 13—Index register—Printed copy of—Presumption of correctness.

The printed copy of the index register is itself a public document. These printed copies are not merely kept for the private use of Government Officers, but they are open to inspection by the public and certified copies are also supplied from them.

Even assuming, however, that it can be admitted only as secondary evidence of the original index, there is the presumption under S. 114, Evidence Act, that the copies were compared with the original index at the time when they were printed and it, therefore, fulfils the provisions of S. 63, Cl. (3), Evidence Act.

Further, they are relevant under S. 13 as well as S. 35 and hence are admissible in evidence. A.I.R. 1942 Bom. 161=44 Bom.L.R. 295=I.L.R. (1942) Bom. 357=201 Ind. Cas. 420.

——S. 74—Mere record copy for private use of Government Officers—If a public document under.

It is only a public document, and not merely a record copy for the private use of Government Officers which it is not the duty of the Government to maintain, that can be admitted in evidence as public document under S. 74, Evidence Act. A.I.R. 1942 Bom. 161=44 Bom.L.R. 295=I.L.R. (1942) Bom. 357=201 Ind. Cas. 420.

——S. 74 (1) (iii)—Register of powers of attorney—Public document.

Every entry in the register of powers of attorney is a 'public document' within the meaning of S. 74 (1) (iii), Evidence Act, being a 'document forming the act or record of the act' of an executive public officer in the discharge of a statutory duty imposed upon him. A.I.R. 1939 Cal. 569=70 C.L.J. 5=43 C.W.N. 907=185 Ind. Cas. 691.

——Ss. 74, 13, 35—Register of information regarding pargana watandars by Assistant Collector under directions of Collector under orders of Inam Committee.

Obiter—(Per Broomfield, J.; Tyabji, J., contra).—The register of information compiled by the Assistant Collector, regarding the pargana watandars, under directions given by the Collector under the orders of the Inam Committee, is a public document within the meaning of S. 74, Evidence Act, being a record of the acts of a public officer and is relevant under S. 35 or, at any rate, S. 13 for proving the date of the grant contained therein. A.I.R. 1937 Bom. 307=39 Bom.L.R. 288=I.L.R. (1937) Bom. 464=170 Ind. Cas. 801.

——S. 74—Jail registers — Finger-print taken in pursuance of statutory duty.

A finger-print slip taken in pursuance of a statutory duty cast upon Police Officers after a convict enters the jail is an act of the executive within the meaning of S. 74, Evidence Act, and is, therefore, a public document. Similarly, a jail register written up by the jail authorities in the ordinary course of their duty as soon as a convict is admitted into jail, is a public document. A.I.R. 1938 Mad. 858=48 L.W. 639=1938 M.W.N. 595=40 Cr.L.J. 355=180 Ind. Cas. 431.

——S. 74—Mutations register—Public document.

Mutation — Quinquennial and settlement registers prepared under Regulation 48 of 1793, S. 16 are public documents—Entries therein are admissible but not conclusive. 75 Ind. Cas. 955=2 Pat. 839=A.I.R. 1924 Pat. 213.

——S. 74—Death Register kept in police station.

The death register kept at a thana is a public document within S. 74 of the Act and a certified copy thereof is admissible in evidence. 46 Cal. 152=22 C.W.N. 822=46 Ind. Cas. 237.

——S. 74—Teiskhana Register.

A teiskhana register prepared under the rules framed by the Board of Revenue under Regulation 12 of 1817 is a Register kept for the information of the Collector but is not a public document. 39 Cal. 995=18 Ind. Cas. 61.

——S. 74—Registers from Collectorate fixing areas and assessment.

Registers produced from the Collectorate giving details of the areas of different villages and the Government Revenue charged on them at the time of the Settlement are public documents. 15 C.L.J. 191=16 C.W.N. 590=14 Ind. Cas. 461.

(p) Reports of officers.

——S. 74—Reports.

Execution of decree—Report of an officer of the Court, entrusted with the execution, is a public document and can be proved by a certified copy—Evidence Act, S. 77. 81 Ind. Cas. 533=25 Cr.L.J. 917=A.I.R. 1925 Oudh 183.

(q) Statements recorded by public officers.

——Ss. 74, 76 and 77—Statements recorded by a public officer.

Statements of witnesses recorded by a public officer are public documents and under S. 77 of the Evidence Act they may be proved by certified copies issued under S. 76. 1948 R.D. 461.

——Ss. 74, 77—Statements recorded under S. 164. Cr. P. Code—Confessions—Certified copies of—Admissibility of.

Certified copies of confessions by accused persons would be admissible under S. 74 of the Evidence Act as evidence to prove the act of the Magistrate recording the confession. A.I.R. 1934 All. 81=56 All. 302=1933 A.L.J. 1551=35 Cr.L.J. 385=147 Ind. Cas. 890 (F.B.). [Impliedly overruled in A.I.R. 1936 P.C. 253 (2)=163 Ind. Cas. 889 (P.C.).]

——S. 74—Statements recorded under S. 164, Cr. P. Code.

The statements recorded under S. 164, Cr. P. Code, are public documents within the meaning of S. 74. A.I.R. 1937 Sind 303=39 Cr.L.J. 57=171 Ind. Cas. 993.

(r) Survey and settlement records.

——S. 74—Survey and settlement report—Public document.

A survey and settlement report prepared by an Assistant Superintendent of Survey is a public document and consequently admissible in evidence. A.I.R. 1941 Pat. 260=22 P.L.T. 699=7 B.R. 897=195 Ind. Cas. 313.

——S. 74—Settlement record.

History of Multan District attached to Settlement Record, was held to be a Public document. 75 Ind. Cas. 1040=A.I.R. 1924 Lah. 639.

——S. 74—Survey proceedings—Parcha slip granted in course of.

A parcha slip granted in the course of survey proceedings is not a public document. 19 Cr.L.J. 886=47 Ind. Cas. 82 (Pat.).

(s) Village papers.

——S. 74—Village papers.

Village papers are prima facie proof of what they record. 103 Ind. Cas. 497=A.I.R. 1927 Oudh 441.

(t) Wazib-ul-arz.

——S. 74—Wazib-ul-arz—Public document—Formal proof, whether necessary—Presumption.

The Wazib-ul-arz, which is a Record of Rights, is a public document and as such is admissible in evidence without any formal proof. The entries in it are presumed to be correct. 170 Ind. Cas. 392=38 Cr.L.J. 881=39 P.L.R. 491.

2. Documents not falling under.

——S. 74—'Act' or 'Record of an act'.

A circular by which the Director General of Post and Telegraphs notified that stamps of a certain kind would soon be issued to Post Offices for sale to the public was not an 'Act' or 'Record of an act' of a public officer within the meaning of S. 74 of the Evidence Act and the same was inadmissible in evidence. 115 Ind. Cas. 509=1929 M.W.N. 193=30 Cr.L.J. 483.

——S. 74—"Act or record of an act"—Civil Surgeon's report.

Magistrate sending an official memo. to a Civil Surgeon to examine an accused and report his age—Civil Surgeon's report is not a record of "act" in official capacity—It is not admissible in evidence without formal proof. 20 Mad. 189, Rel. on. 108 Ind. Cas. 817=1 Luck. Cas. 733=A.I.R. 1928 Oudh 155.

——S. 74—Census registers.

Census registers are not public documents within the meaning of S. 74 of the Evidence Act. (1904) 6 Bom.L.R. 535.

——Ss. 74 and 35—Chaukidar's register.

A Chaukidar's register of births and deaths is not a public document. No importance can be attached to it in view of S. 35. 19 O.C. 221=4 O.L.J. 49=36 Ind. Cas. 941.

——S. 74—Departmental enquiry—Statements recorded in.

Departmental enquiry by a Magistrate in his executive capacity is not judicial enquiry and statements recorded therein is not evidence taken on oath. Such statements, therefore, are not public documents. A.I.R. 1930 Cal. 370=127 Ind. Cas. 657=58 Cal. 96.

——S. 74—Execution petition or counter-affidavit —Copies of.

An Execution petitions or counter-affidavits are not public documents, and their copies require to be proved before they are admitted in evidence. A.I.R. 1942 Mad. 558=(1942) 2 M.L.J. 47=202 Ind. Cas. 697.

——S. 74—Income-tax returns.

An income-tax return is not a public document or a public record of a private document within meaning of S. 74, Evidence Act. A.I.R. 1932 Bom. 291=34 Bom.L.R. 236=56 Bom. 324=137 Ind. Cas. 281.

——S. 74—Letter to Collector forwarding proceedings of a public meeting.

A letter to the Collector forwarding the proceedings of a public meeting is not a public document within the meaning of S. 74, Evidence Act. A.I.R. 1933 Cal. 312=55 C.L.J. 558=143 Ind. Cas. 367.

——S. 74—Map prepared by Collector for private use.

A map prepared by a Collector for his private use in his private capacity is not a public document. 14 C.L.J. 578=16 C.W.N. 317=10 Ind. Cas. 376.

——S. 74—Patwari's abstract.

Abstract statement prepared by **patwari** even though based on papers in his possession and filed in suit is only private document. A.I.R. 1930 All. 712=128 Ind. Cas. 770.

——S. 74—Plaint—If a public document—Copy if can be used when not proved.

A plaint is not a public document within the meaning of S. 74 of the Evidence Act and a copy of it could not be referred to when it had not been proved. 1950 R.D. 71.

——S. 74—Plaint.

Plaint is not a public document. 93 Ind. Cas. 650=A.I.R. 1926 Nag. 339.

——S. 74 (2)—Receipt (original) though registered is private document.

The original receipt by an individual and registered under the Registration Act is not "a public record of a private document" within para. 2 of S. 74, Evidence Act. A.I.R. 1943 P.C. 83=56 M.L.W. 593=1943 O.W.N. 334=1943 A.W.R. (P.C.) 14=46 Bom.L.R. 220=1943 A.L.J. 292=10 B.R. 7=47 C.W.N. 607=(1943) 2 M.L.J. 51=I.L.R. 1943 Kar. (P.C.) 69=207 Ind. Cas. 553 (P.C.).

——S. 74 (i) (iii)—Reports to Police.

Obiter.—The reports made to the police by a woman that she had been married to a certain person are not public documents within the meaning of S. 74 (i) (iii) of the Evidence Act and secondary evidence of their contents cannot be given under S. 65 (e) of the Act. 123 Ind. Cas. 285=31 Punj.L.R. 214.

——Ss. 74 and 65—Report by a village nikha khwan regarding objection to entry whether public document—Secondary evidence.

A report by a village **Nikha Khawan** to the **Mohavir** in the central office informing him of the objection to an entry of marriage in the village register by the former husband of woman is not a public document within S. 74 of the Evidence Act and no secondary evidence of its contents can be given under S. 5 of the Act. 1 P.R. (Cr.) 1914=139 P.L.R. 1914=15 Cr.L.J. 344=23 Ind. Cas. 696.

——S. 74—Roznamcha.

Roznamcha of Police Station is not a public document. 163 Ind. Cas. 382=18 N.L.J. 333.

——Ss. 74 and 78—Written statement — Proof —Presumption.

A written statement is not a public document and must be proved by direct evidence. The presumption of genuineness cannot be extended to certified copies of the pleadings where they are not incorporated in any way in the decree of the Court. A.I.R. 1942 Oudh 303=1942 O.W.N. 191=1942 A.W.R. (C.C.) 139=200 Ind. Cas. 265.

——S. 74—Written statement — Not a public document.

A written statement is not a public document and must be proved by direct evidence. A.I.R. 1942 Oudh 303=1942 O.W.N. 191=1942 A.W.R. (C.C.) 139=200 Ind. Cas. 265.

3. Miscellaneous.

——Ss. 74 and 35—Sections 35 and 74, Evidence Act, presuppose that the document which has been produced is really an extract from an official register. A.I.R. 1942 Cal. 309=74 C.L.J. 574=46 C.W.N. 309=200 Ind. Cas. 749.

——Ss. 74 and 77—Certified copy of entry of registration is proof of entry but not of contents.

A certified copy of an entry of registration is admissible in evidence under Ss. 74 and 77, Evidence Act, as proof of the entry, but not of the contents of the deed. A.I.R. 1938 Cal. 120=177 Ind. Cas. 517.

——S. 74—Public documents—Official documents and reports of officers—Evidentiary value.

Reports of Government officers cannot be regarded as having judicial authority. But although they are opinions on the private rights of the parties, yet being reports of public officers made in course of duties, they are entitled to great considerations so far as they supply information of official proceedings and historical facts and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them and the proceedings of the Government founded on them. A.I.R. 1935 Pat. 33=13 Pat. 517=1 B.R. 570=156 Ind. Cas. 136.

——Ss. 74 and 76—On general principles, as well as under the existing statutes, and rules prescribed by the High Court, any member of the general public is entitled to inspect and have copies of the judgments of the Subordinate Criminal Courts. A.I.R. 1931 All. 364=1931 A. L.J. 405=32 Cr.L.J. 864=53 All. 724=132 Ind. Cas. 327.

——Ss. 74 and 76—Judgments of Criminal Courts.

It is the essence of the administration of justice that judgments affecting the rights and more particularly, the liberties of the people should be made as public as possible so that the public at large might, at leisure, consider those judgments either in their own interest or in the interests of the criminal cause of the condemned person. A. I.R. 1931 All. 364=1931 A.L.J. 405=32 Cr.L. J. 864=53 All. 724=132 Ind. Cas. 327.

——Ss. 74 and 35—Document, a plan, not shown to have been prepared by a public servant in discharge of his duty or to have formed the act or record of the act of a public officer within the meaning of S. 74 cannot be admitted in evidence under either S. 74 or S. 35. 120 Ind. Cas. 547 =1930 A.L.J. 244=1930 Cr. Cases 42=31 Cr. L.J. 133=A.I.R. 1930 All. 26.

——S. 74—Schoolmaster.

A school-master comes under the words "executive officers". 99 Ind. Cas. 307=50 Bom. 716 =28 Bom.L.R. 1225=A.I.R. 1927 Bom. 11.

——S. 76. See also EVIDENCE ACT, S. 74.

——Ss. 76 and 65—Income-tax assessment order —Certified copy—Essentials of.

(Per Mathur, J.)—In S. 76, a particular form of certificate is prescribed in respect of certified copies but that form is not necessary in every case. All that is required by S. 64 of the Act is that it must be a true copy of the original and there must be something to show that it was so. Different sets of rules are provided for that purpose, in different departments. For instance, in Civil Courts, a mere endorsement that it was a true copy signed by an authorised officer is sufficient. Having that purpose in view, copies of income-tax assessment orders can be called certified copies when they bear the seal of the income-tax department and an endorsement that they were duly copied and compared even though it is not known as to who actually signed that endorsement because it may fairly be presumed that the endorsement was signed by the persons who were authorised.

(Per Allsop, J.)—The law requires that certified copies must be certified to be correct. The form is of no importance but there must be a certificate purporting to be signed by some responsible official. A copy of an income-tax assessment order bearing only the initials of the clerks who made and compared it cannot be said to be a certified copy. A.I.R. 1944 All. 114=1944 A.L.J. 118=1944 A.W.R. 91=1944 O.W.N. 58 (2)=I.L.R. (1944) All. 221=214 Ind. Cas. 232.

——S. 76—Public document— Copy of —No certificate of its being true copy—Admissibility.

Where the document purports to be a copy given by a public officer having custody of a public document S. 76 of the Evidence Act requires that such a copy should bear a certificate written at the foot of such copy that it is a true copy of such document. Where such document bears no such certificate and it is not supported by the evidence of the person who prepared it, it is not admissible in evidence. A.I.R. 1941 Oudh 77= 1940 O.W.N. 999=1940 A.W.R. (C.C.) 428= 16 Luck. 230=191 Ind. Cas. 166.

——S. 76—Income-tax assessment order — If comes under—Right of assessee to certified copy of.

An assessment order is a public document within meaning of S. 74, Evidence Act. There is no provision under Income-tax Act which gives an assessee a right to inspect the records of the Income-tax Department. Hence, the assessment order does not fall within the ambit of S. 76, Evidence Act and it follows that he has no right to demand a certified copy of it under the section. A.I.R. 1940 Cal. 187=I.L.R. (1939) 2 Cal. 394=43 C.W.N. 1169=188 Ind. Cas. 37.

——S. 76—Income-tax assessment order—Grant of copy to assessee — Legality.

Section 76 is only an enabling section regarding issue of certified copies. It is not exhaustive. The issue of a certified copy of an order of assessment to the assessee cannot be said to be illegal. A.I.R. 1940 Mad. 308=50 M.L.W. 681=1939 M.W.N. 1028.

——Ss. 76, 74 and 90—Certified copy of document —Seal of Keeper of Records—Original will not forthcoming — Registration copy-produced — Held, on evidence that will was validly executed.

Under S. 76 of the Evidence Act a copy of a document to be certified 'shall be sealed whenever such officer is authorised by law to make use of seal' but where there is no evidence to the effect that the Keeper of the Records of Government of India is so authorised, no such presumption can be made when other necessary formalities have been duly carried out.

The original of the will was not forthcoming but there was a copy made on the register of the Registration Office of which a certified copy had been produced. The endorsement on the will was to the effect that the executant having heard the contents, word for word, verified it and two of the attesting witnesses identified the executant and witnessed the deed and the executant himself as well as these attesting witnesses were personally known to the Registering Officer. Thus before the Registering Officer, there was not merely admission of execution but of the fulfilment of the formalities required to make this will valid:

Held, that excluding S. 90 of the Evidence Act, the will of which it was the copy was validly executed. A.I.R. 1938 Oudh 69=1938 O.W. N. 67=13 Luck. 723=172 Ind. Cas. 882.

——S. 76—Income-tax returns—Grant of copies under.

Certified copies of returns from Income-tax Officer do not come within the provisions of S. 76, Evidence Act. A.I.R. 1938 Rang. 276= 1938 Rang.L.R. 243=177 Ind. Cas. 379.

——S. 76—Police record of statement under S. 161, Cr. P. Code—If a public document—Grant of copies under.

Record of statement heard by Police Officer in exercise of power under S. 161, Cr. P. Code, and recorded in diary is not a public document a copy of which must be given on demand under the provisions of S. 76. A.I.R. 1936 Lah. 359=17 Lah. 472=38 P.L.R. 1040=38 Cr.L.J. 246=166 Ind. Cas. 501.

——Ss. 76 and 77—Pedigree table in khewat of village—Certified copy — Grant of—Admissibility of copy.

A certified copy of a pedigree table taken from the khewat of a village is admissible in evidence. A.I.R. 1935 Oudh 231=1935 O.W.N. 162=1935 R.D. 78=10 Luck. 569=154 Ind. Cas. 135.

——Ss. 76 and 77—Uncertified copies of depositions in prior proceedings.

Uncertified copies of depositions in a prior proceeding can be admitted only after they are proved properly. A.I.R. 1933 Rang. 212=147 Ind. Cas. 414.

——S. 76—On general principles as well as under the existing statutes and rules prescribed by the High Court any member of the general public is entitled to have copies of the judgments of the Subordinate Criminal Courts. A.I.R. 1931 All. 364=53 All. 724=1931 A.L.J. 405=32 Cr.L.J. 864=132 Ind. Cas. 327.

——Ss. 76 and 77—Fards bachh—Public documents—Proof by production of certified copy.

Fards bachh are records of the acts of the public officers, and they can be proved by production of a certified copy. A.I.R. 1931 Lah. 605=32 P.L.R. 508=131 Ind. Cas. 638.

——Ss. 76 and 77—Plaint—Certified copy of—If admissible proof of age in.

Certified copy of a plaint is not admissible in proof of age of the signatory as plaint is not a public document. 92 Ind. Cas. 184=3 Pat. L. R. 270=7 P.L.T. 267=A.I.R. 1926 Pat. 180.

——S. 77. See also EVIDENCE ACT, S. 74.

——Ss. 77 and 78—Order by Government—Mode of proof—Printed copy of order not purporting to be printed or published by order of Government—Sufficiency.

A printed copy of an order signed by the President of the Indian Union, which does not purport to be printed or published by Order of Government, is no proof of the order of the President. Such an order, when not proved thus under S. 78, Evidence Act, can of course be proved by the production of the original or by the production of a certified copy under S. 77 of the Act, or possibly even by an affidavit of a responsible official. But if none of these courses are adopted the order cannot be held to be proved. 29 Pat. 335=4 A.I.Cr.D. 557=51 Cr.L.J. 1081=A.I.R. 1950 Pat. 265.

——Ss. 77 and 74—Mortgage-deed — Contents of can be proved by production of certified copy.

A mortgage deed is, under S. 74, a public document because public records of mortgages are kept in British India and under S. 65 secondary evidence can be given of it and under S. 77, its certified copies may be produced in proof of its contents. A.I.R. 1945 Bom. 319=47 Bom. L. R. 116=219 Ind. Cas. 427.

——S. 77—Income-tax assessment order — Proof by production of certified copy.

An assessment order is a public document within meaning of S. 74, Evidence Act. There is no provision in Income-tax Act which gives the assessee a right to inspect the records of Income-tax Department. Hence the assessment order does not fall within the ambit of S. 76, Evidence Act; and it follows that if the assessee has no right to inspect it, he has no right to demand a certified copy of it. Accordingly such copies are not under S. 77 certified copies which may be produced in proof of the contents of the public documents or part of the public documents, of which they purport to be copies. A.I.R. 1940 Cal. 187=I. L.R. (1939) 2 Cal. 394=43 C.W.N. 1169=188 Ind. Cas. 37. **But see** (1940) 2 M.L.J. 257=A. I.R. 1940 Mad. 768=I.L.R. 1940 Mad. 869.

——S. 77—Birth and death certificates—Value of.

The entries in birth and death certificates are **prima facie** evidence of all the facts stated therein. A.I.R. 1938 Cal. 641=42 C.W.N. 855=I.L.R. (1938) 2 Cal. 457=178 Ind. Cas. 554.

——S. 77—Entry in registration—Certified copy of—If admissible as proof of contents.

A certified copy of an entry of registration is admissible in evidence under Ss. 74 and 77, Evidence Act as proof of the entry but not of the contents of the deed. A.I.R. 1938 Cal. 120=177 Ind. Cas. 517.

——S. 77—Document—Certified copy produced—Proof of contents.

Contents of a document cannot be more satisfactorily established than by producing a certified copy. A.I.R. 1938 Nag. 152=I.L.R. (1938) Nag. 333=176 Ind. Cas. 315.

——Ss. 77, 35—Khasra Girdawaris—Proof by production of certified copies.

Khasra Girdawaris are public documents and are properly proved by the production of certified copies as is allowed by S. 77, Evidence Act. They are also made relevant by S. 35, Evidence Act. A.I.R. 1934 Lah. 698=35 P.L.R. 405=151 Ind. Cas. 786 (1).

——S. 77—Depositions in prior proceedings—Production of certified copy—If proof.

The certified copies of depositions in a prior proceeding can be admitted only after they are proved properly. A.I.R. 1933 Rang. 212=147 Ind. Cas. 414.

——S. 77—Reports of officer of Court.

Execution of decree—Report of an officer of the Court, entrusted with the execution, is a public document and can be proved by a certified copy. 81 Ind. Cas. 533=25 Cr.L.J. 917=A.I.R. 1925 Oudh 183.

——S. 77—Certified copy of document — Fard hissa kashi baghat—Whether admissible.

A certified copy of a document **Fard hissa Kashi baghat** drawn up at the First Regular settlement is admissible in evidence. An entry in a Wajibul-ul-arz may be taken as evidence of custom. 19 O.C. 363=38 Ind. Cas. 67.

——S. 77—Certified copy of compromise order admissible without proof.

Copy of an application for compromise with an order of the Court on it was admissible in evidence under S. 77 of the Evidence Act and need not be proved. (1904) 1 A.L.J. 369.

——S. 78.

Synopsis.

1. Acts.
2. Applicability.
3. Copies.
4. Diplomatic agent.
5. Foreign copies.
6. Municipal proceedings.
7. Notifications.
8. Orders of Government.
9. Proceedings of parliament.
10. Reports printed and published by Government.

1. Acts.

——S. 78—Acts—Gazette—Publication in.

Text of an Act published in Gazette of India is authority and must be followed even though intention of Legislature is not carried out—Interpretation of statutes. 97 Ind. Cas. 316=A. I. R. 1927 Pat. 142.

——S. 78—Acts—Gazette publication—Preference of.

Conflict between version of Act published in Gazette and that published by Superintendent, Government Printing—Gazette version must be preferred. 92 Ind. Cas. 566=22 M.L.W. 538=A.I.R. 1926 Mad. 65=49 M.L.J. 363.

2. Applicability.

——S. 78—Applicability—Order under seal of—Government and signed by under secretary to Government.

Per Cunliffe, J., (Henderson, J.; contra.).—Where the Government order sets out the names of certain persons as having committed various offences under the Arms Act, and directs that they should be tried by a Magistrate invested with the power of a Special Magistrate ending with 'by order of the Governor-in-Council,' and is signed by the under-Secretary to the Bengal Government, and the official seal is also affixed, the order is not a copy and it cannot be called into question. The necessity, therefore, of the usual mode of proof of Government documents, which do not prove themselves and which is alluded to in S. 78, Evidence Act, has no application. A.I.R. 1936 Cal. 316 =37 Cr.L.J. 775=63 C.L.J. 232=63 Cal. 1053 =163 Ind. Cas. 41.

3. Copies.

——Ss. 78, 86—Copies—Admissibility.

Copies of documents required by S. 78 or 86 of the Evidence Act to be certified are not admissible in evidence when they are not duly certified. 87 P.L.R. 1909=4 Ind. Cas. 929.

4. 'Diplomatic agent'.

——S. 78—'Diplomatic agent'.

The words "diplomatic agent" are very wide and prima facie cover the Resident of Hyderabad, who is the Political Agent of the Government of India. 99 Ind. Cas. 307=50 Bom. 716=28 Bom. L.R. 1225=A.I.R. 1927 Bom. 11.

5. Foreign copies.

——S. 78—Foreign copies.

Copies of entries in registers kept by the officers of a Native State are not admissible in evidence having regard to the provisions of S. 78 (6). 90 Ind. Cas. 329=A.I.R. 1926 Pat. 29.

6. Municipal proceedings.

——S. 78—Municipal proceedings.

Municipal proceedings may be proved by copy certified by the keeper. 75 Ind. Cas. 506=37 C. L.J. 589=A.I.R. 1923 Cal. 675.

——S. 78—Municipal proceedings—Printed books.

Printed proceedings themselves would not be sufficient legal proof unless they answer the description of a printed book purporting to be published under the authority of the committee as required by S. 78 of the Evidence Act. 16 Cr.L. J. 659=30 Ind. Cas. 643 (Cal.).

7. Notifications.

——S. 78—Notifications of Government — Proof of.

Where as required by Ss. 4 (36) and 26, N.-W. F.P. General Clauses Act, a certain notification is not published in the Government Gazette of the Local Government, such notification is not one that has been made and is in fact not a notification. It cannot be proved under S. 78 (1), Evidence Act, by producing Revenue Records. A. I.R. 1937 Pesh. 52=1937 Pesh.L.J. 52=38 Cr. L.J. 1042=170 Ind. Cas. 772.

——S. 78—Notifications of Government—Proof—News-paper extract.

An extract from a newspaper is inadmissible as proof of a Government notification. A.I.R. 1931 All. 12=1930 A.L.J. 1535=32 Cr.L.J. 311=130 Ind. Cas. 443.

——S. 78—Notifications of Government — Newspaper extract—Admissibility.

An extract from a newspaper about a Government notification is inadmissible in evidence. A copy of the Government Gazette should be produced. 1931 Cr.C. 12.

——S. 78—Notifications—Proof of.

The production of the Gazette printed under the authority of the Government will be sufficient proof of the notification under S. 78. 107 Ind. Cas. 578=A.I.R. 1928 All. 355.

——S. 78—Notifications—Proof of—Order of Government.

Where a notification fixing the election is published in the Gazette, it is proof of the order of Government fixing that election under S. 78. 106 Ind. Cas. 144=39 M.L.T. 367=26 M. L. W. 569=A.I.R. 1927 Mad. 980=53 M.L.J. 603.

8. 'Order of Government'

——S. 78—"Order of Government".

Circular issued by the Director-General of Post and Telegraphs notifying that stamps if a certain kind would soon be issued to post offices for sale to the public is not an order of Government within the meaning of S. 78 and the same is inadmissible in evidence. 115 Ind. Cas. 509=1929 M.W.N. 193=30 Cr.L.J. 483.

9. Proceedings of Parliament.

——S. 78—Proceedings of Parliament—Proof of —Official Parliamentary Debates.

The volumes of the Official Parliamentary Debates afford adequate legal proof of the passing of the Resolutions by the Houses of Parliament.

The proceedings of Parliament fall under either the second or fourth of the categories set out in S. 78, Evidence Act.

The expression "journals" in S. 78, Evidence Act, is plainly to be given a broad and general meaning, since it is not confined to the Journals of the Houses of Parliament, but includes journals of other Legislatures also; and there is no reason, therefore, why, in its application to Parliament; it should necessarily be confined to the particular kind of journals, if it can be shown that the Houses have authorized the publication of other official records of their proceedings and that these records are printed "by order of Government." The Official Parliamentary Debates are such a record. Where, though the question is one of the proper method of proving an event which occurred in England, whether the proclamation of emergency issued under S. 102 on September 3, 1939, was approved by a resolution of Parliament, the law applicable is the Indian and not the English Law of evidence. A.I.R. 1942 F.C. 22=43 Cr.L.J. 504=55 L.W. 344=8 B.R. 703=46 C.W.N. F.C. 9=23 P.L.T. 443=1942 F.C.R. 38=1942 M.W.N. 417=I.L.R. (1942) Kar. (F.C.) 56 (Sup.) =200 Ind. Cas. 289 (F.C.).

——S. 78 (2)—Proceedings of Parliament.

The course of proceeding of Parliament mentioned in S. 57 (4) is distinct from the proceedings themselves which may be proved as under S. 78 (2). 37 Cal. 760=14 C.W.N. 713=6 Ind. Cas. 81.

10. Reports printed and published by Government.

——Ss. 78, 56 and 57—Report printed and published by Government—Public document—Admission in evidence as exhibit.

With respect to the existence of certain touzi numbers, a report published by Government was filed by the party relying on it. But the Court returned it, thinking that it was a matter of which it was entitled to take judicial notice under Ss. 56 and 57, Evidence Act. There was a reference to this report in the judgment of the Court:

Held, that the report should be regarded as a public document within the meaning of S. 78, Evidence Act, which could be proved by any document purporting to be printed by order of Government. The Court should have admitted it formally in evidence and marked it as an exhibit. A.I.R. 1937 Pat. 334 =3 B.R. 648=170 Ind. Cas. 61.

——S. 79—Carbon copy—No presumption when not certified.

Carbon copy of Government order filed to prove Government sanction under S. 23 of Cotton Cloth and Yarn (Control) Order, 1943—Copy bearing no signature of sanctioning authority nor proof adduced to prove sanction.

Held, that though a duly certified public document proves itself under S. 79, as there is no proof that the document in question was so certified, it cannot enjoy benefit of any presumption. I.L.R. (1945) All. 644=1945 A.W.R. (H.C.) 175=1945 A.L.J. 203=1945 O.W.N. (H.C.) 165.

——S. 79—Certificate under.

Certificate of visitors to lunatic asylum signed by Superintendent of asylum is public document —Presumption of genuineness in view of S. 473, Cr. P. Code—No formal proof necessary. 63 Cal. 425.

——S. 79—Certificate of registration.

Registering Officer's evidence is not necessary to prove the certificate of registration, the genuineness of which is to be presumed under S. 79. 71 Ind. Cas. 805=A.I.R. 1924 Lah. 389.

——S. 79—Sanction.

Letter not signed by Chief Secretary but by an officer for him, is not a certified copy and cannot be basis of prosecution. 71 Ind. Cas. 239 =50 Cal. 135=36 C.L.J. 180=26 C.W.N. 878 =24 Cr.L.J. 111=A.I.R. 1922 Cal. 298.

——S. 80.

1. Confessions.
2. Depositions.
3. Dying declarations.
4. Scope.
5. Statements of accused.

1. Confessions.

——S. 80—Confession induced by torture—Duty of Judge—Trial by Jury.

Where a Judge is of opinion, having regard to all the evidence, that a confession recorded by a Magistrate had been induced by torture, his duty is not to leave the confession to the Jury but to exclude it entirely from the evidence. There is a patent error of law in his procedure in leaving the confession for consideration of the Jury, although he does his best to tell them that it is worthless. 85 C.L.J. 93=51 Cr.L.J. 1282=A.I.R. 1950 Cal. 331.

——S. 80—No presumption of voluntariness of confession—Accused pleading not guilty and retracting confession.

Per **Sen, J.**—All that S. 80 says is that the Court will presume that the confession was duly recorded and that the circumstances under which the confession was recorded were such as have been set down in the record made by the Magistrate. It says nothing about there being any presumption regarding the voluntariness of the confession. The fact that the accused pleaded

not guilty and he retracted his confession is a circumstance to indicate that the case of the accused was that his confession was not a voluntary one. A.I.R. 1943 Cal. 625=I.L.R. (1943) 1 Cal. 487=45 Cr.L.J. 155=209 Ind. Cas. 550.

——S. 80—Confessional statement under S. 164, Cr. P. Code.

Statements recorded under S. 164, Cr. P. Code, are presumed to be genuine. A.I.R. 1938 Lah. 477=40 P.L.R. 752=39 Cr.L.J. 864 (2) =177 Ind. Cas. 32.

——S. 80—Confession recorded in accordance with law.

Where the confessions are recorded strictly in accordance with law, the usual presumption arises under the provisions of S. 80, Evidence Act, that the confessions were voluntarily made, and the burden is on the accused of showing that their confessions were not voluntarily made. A.I.R. 1935 Rang. 491=37 Cr.L.J. 280=160 Ind. Cas. 292.

——S. 80—Confession.

Confession recorded according to law is presumed to be genuine. 89 Ind. Cas. 897=26 Cr. L.J. 1425=A.I.R. 1926 Lah. 122.

——S. 80—Confession containing memorandum under S. 164 (3)—Presumption under S. 80, Evidence Act, arises that all formalities have been performed—Court must be satisfied that confession was voluntarily made. 93 Ind. Cas. 978= 27 Cr.L.J. 514=6 Lah. 415=7 L.L.J. 482=A. I.R. 1925 Lah. 605.

——Ss. 80 and 114—Confession duly made.

Under S. 80 confession by any prisoner or by any accused taken in accordance with law and purporting to be signed by the examining Magistrate shall be presumed to be so made. The officer who recorded the confession may be examined as a witness. 2 Pat.L.J. 80=18 Cr.L.J. 445=38 Ind. Cas. 1005.

——S. 80—Admissibility of confession—No certificate of Magistrate. **See** CR. P. CODE, S. 164, sub-S. 3. 7 C.W.N. 220.

2. Depositions.

——S. 80—Deposition of witness taken by Special Judge appointed under Ordinance which is **ultra vires**—If one taken in judicial proceeding. I.L.R. (1945) 1 Cal. 326=46 Cr.L.J. 692=220 Ind. Cas. 237=78 C.L.J. 217=A.I.R. 1945 Cal. 159.

——Ss. 80, 91—Depositions—Mode of proof.

Depositions are matters required by law to be reduced to the form of a document within the meaning of S. 91, Evidence Act, and the only way they can be proved is under the provisions of S. 80 of the same Act, and this is only when they are taken in accordance with law. A.I.R. 1933 Cal. 190=34 Cr.L.J. 430=142 Ind. Cas. 653.

——S. 80—Depositions—Very old.

Under S. 80 the presumption has to be made as to the genuineness of the statement recorded. No presumption, however, can be made regarding the identity of the deponent; but where the document containing the deposition of a particluar person is a very old document, one can turn to the deposition itself to find out whether there is inherent evidence of the identity of the deponent. 94 Ind. Cas. 985=A.I.R. 1926 Oudh 489.

——S. 80—Deposition not read over.

If the deposition has not been read over to the witness in the presence of the presiding Judge, it does not prove itself under S. 80, but it may be provided in some other way. The Judge who recorded it can prove it or the accused can admit it. 68 Ind. Cas. 36=18 N.L.R. 192=23 Cr.L. J. 500=A.I.R. 1923 Nag. 39.

——S. 80—Though there is no oral evidence to identify the deponent of a deposition made 60 years ago, it is not a sufficient reason to render S. 80 inapplicable and though there is no signature of the presiding officer over it, the presumption that the copy is a true copy may safely be drawn. 60 Ind. Cas. 437=7 O.L.J. 542.

——S. 80—C. P. Code, O. 18, R. 5—Reading of deposition by witness.

Presumption under S. 80 of the Evidence Act can be raised, if the deposition is read over by the witness himself in Court, for that is substantial compliance with O. 18, R. 5, C. P. Code. The absence of a certificate by the Judge at the foot of the deposition of its having been read over, etc., does not deprive it of the presumption under S. 80. 46 Cal. 895=23 C.W.N. 661=29 C. L.J. 513=20 Cr.L.J. 324=50 Ind. Cas. 660.

——S. 80—Deposition not read over—Admissibility.

A statement not read over to or corrected by the witnss in accordance with law is not admissible against the person making the same. 1 U. B.R. (1912) 123=13 Cr.L.J. 569=15 Ind. Cas. 985.

——Ss. 80, 91—Evidence not read over to witness —Not admissible. **See** PENAL CODE, S. 193, AND CR. P. CODE, S. 360. 12 C.W.N. 845.

3. Dying declarations.

——S. 80—Dying declaration—If record of evidence under.

The dying declaration is not a record of the evidence given by a witness before an officer authorised by law to take such evidence. Therefore, the presumption mentioned in S. 80 cannot arise. A.I.R. 1941 Rang. 301=1941 Rang.L.R. 258= 43 Cr.L.J. 123=197 Ind. Cas. 131.

——S. 80—Dying declaration before Magistrate recorded by him—Admissiblity.

When a dying declaration is made before a Magistrate who records it, it is 'evidence' and can be admitted without proof under S. 80, Evidence Act. A.I.R. 1934 All. 340=36 Cr.L.J. 65=56 All. 750=152 Ind. Cas. 249.

——S. 80—Dying declarations.

The presumption under S. 80, Evidence Act, that the circumstances under which a document appears to be taken are true, applies to a dying declaration to which a certificate is appended by the Magistrate who recorded it, that it was read over to him and declared to be correct. 40 Bom. 97=17 Bom.L.R. 881=16 Cr.L.J. 761=31 Ind. Cas. 361.

4. Scope.

——S. 80—Scope of—Presumption under.

Certified copies of confessions by accused persons would be admissible as evidence to prove the act of the Magistrate recording confession. Where there are no irregularities and the statement is taken in accordance with law, then under S. 80, there would be a further presumption that the circumstances under which it was stated to have been taken were true, but there would be no such presumption, if the statement had not been taken in accordance with law. The copies would not be sufficient to prove the identity of the accused. A.I.R. 1934 All. 81=1933 A.L.J. 1551=35 Cr. L.J. 385=56 All. 302=147 Ind. Cas. 390 (F. B.). [Impliedly overruled in A.I.R. 1936 P.C. 253 (2)=163 Ind. Cas. 881 (P.C.).]

——S. 80—Scope.

S. 80 does not deal with admissibility of documents—Only formal proof is dispensed with. 119 Ind. Cas. 193=50 C.L.J. 106=33 C.W.N. 1121 =30 Cr.L.J. 993=1929 Cr.C. 228=A.I.R. 1929 Cal. 617 (S.B.).

——S. 80—Scope of.

Where, therefore there has been an attempt by the presiding officer to comply with provisions of S. 360, Cr. P. Code and to secure the accuracy of the record of evidence, the provisions of S. 80 do not lead to complete exclusion of the document, and the Court is bound to admit under S. 5, but it is open to each side to adduce evidence as to its faithfulness or otherwise and as to the degree of presumption under S. 80 and the weight to be attached to it. 46 Cal. 895, Foll. 86 Ind. Cas. 33=16 S.L.R. 255=26 Cr.L.J. 657=A.I. R. 1921 Sind 151.

5. Statements of accused.

——S. 80—No prima facie case made out against accused — Magistrate examining accused and recording answers—It cannot be said that examination of accused was duly recorded by him within meaning of S. 287, Cr. P. Code, and presumption under S. 80, Evidence Act, cannot apply to it. A.I.R. 1941 Mad. 1=1940 M.W.N. 1105= 52 M.L.W. 710=42 Cr.L.J. 677=195 Ind. Cas. 129.

——S. 80—Recital of statement in a judgment.

The prosecution must prove conclusively that the statement made by the accused was necessarily a false statement, before a conviction can be sustained under S. 193, I. P. Code. The recital in a judgment of a statement made by the witness is not the same thing as a record of the deposition of the witness. Nor can such recital be accepted as evidence under S. 80 of the Evidence Act and it, therefore, cannot form the basis of a prosecution under S. 193, I. P. Code. 21 Cr.L. J. 500=56 Ind. Cas. 660 (Pat.).

——S. 80—Statements of accused—Record by a Magistrate in Native State—Admissibility.

The statement of an accused person recorded by a Magistrate in a Native State is inadmissible, unless the Magistrate himself deposes to it in person. 16 Bom. L. R. 261=15 Cr.L.J. 433=24 Ind. Cas. 169.

——S. 81—Reports of debates of legislative assemblies—"White Book" on the Maltese Question —Evidentiary value of, for contents.

Reports of debates in the Legislative Assembly can only be evidence of what was stated by the speakers in the Legislative Assembly, and are not evidence of any facts contained in the speeches:

[Held, also, that "the White Book"; a publication edited by the Vatican in 1930, containing documents relating to the Maltese Question, could not be used as evidence.] A.I.R. 1935 P.C. 34 1935 O.W.N. 327=37 P.L.R. 118=1935 A.W. R. 440=41 M.L.W. 665=153 Ind. Cas. 1 (P. C.).

——S. 81—Where a copy of the Gazette notification is produced for first time before High Court in revision, the High Court can presume its genuineness under S. 81, Evidence Act and can hold the production of it in the High Court sufficient even if it had not been tendered in evidence before the trial Court. A.I.R. 1931 Lah. 273= 32 Cr.L.J. 1227=134 Ind. Cas. 769.

——S. 81—Gazette.

Under the provisions of S. 81 the genuineness of the Gazette must be presumed, though it is not formally tendered at the trial. It is enough if the Court has the Gazette before it. 88 Ind. Cas 22=7 L.L.J. 264=26 Cr.L.J. 1078=26 P. R. 566=A.I.R. 1925 Lah. 299.

——S. 81—Newspaper.

Newspaper actually produced — Presumption of genuineness arises. 120 Ind. Cas. 798= 1930 Cr.C. 331=31 Cr.L.J. 168=A.I.R. 1930 Lah. 371.

——S. 81—Newspaper—Value in evidence.

Even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement. 88 Ind. Cas. 22= 7 L.L.J. 264=26 Cr.L.J. 1078=26 P.L.R. 566 =A.I.R. 1925 Lah. 299.

——S. 81—Presumption of genuineness—Extent of.

Presumption of genuineness of a document does not include the presumption that the document was printed or published by the particular person by whom it purports to have been published. 36 Mad. 457=22 M.L.J. 75=10 M.L. T. 506=(1911) 2 M.W.N. 576=12 Cr.L.J. 585 =12 Ind. Cas. 961.

——S. 82—Certificate of Chamber of Commerce.

Certificate of Manchester Chamber of Commerce as to coal strike in England to show consequent shortage of coal is not admissible. 93 Ind. Cas. 622=28 Bom.L.R. 232=A.I.R. 1926 Bom. 253.

——S. 83.

Synopsis.

1. Maps, Government (Revenue, survey and settlement).
2. Maps, Municipal.
3. Private maps.
4. Rennell's maps.
5. Special occasion maps.
6. Thak maps.
7. Plans.
8. Miscellaneous (Settlement documents).

1. Maps (Government).

——S. 83—Settlement maps — Evidentiary value —Boundaries—Dispute as to.

In the case of a dispute as to the boundary between two villages, it is much safer to rely on the existing pillars which have been treated as the boundary between the two villages for a considerable time than to base conclusion upon settlement map and subsequent measurements to show that the pillars are not the real boundary between the two villages. A.I.R. 1943 All. 46 =1942 A.W.R. (H.C.) 292=207 Ind. Cas. 480.

——S. 83—Survey — Thakbast — Function of— Statement in thakbast, evidentiary value of— Fard-i-abpashi, preparation of.

The **thakbast** was a rough and ready survey made in 1844 as a preliminary to the regular Revenue Survey made in 1845. Its function was to record boundaries only, as a demarcation survey, and water rights were completely beyond its scope. The surveyors had no authority to record any irrigation rights, and any such notes made on the map carry no presumption and are not evidence. Entries in the **thakbast hesra** have by themselves, no evidentiary value. **Thakbast** statements are admissible and have evidentiary value, unless the entries relate to matters altogether outside the scope of the **thakbast** survey. A.I.R. 1941 Pat. 118=7 B.R. 153=21 P.L.T. 873=191 Ind. Cas. 275.

——S. 83—Presumption — Diara map — Rebuttal of presumption of correctness.

The correctness or otherwise of the **diara** map can, under no circumstances, depend upon the correct location of a particular trijunction, where there is nothing to show that the **diara** map was prepared with reference to it. The presumption of the correctness of the **diara** map will in no sense be rebutted by the mere fact that his particular trijunction has not been located. A.I.R. 1937 Cal. 574=176 Ind. Cas. 341.

——S. 83—Revenue Survey Map — Evidentiary value of—Suit by proprietor of Mouzah for declaration that resumption and assessment of particular area is illegal—Revenue Survey Map, whether conclusive against Government.

In proceeding to assess lands as added land under Act IX of 1847, one has to take the Revenue Survey Map as the starting point, and cannot go behind the map and assess lands shown therein as forming part of a permanently-settled **mouzah**; but this does not imply an admission that all lands shown as such had already been, in fact, assessed. In a suit by a proprietor of a **mouzah** for a declaration that the resumption and assessment of a particular portion of land found to have been accreted to it are illegal and **ultra vires**, the Revenue Survey Map cannot be taken as conclusive as against the Government. It is for the plaintiff to prove that the area in suit forms part and parcel of a permanently settled estate. 164 Ind. Cas. 637=39 C.W.N. 1000.

——S. 83—Evidentiary value of Government maps and survey documents—Boundaries shown in cadastral survey.

The maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made.

Title may, in certain cases be inferred from long possession and where the question is whether certain lands appertain to one or other of two neighbouring estates, if it is to be presumed that the boundaries of the two estates as shown in the cadastral survey paper are correct, that fact by itself may be regarded as some evidence of title. A.I.R. 1933 Pat. 671=13 Pat. 51=15 P.L.T. 28=149 Ind. Cas. 1095.

——S. 83—Gangetic Survey and Revenue Survey Maps—Relative value of.

The Gangetic Survey cannot be very strong evidence of possession and cannot have the same value as evidence of title as the revenue survey map. Where there is conflict between the Gangetic Survey map and a later cadastral survey map, the latter must be given preference. A.I.R. 1933 Pat. 671=15 P.L.T. 28=13 Pat. 51=149 Ind. Cas. 1095.

——S. 83—Maps prepared by Government, value of.

There is no statutory presumption as to the correctness of maps prepared by the Government. Survey Office. (Conceded by parties in the case). A.I.R. 1931 Pat. 436=13 P.L.T. 73=133 Ind. Cas. 453.

——S. 83—Survey maps.

Revenue Survey map should be properly judicially received in evidence as correct when made. 30 Cal. 291, P.C. A Cadastral Survey Map is a map of very great importance. The entry in the record of rights operates in the same way between landlord and tenant, as between landlords of the same or of the neighbouring estates, or between tenant and tenant. The entry must be presumed to be correct until it is shown by evidence to be incorrect. 84 Ind. Cas. 488=1924 P.H.C.C. 213=A.I.R. 1924 Pat. 719.

——S. 83—Map — Map is admissible without field book.

A map is admissible in evidence without the field book. The failure to produce the field book affects the weight to be attached to the map and not its admissibility. 83 Ind. Cas. 205=3 Pat. 85=A.I.R. 1924 Pat. 402.

——S. 83—Kistwari map—Presumption.

Court may not only presume the correctness of the physical features represented in the map but also the correctness of the statements as to the possession. 64 Ind. Cas. 326=3 Pat.L.T. 140 =1 Pat. 65=A.I.R. 1922 Pat. 58.

——S. 83—Survey maps—Value of.

Survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence as to the state of things at the time they were prepared. They are not conclusive and may be shown to be wrong but in the absence of evidence to the contrary, they may be judicially received in evidence as correct when made. 30 Cal. 29, Foll. 44 Ind. Cas. 247 (L. B.).

——S. 83—Revenue map—Entry in—Value of, in proving title.

An entry in a Revenue Map is not sufficient to establish title to immoveable property. 8 L.B. R. 264=9 Bur.L.T. 242=35 Ind. Cas. 432.

——S. 83—Maps and Surveys—Value as evidence.

Maps and Surveys made for revenue purposes are official documents prepared by competent persons and with sufficient publicity and notice to persons interested. They are valuable evidence of the state of things at the time of their preparation though they are not conclusive and may be shown to the wrong. (1911) 1 M.W.N. 213= 9 M.L.T. 415=10 Ind. Cas. 653.

2. Maps. (Municipal).

——Ss. 83 and 35—Map prepared by Municipality to which Calcutta Survey Act is made applicable under Bengal Municipal Act (3 of 1884)—Presumption of correctness.

A map prepared by a Municipality to which the Calcutta Survey Act is made applicable under S. 223-A, Beng. Municipal Act is one prepared under the authority of the Government and a presumption of correctness attaches to it under S. 83, Evidence Act, even if the Calcutta Survey Act contains no provision for such presumption. A.I. R. 1937 Pat. 567=4 B. R. 71=18 P.L.T. 464 =171 Ind. Cas. 732.

——Ss. 83, 87, 36—Printed maps of different wards in city, admissibility.

Printed maps showing the different wards of a city are admissible, not only under S. 83, but also under Ss. 36 and 87, Evidence Act, as well as S. 213, Land Revenue Code. A.I.R. 1942 Bom. 161=44 Bom.L.R. 295=I.L.R. (1942) Bom. 357=201 Ind. Cas. 420.

3. Private maps.

——S. 83—Private maps—Admissibility — If falls under.

S. 83 of the Evidence Act does not deal with the question of the admissibility of a private map. It must depend upon the relevancy of the map in relation to the question in controversy. A private map may be admissible as against the party by whom it was prepared or his predecessor as an admission or it may be used as evidence, possibly even against a stranger on questions of public or general interest if made by a deceased person of competent knowledge. 17 C.L.J. 642= 16 Ind. Cas. 747.

4. Rennel's maps.

——S. 83—Rennel's maps — River C shown as small branch of river B—No survey or map of river till 1783—Presumption.

So far as river surveys and road surveys are concerned, Rennel's maps are scientific and accurate ones; only the village sites shown in his map are approximate. Rennel's map can be made the basis for adjudication of land revenue.

The Decennial Settlements were about twelve years after Rennel's survey and nine years after the preparation of his map. During this intervening period, there was no survey or map of the river Culcully. The river called Culcully by Rennel was comparatively small branch issuing out of the river Padma:

Held, that an inference could legitimately be drawn that the river Culcully continued to be substantially in the same position in 1783, when the Decennial Settlement, made permanent in 1793, was made; as at the time of Rennel's survey, especially when there was positive evidence that even the river Padma at the locality did not begin to change its bed during that period. A.I.R. 1941 Cal. 520=46 C.W.N. 218=197 Ind. Cas. 5.

——S. 83—Rennell's map.

Rennell's map in Bengal can be presumed to be accurate. 66 Ind. Cas. 287=34 C.L.J. 205=A. I.R. 1921 Cal. 661.

5. Special occasion maps.

——S. 83—Maps prepared for a cause—No presumption.

It is within the provision of S. 83 that maps made for the purposes of any cause must be proved to be accurate. A.I.R. 1937 P.C. 69=18 P.L. T. 257=1937 A.W.R. 459=3 B.R. 368=1937 O.W.N. 396=45 M.L.W. 580=41 C.W.N. 577 =1937 R.D. 178=16 Pat. 258=1937 M. W. N. 593=1937 A. L. J. 638=31 Sind L.R. 242=39 Bom.L.R. 731=65 C.L.J. 241=(1937) 2 M.L. J. 631=167 Ind. Cas. 329 (P.C.).

——S. 83—Map prepared for one case.

There can be no presumption in another case, of accuracy of a map prepared for one case. 14 C.L.J. 578=16 C.W.N. 317=10 Ind. Cas. 376.

——S. 83—Map prepared by Government for private purposes.

A map prepared by private arrangement with Government servant for the settlement of the silted bed of a river raises no presumption under the section. 19 Ind. Cas. 572 (Cal.).

6. Thak maps.

——S. 83—Thak maps.

Thak maps have been held to be good evidence of the state of things at the date of the Permanent Settlement in the absence of evidence to the contrary. A.I.R. 1935 Cal. 368=60 C.L.J. 477= 62 Cal. 346=159 Ind. Cas. 98.

——S. 83—Thak map—Presumption as to accuracy.

Thak maps are always considered by Courts as good evidence and although the value of the thak map depends upon its accuracy, a thak map is not always inaccurate. Only substantial and not mathematical accuracy, can be expected from these ancient maps. 20 C.W.N. 1028=36 Ind. Cas. 184.

7. Plans.

——S. 83—Plan prepared by P.W.D.—Presumption of accuracy.

A plan which is signed by the Executive Engineer and Sub-Divisional Officer to P. W. D., when land was transferred to the District Board, must be presumed to be accurate under S. 83, Evidence Act. A.I.R. 1937 Lah. 155=38 Cr.

L.J. 438=17 Lah. 843=39 P.L.R. 143=167 Ind. Cas. 573.

——S. 83—Applicability—Parties not objecting to plan in evidence.

Where both the parties have relied upon a plan without taking any objection as to its accuracy, the plan is not inadmissible on the ground that its accuracy had not been established by evidence in accordance with the provisions of S. 83, Evidence Act. A.I.R. 1940 Lah. 309=42 P.L.R. 247=190 Ind. Cas. 689.

8. Miscellaneous.

——S. 83—Record of rights—Presumption of correctness—Lapse of time—Effect.

The presumption of correctness, which attaches to the finally published Record-of-Rights, relates only to possession at the time when the record is prepared; and even if such presumption can be made in a Criminal trial, it is clear, that where there has been an interval of 10 or 12 years between the preparation of the record and the occurrence of an offence in respect of dispute arising over possession of land, any presumption arising from the record is obviously of the weakest possible description. Indeed the probative value is practically nil since all sorts of changes may obviously take place in the course of 10 or 12 years. 125 Ind. Cas. 746=31 Cr.L.J. 918=34 C.W.N. 170=1930 Cr.C. 134=A.I.R. 1930 Cal. 134.

——S. 83—Settlement register.

Where Settlement Register of 1876 was signed by Acting Director of Revenue Settlement and was dated from the Revenue Settlement Officer.

Held, it cannot be too clearly premised, that any such record would not be held to be conclusive evidence of ownership; but upon the other hand one cannot be blind to the importance of such a document which appears de facto, to have settled the bounds of the possession of certain plots for a period of thirty-five years (that is to say, from 1876 to 1910). 68 Ind. Cas. 1=45 Mad. 565=16 M.L.W. 247=31 M.L.T. 1=49 I.A. 237=24 Bom.L.R. 1214=21 A.L.J. 250=27 C.W.N. 317=36 C.L.J. 524=A.I.R. 1922 P.C. 325=43 M.L.J. 536 (P.C.).

——S. 83—Chittas.

Chittas made by a Government for private use in connection with resumption proceedings are not admissible either under S. 83 or S. 13. 98 Ind. Cas. 85=A.I.R. 1927 Cal. 189.

——S. 83—Chittas — Documents of public nature —Meaning.

The words "documents of a public nature" mean "public documents" and not "documents prepared by officers of Government." 19 C.W.N. 1015=31 Ind. Cas. 695.

——Ss. 83 and 13—Chittas — Evidentiary value.

A chitta prepared by Government cannot be regarded as public document under S. 83, but it may be used in evidence under S. 13. Chittas are evidence; and though their accuracy cannot be presumed, they are evidence of the recognition and assertion of right that makes the entry admissible and not that they have been accurately prepared. 2 Ind. Cas. 513 (Cal.).

——S. 85—Effect of authentication — Presumption under.

Authentication is not merely attestation, but something more. It means that the person authenticating has assured himself of the identity of the person who has signed the instrument as well as the fact of execution. It is for this reason that a power of attorney bearing the authentication of a notary public is taken as sufficient evidence of the execution of the instrument by the person who appears to be executant on the face of it. The presumption, no doubt, is rebuttable. But unless rebutted, the presumption stands and the document can be admitted in evidence as a document executed by the person alleged to have executed it without any further proof. 1950 A.L.J. 466=A.I.R. 1950 A. 524=1950 A.W.R. 507.

——S. 85—Scope of—Presumption that all necessary requirements for proper execution of power-of-attorney were fulfilled.

Under S. 85, Evidence Act, the Court shall presume that a power-of-attorney executed before and authenticated by a notary public, was so executed and authenticated. The provision is mandatory, and it is open to the Court to presume that all the necessary requirements for the proper execution of the power-of-attorney have been duly fulfilled. Moreover, there are different legal modes of executing a power-of-attorney, and the provision of S. 85 is not exhaustive. A.I.R. 1939 Bom. 347=41 Bom.L.R. 530=I.L.R. (1939) Bom. 295=184 Ind. Cas. 673.

——S. 85—Powers of attorney—Scope of presumptions.

Statements in powers of attorney are required to be proved like any other statements. 84 Ind. Cas. 131=20 M.L.W. 395=1924 M.W.N. 785=A.I.R. 1924 Mad. 880.

——S. 85 — Registered power of attorney—Registration Act, S. 60.

A registered power-of-attorney is admissible in evidence to prove agency under S. 85 of the Evidence Act. 18 O.C. 372=33 Ind. Cas. 661.

——Ss. 85 and 113—S. 85 of the Evidence Act is mandatory. When a document purporting to be a power-of-attorney and to have been executed before and authenticated by a Notary Public is produced before the court, an affidavit of identification as to the person purporting to make the power-of-attorney being the person named therein is unnecessary. If the Court, however, is not satisfied as to its execution and authentication, it may, under rule 748 of the Court's rules and orders, call for further evidence. (1905) 9 C.W.N. 986=33 C. 625.

——S. 86—Scope of.

Copy of evidence given in a Court in Kutch, was not certified by the Political Agent in a manner which fully satisfied the requirements of Ss. 78 (6) and 86.

Held, that S. 86 did not exclude other proof. 27 Cal. 639, Foll. 113 Ind. Cas. 313=30 Bom.L.R. 1519=A.I.R. 1929 Bom. 24.

——S. 86—Certifying of document.

Where copies of the statements of certain witnesses who were examined in a succession certi-

ficate case in a Court of a Native State were sought to be put in evidence in a British India Court under S. 33 of the Evidence Act.

Held, that (1) the mere fact that the Resident of the State forwarded the copies in due course is not equivalent to the certificate referred to in S. 86. When a certificate is required by law it cannot be dispensed with merely because it can be obtained at any time. 92 Ind. Cas. 138=5 Lah. 105=A.I.R. 1924 Lah. 493.

——S. 86—Official translation.

The Court must accept the official translation as correct. 66 Ind. Cas. 193=26 C.W.N. 425=3 P.L.T. 133=15 M.L.W. 434=24 Bom. L.R. 576=35 C.L.J. 427=20 A.L.J. 362=1922 M.W.N. 368=30 M.L.T. 242=1 Pat. 305=49 I.A. 25=A.I.R. 1922 P.C. 63=42 M.L.J. 492 (P.C.).

——S. 87—Printed maps showing the different wards of a city are admissible not only under S. 83, but also under Ss. 36 and 87, Evidence Act. A.I.R. 1942 Bom. 161=44 Bom.L.R. 295=I. L.R. (1942) Bom. 357=201 Ind. Cas. 420.

——S. 87—Map — Correctness — Essentials — Contents, when can be relied.

Accuracy as to the information contained in a map must depend upon the source from which the information is obtained, and where no sufficient evidence as to the informants who have been questioned is forthcoming, nor is it clear how far that evidence has been tested by checking the evidence of one informant against that of another, and it is acknowledged that corrections have to be made from time to time, the contents of the map cannot be relied upon as authoritative. A.I.R. 1939 P.C. 143=182 Ind. Cas. 56 (P.C.).

———S. 87—Revenue maps—Accuracy of — Presumption — Rebuttable.

The Courts have always given great weight to the accuracy of survey maps. They are not conclusive, but in the absence of evidence to the contrary they will be presumed to be accurate. Where the maps are proved to have been based on insufficient material, the weight due them is not much. 44 Cal. 328=(1917) M.W.N. 25=14 A.L.J. 1205=18 Bom.L.R. 1027=21 C.W.N. 291=5 L.W. 570=25 C.L.J. 425=43 I.A. 303=38 Ind. Cas. 379 (P.C.).

——S. 87—Thak map.

An entry in the "thak" map that it was prepared in the presence of the Tahsildar is admissible in evidence. 7 C.W.N. 839, Foll. 10 O.L.J. 527=4 Ind. Cas. 442.

——S. 87—Extra Assistant Settlement Officer preparing history of particular sect—Such history not forming part of Settlement records—It has no presumption of truth attached to it but may be of some value if at the time it was prepared there was no dispute. A.I.R. 1934 Lah. 1=154 Ind. Cas. 375.

——S. 87—Custom — Evidence of—Books.

Per Mookerjee, J—Reference may legitimately be made to the work of Mr. Crokes on Castes and Tribes of the North Western Provinces and Oudh, as an authoritative statement of customs prevalent among the Eraki sect. of Mahomedans. 28 C.L.J. 306=48 Ind. Cas. 561.

——S. 87—Books of reference — Atkinson's "Historical Account of the N.W.P." Manual of "Titles. N.W.P." and Settlement Report of Basti District, admitted in evidence as historical works and books of reference. (1904) 1 A.L.J. 543.

——S. 88—Telegram, evidentiary value of.

The contents of the telegrams are not evidence of the facts stated in them. A.I.R. 1945 P.C. 174=1945 O.W.N. 287=1945 M.W.N. 634=12 B.R. 221=221 Ind. Cas. 587 (P.C.).

——S. 88—Telegram — Original not proved—Admissibility.

Section 88, Evidence Act; does not bar the document being considered along with other evidence though the original may not be proved as the document is admissible under S. 9, Evidence Act. A.I.R. 1933 Pat. 96=13 P.L.T. 802=34 Cr.L.J. 421=142 Ind. Cas. 809.

——S. 88—Evidentiary value.

On the only evidence of telegrams, it cannot be presumed that they are issued from a particular person but they can be considered with the other evidence. 91 Ind. Cas. 690=49 Bom. 878=27 Bom.L.R. 1373=27 Cr.L.J. 114=A.I.R. 1926 Bom. 71.

——S. 88—Telegram — Proof that it emanated from Government.

The sanction of the Local Government to prosecute a person for an offence under S. 124-A of the Penal Code communicated by telegram must be proved to have emanated from the Government. The Court is forbidden by the express provisions of S. 88 of the Evidence Act to make any presumption as to the person by whom the telegram was sent. 42 Mad. 885=37 M.L.J. 81=(1919) M.W.N. 669=20 Cr.L.J. 455=51 Ind. Cas. 343.

——S. 88—Proof of telegraph message.

Before applying S. 88 there must be legal proof that the message was sent from the telegraph office to the person concerned. In the absence of such evidence, the telegram cannot be held to have been proved. 10 Cr. L.J. 520=4 Ind. Cas. 240.

——S. 89 — Applicability — Bahi summoned—Existence denied—Entry as to mortgage in bahi—Presumption — Secondary evidence — Stamp Act, S. 35.

In a redemption suit, the question was whether the plaintiffs were the mortgagors and the defendant the mortgagee. The plaintiffs alleged that the mortgage was executed 50 years ago but did not state in the plaint whether there was any mortgage deed or any other documentary evidence in support of the alleged mortgage. Later on, however, they stated that an entry had been made with respect to the mortgage in a *bahi* belonging to the mortgagee. The defendant was called upon to produce the *bahi* but he stated that no such *bahi* was in his possession. The evidence of the plaintiffs showed that the entry was made in the ordinary *bahi* and not on stamped paper though required by law to be such:

Held, that in the absence of any reliable evidence to show that the *bahi* was in possession of de-

fendant and was being intentionally withheld by him, no presumption could be drawn under S. 89, Evidence Act. Moreover, as the entry with respect to mortgage was made in an ordinary *bahi*, no question of any presumption arose in this case.

Held, also that apart from this, as the original *bahi* entry was not duly stamped, secondary evidence of the contents of the entry was wholly inadmissible. A. I. R. 1938 Lah. 90=181 Ind. Cas. 642.

——S. 89—Object of.

S. 89 clearly relates to a case where there is in the possession of a party—the adverse party—document which that party refuses to produce after having been called upon by proper notice to do so and it is then that the presumption as to the innocence of the document arises. S. 89 is more for the purpose of penalising the non-producer of the document by raising that presumption than for raising the presumption of its innocence. 1932 M.W.N. 432.

——S. 90.

Synopsis.

1. Applicability and scope.
(a) Ancient documents.
(b) Certified copies.
(c) Copies.
(d) Documents not signed or anonymous.
2. Computation of period.
3. Custody.
4. Discretion of Court.
5. Duty of Court.
6. Evidentiary value of recitals.
7. Extent of presumption.
8. Interference in appeal.
9. Presumption when arises.
10. Secondary evidence.
11. Wills (ancient.)
12. Miscellaneous.

1. Applicability and scope—(a) Ancient documents.

——S. 90—Applicability and scope — Ancient document — Procedure in admitting in evidence.

S. 90 of the Evidence Act states that the Court may draw the presumption referred to in the section and not that it must draw the presumption, and in many cases it would be most dangerous to draw the presumption that a document was genuine merely because it was thirty years old according to the recitals in the document and came from proper custody. It is open to the Court in such a case to mark the document as an exhibit without requiring formal proof and then consider having regard to the evidence and the surrounding circumstances whether it was or was not genuine. 61 L.W. 193=1948 M.W.N. 201=A.I.R. 1948 Mad. 388=(1948) 1 M.L.J. 215.

——S. 90—Ancient document—Copy of document found to be 30 years old—Presumption.

Where a copy of the document is produced in evidence and the same is found to be 30 years old, the only presumption under S. 90 is that the signatures authenticating the copy are genuine. A.I.R. 1946 All. 389=1946 O.W.N. (H.C.) 188 =I.L.R. (1946) All. 178=223 Ind. Cas. 467.

——S. 90 — Ancient documents — Presumption as to genuinness—When drawn.

In order to decide the genuineness of old documents, the important consideration should be whether they were acted upon or not or whether they were supported by possession or not. Too much importance cannot be attached to resemblance of signatures or to the opinion of experts about them. A.I.R. 1942 All. 425=1942 A.L.J. 449=1942 A.W.R.H.C. 297=204 Ind. Cas. 540.

——S. 90—Applicability — Copy more than 30 years old produced from proper custody—Presumption of due execution of original.

If a copy more than 30 years old is produced from proper custody, the signatures authenticating the copy may be presumed to be genuine; but the production of a copy is not in itself sufficient to justify any presumption of due execution of the original. A.I.R. 1941 Lah. 400=197 Ind. Cas. 581.

——S. 90—Copy thirty years old — Presumption of execution of original.

The production of a copy of a deed more than thirty years old raises no presumption as to the due execution of the original. A.I.R. 1940 All 74=1939 A.L.J. 1023=1939 A.W.R. 884.

——S. 90—Applicability — Ancient document—Copy thirty years old.

A copy more than 30 years old, containing statement that it is true copy and also signature of person signing original, produced from proper custody—Such copy is admissible. A.I.R. 1940 Mad. 273=1939 M.W.N. 841.

——S. 90—Scope of—Ancient documents — Presumption that contents of document are true

S. 90, Evidence Act, only provides that documents more than 30 years old coming from proper custody prove themselves, but it does not involve any presumption that the contents of the documents are true. A.I.R. 1939 Bom. 59=40 Bom. L. R. 1262=I.L.R. (1939) Bom. 97=179 Ind. Cas. 697.

——S. 90 — Applicability — Ancient document—Presumption as to genuineness — Signatures of attesting witness and scribe.

In order to raise a presumption of genuineness under S. 90, Evidence Act, in respect of an ancient document, it is not necessary to prove the signatures of the attesting witnesses or of the scribe, because, if everything is proved, there would be no need to presume anything. A.I.R. 1939 Oudh 96=1939 O.W.N. 1=1939 A.W.R. 7 =14 Luck. 393=179 Ind. Cas. 596.

——S. 90—Applicability—Char Sanads executed as early as 1251 B. S. and 1269 B. S.—Presumption.

A presumption under S. 90 as to genuineness of ancient documents attches to *char sanads* executed as early as 1251 *B. S.* and 1269 *B. S.* The mere fact that no reference is made to them in other documents is not sufficient to rebut the presumption. A.I.R. 1938 Cal. 763=67 C.L.J. 111=182 Ind. Cas. 413.

——S. 90 — School register — Presumption — Person making entry not produced as witness—Effect.

A school register which is more than thirty years old and produced from proper custody, attaches to

itself a presumption of genuineness and the fact that the person responsible for the entries was not produced as a witness is immaterial. A. I. R. 1936 Lah. 104=163 Ind. Cas. 81.

——S. 90—Ancient document — Document bearing name of alleged executant by the pen of another.

A document bearing the name of the alleged executant by the pen of another is a document purporting to have been executed by the executant to which, therefore, S. 90, Evidence Act, would apply. A.I.R. 1934 All. 529=3 A.W.R. 537=148 Ind. Cas. 1172.

——S. 90—Ancient document written by licensed stamp-vendor 55 years ago.

Where a document itself is written 55 years ago by a licensed stamp-vendor and comes out from proper custody, the benefit of S. 90, Evidence Act, can be claimed. A.I.R. 1934 Lah. 885=16 Lah. 313=37 P.L.R. 592=155 Ind. Cas. 1064.

——S. 90—Ancient document — Presumption of genuineness—Pedigree table filed in preparation of khewat.

Where a pedigree table had been filed for the purpose of preparation of *khewat* and it was a document 30 years old and was produced from the *misl haqiat* of the first regular settlement:

Held, that it could be presumed to be genuine. A.I.R. 1934 Oudh 210=148 Ind. Cas. 1041.

——S. 90—Applicability — Document signed for the executant by another—Presumption of authority.

Even where an ancient document does not purport to have been signed by the executant, it is open to the Court to presume that the party who signed for the executant signed it with an authority from him. A. I. R. 1925 All. 1 (F.B.), Foll. 99 Ind. Cas. 759=A.I.R. 1927 All. 765.

——S. 90—Scope of—Presumption — Care and caution necessary — Registered documents thirty years old.

If a Court is prepared to presume the genuineness of a document under S. 90 the question whether the endorsement of the stamp-vendor thereon sets out the true facts as to the name of the purchaser of the stamp and the object for which he wanted the stamped *cadjan* is not so much a question governed by S. 90 as by S. 114 an illustration to which provides that the regularity of official acts might be presumed. The presumption under S. 90 as to documents over thirty years old, has to be made with some care. In the case of registered documents such a presumption is very readily raised; and in the case of other documents unless by reason of their appearance or by reason of internal evidence there are some cogent considerations which recommended them to the favour of the Court, the Court is not bound to raise such a presumption usually. 69 Ind. Cas. 289=14 M. L.W. 416=1921 M.W.N. 750=A.I.R. 1921 Mad. 452=41 M.L.J. 310.

——S. 90 — Applicability — Ancient document signed by another for an illiterate person—Presumption.

The presmption arising under S. 90 of the Evidence Act can be applied to a deed executed by an illiterate person whose signature has been made by some other person on his behalf. 52 Ind. Cas. 314 (Cal.).

——S. 90—Copies of ancient document — Copy ancient—Presumption if applicable.

The presumption mentioned in S. 90 of the Evidence Act is applicable to the copy produced which was more than thirty years old. 34 Cal. 1059, Foll. 29 C.L.J. 577=52 Ind. Cas. 825.

——S. 90—Sale deed thirty years old—Genuineness — Evidence to prove, if necessary.

A sale deed more than 30 years old is presumed to be genuine under S. 90 and no evidence to prove its genuineness need be given. 35 Ind. Cas. 598 (All.).

——S. 90—Ancient document—Proof of genuineness.

No proof of genuineness is required for a document thirty years old. 35 Ind. Cas. 598 (All.).

——S. 90—Presumption in case of copies thirty years old.

Under S. 90, a copy thirty years old, is presumed by the Court, to be in the handwriting of the person in whose handwriting it purports to be. 31 Ind. Cas. 579 (Mad.).

——S. 90—Applicability — Pedigree extracted from settlement record — Presumption.

A pedigree extracted from the settlement record and signed by same persons named in the pedigree being more than 30 years old and coming from the proper custody can be presumed to be genuine under S. 90 of the Evidence Act. 21 Ind. Cas. 274 (Oudh).

——S. 90—Maps (private document) thirty years old—Presumption under, scope of.

Under S. 90 the map only shows it was prepared at the time and by the officer whose signature it bears; it does not establish its accuracy. 16 C.W.N. 317=14 C.L.J. 578=10 Ind. Cas. 376.

(b) Certified copies.

——S. 90—Certified copy of document—Proof of contents and execution.

Under S. 90 of the Evidence Act, the production of a certified copy of a document which is more than 30 years old can prove the contents of the document but not its execution. The section requires production in Court of the particular document in regard to which it is asked to draw the statutory presumption of execution. I.L.R. (1949) Nag. 521=A.I.R. 1950 Nag. 6=1949 N. L.J. 226.

——S. 90—Applicability — Copy of lost document—Presumption as to genuineness of original —If evidence of contents of original—Copy not thirty years old—Effect of.

The production of a copy is not sufficient to justify the presumption of due execution of the original under S. 90 of the Evidence Act and mere production of a certified copy would not ordinarily relieve the person producing it from the necessity of producing evidence as regards the execution of the original. In suitable cases, however, the presumption arising under S. 90 also apply to copies. If the copy produced under S. 65 and admitted as secondary evidence is produced

from proper custody and is over 30 years old then the signatures authenticating the copy may be presumed to be genuine. The copy would therefore be admissible as evidence of the terms of the lost original being secondary evidence of the terms of the original grant. If the copy is not itself over 30 years old, S. 90 cannot be invoked in proof of the original of that document. 50 Mys.H.C.R. 118=26 Mys.L.J. 121.

——S. 90—Applicability — Production of certified copy of registered deed—Presumption of execution—If can be made.

The statutory presumption under S. 90 of the Evidence Act cannot be made in respect of a document merely on production of its copy under S. 65 (*e*) of the Act. Where the original is a registered document, and the copy produced is a certified copy, bearing the necessary endorsements of the Registering Officer before whom the executant acknowledged the execution and was duly identified, the facts mentioned in the endorsement may be proved by the endorsement, the copy can be admitted in evidence as proof of the execution of the original. 224 Ind. Cas. 169=47 Bom. L.R. 962=A.I.R. 1946 Bom. 193.

——S. 90—Applicability — Document not before Court—Copies.

The statutory presumption under S. 90, can be raised only with regard to the actual document produced before the Court. No presumption under the section can be raised with regard to the original document by the production of a certified copy of the same when the original is not before the Court. A.I.R. 1945 Bom. 319=47 Bom.L.R. 116=219 Ind. Cas. 427.

——S. 90—Original document lost—Copy admitted as secondary evidence under S. 65—Presumption as to genuineness of original.

Where the original document having been lost, its copy is admitted under S. 65 of the Evidence Act, as secondary evidence of the original, the only presumption that can be drawn under S. 90, is that it is a correct copy of the original document, but whether the original document was a genuine document is a question which is capable of proof and it is not permissble to invoke the assistance of S. 90 of the Evidence Act, to prove the genuineness of the original by the production of the certified copy. A.I.R. 1941 Oudh 433=1941 O.W.N. 669=1941 R.D. 387=16 Luck. 778=1941 A.W.R. 408=194 Ind. Cas. 855.

——Ss. 90 and 65—Copy admissible under S. 65—Presumption under S. 90.

Where a copy is admissible under the provisions of S. 65, Evidence Act, a presumption of correctness under the provisions of S. 90 of the Act can be drawn in respect of the copy as well. A.I.R. 1941 Pesh. 89=197 Ind. Cas. 633=1941 Pesh. L.J. 89.

——S. 90—Applicability — Copies—Original not produced.

S. 90 does not apply where the original deed is not forthcoming and only a certified copy has been produced. A. I. R. 1939 Lah. 458=41 P.L.R. 376.

——Ss. 90 and 65—Certified copies — Secondary evidence — Presumption of genuineness of original.

Where certified copies of the documents proved to have been weeded out of by a Government office, have been produced in evidence, such copies are, no doubt, admissible under S. 65, Evidence Act for proving the contents of the original documents. But the genuineness of the original documents cannot be presumed under S. 90, Evidence Act. A.I.R. 1936 Oudh 298=1936 O.W.N. 619=12 Luck. 568=162 Ind. Cas. 527.

——Ss. 90 and 65—Copies, Secondary evidence—Presumption if applies.

The presumption under S. 90 in regard to documents thirty years old arises in the case of copies as well as of originals. A.I.R. 1935 Oudh 96=11 O.W.N. 1435=152 Ind. Cas. 861.

——Ss. 90 and 65 — Applicability — Copy produced—Original lost — Genuineness of original.

S. 90, Evidence Act, cannot be so applied as to raise any presumption as to the genuineness, or due execution of the original of a document which has been lost, and of which a copy is produced as secondary evidence under S. 65, Evidence Act. A.I.R. 1936 All. 298=1936 A.W.R. 65=1936 A.L.J. 161=162 Ind. Cas. 56.

——S. 90—'Where any document....is produced"—Scope of.

The words "where any document....is produced," as they stand, do not confine the application of S. 90 to cases in which the original document is actually produced before the Court. There is nothing in S. 90 to prevent the Court making a presumption of the genuineness of the original when a certified copy of a plaint is produced to show acknowledgment for the purposes of limitation: A. I. R. 1923 Mad. 1 (F.B.), Rel. on. 121 Ind. Cas. 273=6 O.W.N. 880=A.I.R. 1929 Oudh 483.

——S. 90—Applicability — Certified (registration) copy of mortgage deed—Secondary evidence—Admissibility of S. 66.

The presumption allowed by S. 90 of the Evidence Act applies to the certified copy of the mortgage deed. The original deed being presumably in the possession of the defendants, the plaintiffs were entitled to give secondary evidence of the contents without notice to the defendants inasmuch as they must have known that they would be required to produce it in the suit for redemption. 41 All. 592=17 A.L.J. 711=1 U.P.L.R. (H.C.) 81=512 Ind. Cas. 275.

(c) Copies.

——S. 90—Document 30 years old—Presumption—If arises in cases of copies.

The view expressed by the Full Bench in (1922) I.L.R. 46 Mad. 92 (F.B.), that the presumption under S. 90 of the Evidence Act with regard to documents 30 years old arises in the case of copies as well as originals, and that if a copy is found to be a true copy a presumption may be of the genuineness of the original itself is no longer good law. The party relying on such a copy must prove the execution of the original in some way known to law, at least by approved circumstantial evidence. (1929) 56 M.L.J. 730: L.R. 56 I.A. 146: I.L.R. 52 Mad. 453 (P.C.) and (1935) 69 M.L.J. 225: L.R. 62 I.A. 180: I.L.R. 57 All. 494 (P.C.), followed. 1950 M.W.N. 368=63 L.

W. 588=A.I.R. 1950 Mad. 634=(1950) 1 M.L. J. 720.

——S. 90—Applicability—Copies.

The presumption allowed by S. 90, Evidence Act, has no application in the case of a copy. A.I.R. 1944 All. 5=1943 A.W.R.H.C. 256=1944 A.L. J. 9=1944 O.W.N.H.C. 10=I.L.R. (1944) All. 9=210 Ind. Cas. 540.

——S. 90—Applicability — Document must be before Court—Copy not sufficient.

S. 90, Evidence Act, clearly requires the production in the Court of the particular document in regard to which the Court may make the statutory presumption. A. I. R. 1935 P.C. 132=1935 A. L.J. 847=39 C.W.N. 1057=1 B.R. 761=69 M. L.J. 225=42 M. L. W. 231=16 P.L.T. 669= 1935 A.W.R. 879=37 Bom.L.R. 805=37 P. L. R. 614=1935 O.W.N. 759=1935 M.W.N. 768= 57 All. 494=62 I.A. 180=156 Ind. Cas. 864 (P. C.).

[Impliedly overrules:

(1) A. I. R. 1919 All. 232=41 All. 592=51 Ind. Cas. 275.

(2) 22 All. 294.

(3) 5 Cal. 886=6 C.L.R. 199.

(4) A.I.R. 1934 Nag. 67=30 Nag.L.R. 155.]

——S. 90—Applicability—Copies — Copy not thirty years old—Presumption.

The presumption contained in S. 90, Evidence Act, cannot apply to a copy that is not itself 30 years old. A.I.R. 1940 Nag. 382=1940 N.L.J. 437=193 Ind. Cas. 41.

——S. 90—Copies produced—Presumption as to genuineness or due execution of original.

No presumption can be drawn under S. 90, Evidence Act, as to the genuineness or due execution of the original, a copy of which is put on record and no proof of the original is given. A.I.R. 1936 Bom. 301=38 Bom.L.R. 593=164 Ind. Cas. 703 (2).

——S. 90—Copies—Certified copy not thirty years old—Presumption.

Where the certified copy of a document is not thirty years old, the presumption under S. 90, Evidence Act cannot be raised in respect of it. A.I.R. 1936 Lah. 788=166 Ind. Cas. 647.

——S. 90—Applicability — True copies of the original document—Presumption.

The presumption arising under S. 90, Evidence Act, as to the due execution and attestation of a document 30 years old is equally applicable to the copies as to the originals when the copy is proved to be a true copy of the original. A.I.R. 1934 Nag. 67=30 Nag.L.R. 155=148 Ind. Cas. 561.

[Overrules A.I.R. 1918 Nag. 114=15 Nag.L. R. 192=53 Ind. Cas. 947.]

[Impiedly overruled in A. I. R. 1935 P. C. 132.]

——S. 90—Copies.

Court may presume genuineness of signature authenticating a copy. 117 Ind. Cas. 507=33 C. W.N. 578=52 Mad. 453=29 M. L. W. 804=31 Bom.L.R. 756=49 C.L.J. 566=56 I. A. 146= 1929 M.W.N. 553=A.I.R. 1929 P. C. 115=56 M.L.J. 730 (P.C.).

——S. 90—Applicability — Certified copy of receipt—Presumption under.

A certified copy of receipt more than thirty years old, is inadmissible in evidence in the absence of any indication of the record from which it was obtained. No presumption can be made in favour of a copy of a document under S. 90 of the Evidence Act. 16 N.L.R. 106=55 Ind. Cas. 426.

——S. 90—Applicability — Copies — Original document not before Court.

No presumption can be made under S. 90, Evidence Act in favour of any document which itself is not produced before the court invited to make the presumption. The production of a copy is insufficient. 5 Cal. 886; 22 All. 294; 93 P.R. 1910; 21 M.L.J. 981, Diss. The rule of presumption embodied in S. 90, is one to be applied with exceeding caution in India. 15 N. L. R. 192=53 Ind. Cas. 947.

——S. 90—Copies of ancient document.

The presumption contained in S. 90 of the Evidence Act applies not only to original documents but also to copies thereof. 22 All. 294, Foll. 29 M.L.J. 772=2 L.W. 509=29 Ind. Cas. 386.

——S. 90—Copies of ancient document.

The presumption as to the genuineness of an ancient document can be drawn where the original has been lost but its copy has been produced. 21 M.L.J. 981=12 Ind. Cas. 453.

——S. 90—Copies of ancient document.

A court can accept a copy in evidence and apply the presumption under S. 90 to it. 18 Ind. Cas. 250 (Oudh).

(d) Documents not signed or anonymous.

——S. 90—Applicability — Document bearing no signature or mark nor purporting to be written by any one but bearing only a seal — Presumption of genuineness — If arises.

The presumption available under S. 90 of the Evidence Act applies only if the document in question purports to have been 'signed' by somebody or if it purports to be in the handwriting of somebody. The presumption does not apply to the genuineness of a *seal* which the document bears, when such document does not purport to have been 'signed' or written by anybody and the presumption cannot therefore avail such a document which purports to bear only a seal without any signature or mark. A.I.R. 1935 Oudh 289; 1937 Oudh 194; 1942 Oudh 374, rel. on. I.L.R. (1949) Cut. 312.

——S. 90—Old account books not signed—S. 90 does not apply.

S. 90 can have no application to unsigned account books as in order to attract the operation of S. 90, the document must have been signed. A.I.R. 1944 Lah. 58=45 P.L.R. 441=212 Ind. Cas. 416.

——S. 90—Applicability — Old document not purporting to be in handwriting of or signed by any known person.

Before a relevant statement is admitted into evidence, its authorship has to be proved. For that purpose, S. 90 is commonly relied upon in the case of old documents, the authorship of which cannot be proved by persons who knew the handwriting or

can recognize the signature of the maker. S. 90 cannot, however, be relied upon for the proof of a document which does not purport to be in any known person's handwriting or to be signed by any known person. A.I.R. 1941 Mad. 602=53 M.L.W. 634 =(1941) 1 M.L.J. 759=1941 M.W.N. 518=198 Ind. Cas. 606.

——S. 90—Pandah's bahis are admissible under S. 32 (5) and (6) and S. 90, Evidence Act, only if evidence is led to prove the identity, signature and handwriting of the writer. A.I.R. 1940 Lah. 245 =190 Ind. Cas. 597.

——S. 90—Applicability — Document — Not signed.

A document which does not even purport to be signed by the executants is inadmissible in evidence in spite of the fact that it is more than 30 years old. A.I.R. 1939 Lah. 285=41 P.L.R. 108=182 Ind. Cas. 1008.

——S. 90—Applicability — Presumption — Anonymous documents.

S. 90 does not lay down that there is any presumption regarding anonymous documents the writer of which is not known. The English rule that an ancient document proves itself is not applicable in its full extent in India in view of the very precise terms of S. 90. Hence where an entry in ancient document is not signed by the person who wrote it and there is nothing from which one can say that particular person purports to have written it, except a general statement that it is kept amongst the family records as a record of the family's transactions, the document cannot be taken to be properly proved by virtue of presumption under S. 90. A.I.R. 1939 Mad. 926=1939 M.W.N. 946=(1939) 2 M.L.J. 593 =50 M.L.W. 527.

——S. 90—Party tendering document unable to say by whom it was written—Admissibility of.

S. 90 of the Evidence Act, does not contemplate that where a party tendering a document is unable to say who prepared or signed it, or where the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than thirty years old makes it admissible without proof. A.I.R. 1937 Oudh 353 =1937 O.W.N. 179=1937 R.D. 88=166 Ind. Cas. 930.

——S. 90—Applicability — Documents — No names of executant, scribe or witness — Presumption.

The presumption referred to in S. 90, Evidence Act, is of a limited character and applies only to the signature or handwriting. Where, however, there are no names of executant, scribe or witness, the section cannot avail to prove the document, merely because it happens to be more than 30 years old or is produced from custody which the Court may consider proper. A.I.R. 1942 Cal. 309=74 C.L.J. 574=46 C. W.N. 309=200 Ind. Cas. 749.

——S. 90—Scope of—Document merely sealed not signed.

All that S. 90 of the Evidence Act lays down is that where a document is proved to be 30 years old and is produced from proper custody, the Court may presume that the signature and every other part of the document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to be so executed and attested. But S. 90 of the Evidence Act, makes no provision for any presumption in regard to seals, and a seal cannot be regarded as a signature within the meaning of the definition contained in the General Clauses Act. A.I.R. 1937 Oudh 194=1936 O. W.N. 768=1936 R.D. 408=12 Luck. 400=164 Ind. Cas. 494.

——S. 90—Applicability — Unsigned deed—Seal affixed—No evidence as to actual affixing of seal—Presumption.

Where there was no signature or endorsement of the author of a grant in the deed and no evidence to show that the person alleged to be its author actually affixed his seal on the deed or got it affixed by some one under his order:

Held, that the impressions of the seals could not be held to be the impressions of the genuine seal and the document could not be presumed to be genuine. A.I.R. 1937 Oudh 194=1936 O.W.N. 768=1936 R. D. 408=164 Ind. Cas. 494=12 Luck. 400.

——S. 90—Applicability to Imami letters (writer not known).

In the case of imaginary persons like *Imams*, there can be no question of signatures and handwriting, and an attempt to apply S. 90 to such documents is merely futile. A.I.R. 1935 Nag. 156=157 Ind. Cas. 302.

——S. 90—Scope of — Presumption in regard to seals.

S. 90 makes no provision for any presumption in regard to seals, nor can a seal be regarded as signature under the definition contained in the General Clauses Act. A.I.R. 1935 Oudh 289=1935 O.W.N. 387=1935 R.D. 171=11 Luck. 35=154 Ind. Cas. 965.

——S. 90 — Applicability of — Presumption—Unsigned accounts.

There is no presumption under S. 90 with regard to unsigned accounts not purporting to be in the handwriting of any particular persons. 33 M.L.J. 84, Foll. 124 Ind. Cas. 609=A.I.R. 1930 Nag. 225.

——S. 90—Applicability — Document not signed nor sealed.

S. 90 of the Evidence Act does not apply to old papers filed in the case which are neither signed nor sealed nor purported to be in the handwriting of any particular person. 40 Ind. Cas. 450 (Cal.).

——S. 90—Applicability — Document thirty years old—Author not known—Not admissible.

Where a party producing a document more than 30 years old cannot show and the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than 30 years old does not make it admissible without proof under S. 90 of the Evidence Act. 3 Pat. L.J. 306=4 Pat. L.W. 213=(1918) P.H.C.C. 145=44 Ind. Cas. 422.

——Ss. 90 and 114—Unsigned accounts—Applicability of section 90.

Neither S. 90 nor S. 114 enables the Court to presume that unsigned accounts more than a century old, which do not purport to be in the handwriting of any particular person or persons, were written by

authorised accountants. 33 M.L.J. 84=41 Ind. Cas. 788.

2. Computation of period.

——S. 90—Computation of period of thirty years —From what date to be reckoned.

The period of thirty years, under S. 90, Evidence Act, is to be reckoned, not from the date upon which the deed is filed in Court but from the date on which it having been tendered in evidence, its genuineness or otherwise becomes subject of proof. 169 Ind. Cas. 402=39 P.L.R. 340.

——S. 90—Computation of period of thirty years —From what date to be reckoned.

Under S. 90, Evidence Act, the period of 30 years is to be reckoned, not from the date upon which the deed is filed in Court but from the date on which, it having been tendered in evidence, genuineness or otherwise becomes the subject of proof. A. I. R. 1936 P.C. 15=1936 O.W.N. 10=38 Bom. L.R. 330 =63 I.A. 85=40 C. W. N. 226=38 P. L. R. 19 =43 M.L.W. 107=1936 A.W.R. 45=1936 M.W. N. 22=2 B.R. 207=1936 A.L.J. 84=70 M.L.J. 206=19 N.L.J. 29=63 C.L.J. 29=160 Ind. Cas. 29 (P.C.).

——S. 90—Computation of period—From what date.

30 years should be counted from the date of its genuineness being subjected to proof. 82 Ind. Cas. 487=A.I.R. 1925 Mad. 184.

——S. 90—Computation of period—Date of production is immaterial.

Date of production is immaterial—Date of challenging genuineness is to be looked to. 75 Ind. Cas. 57=4 Lah. 233=6 L.L.J. 97=A.I.R. 1924 Lah. 145.

——S. 90—Computation of thirty years—Time of hearing.

Under S. 90 of the Evidence Act the Court can presume the genuineness of a document thirty years old not on the date of the suit or on the date of its production but on the date when arguments were heard. 6 O.L.J. 615=54 Ind. Cas. 368.

——S. 90—Computation of thirty years.

The period of thirty years under S. 90, must be reckoned as from the date on which the genuineness or otherwise of the document becomes the subject of proof and not from the date of suit. 146 P.W.R. 1917=42 Ind. Cas. 80.

——S. 90—Dpcument not thirty years old when suit was dismissed for default of appearance—Thirty years old at the trial after restoration—Evidence let in proof—Disbelieved by Court—Presumption of genuineness not drawn—*Held* justified under the circumstances. 12 A.L.J. 507=25 Ind. Cas. 412.

3. Custody.

——S. 90—Custody—Proper custody explained.

The deed relating to the affairs of the family, in which every member is evenly interested, has to be placed in the custody of some one and there can be no better custodian than the mother to whom all the sons are alike and who is evenly interested in all. A.I.R. 1946 All. 67=1945 A.L.J. 426=I. L. R. (1946) All. 130.

——S. 90—Deeds more than 30 years old produced as instances of custom—Proper custody—Not essential.

In a case where the deeds more than 30 years old are being produced as instances and not as foundation of title, the Court should accept all the deeds more than 30 years old irrespective of the fact, whether they come from proper custody or not. A.I.R. 1939 Lah. 152=41 P.L.R. 670=181 Ind. Cas. 703.

——S. 90—Old will of 1899 produced by person not named therein in probate proceedings in 1907 —His custody not accounted for—Subsequent production—Genuineness.

A will alleged to have been made by the testator in 1899, was first produced by a person who was not named in the will, in the probate proceedings in 1907. It was not known, how he came in possession of it. It was subsequently produced in 1930, in some proceedings:

Held, that the presumption under S. 90, Evidence Act, as to its genuineness could not arise, since there was nothing to show that it was produced in the probate proceedings from proper custody. A.I.R. 1937 Lah. 786=40 P.L.R. 82=176 Ind. Cas. 262.

——S. 90—Ancient document—No signature but mere mark—Presumption—Proper custody—Finding of fact—Interference.

The presumption under S. 90, Evidence Act, can be drawn even if the person claiming title under the document in question is out of possession or has not actually signed or thumb-marked the document himself. As regards the question of possession, it is for the Court to decide in each case whether the custody from which the document is produced is or is not proper and if it considers the custody to be proper, it can raise the presumption. Where a presumption has been drawn under S. 90, Evidence Act, not arbitrarily or as a matter of course but after considering various cicumstances, there is no justification for interfering on second appeal with the discretion of the lower Court. A.I.R. 1932 Lah. 43=32 P.L.R. 626=134 Ind. Cas. 296.

——S. 90—Custody — Question of fact in each case.

The question whether the custody is proper or not cannot be determined by any general principles but is one, as the law declares it to be determined on the facts "of the particular case." 126 Ind. Cas. 19.

——S. 90—Custody—Duty to prove, it was proper custody.

Mere production of an ancient document by a party affords no proper custody and it is for the party producing it to explain how the document came to be in his custody. 124 Ind. Cas. 609=A.I.R. 1930 Nag. 225.

——S. 90—Partition papers—Collectorate, if proper custody.

Collectorate is not normally a proper custodian for a chitta relating apparently to a private partition among certain persons or certain property. 90 Ind. Cas. 722=A.I.R. 1926 Cal. 370.

——S. 90—Proof of custody.

If a party cannot explain properly how he came to possess a document, the custody of the document is not clearly proved. 23 C.W.N. 201=50 Ind. Cas. 222.

——S. 90—Proper custody—Legitimate origin.

Although a person appointed manager by the Court of the property of an insane person ought to restore a document in his possession as such manager to the proprietor when he is removed from the management, his failure to do so does not, having regard to the explanation in S. 90, make the custody of the document improper within the meaning of the Evidence Act. (1906) 3 C.L.J. 306=10 C.W.N. 738=33 Cal. 511.

——S. 90--Custody—Legitimate and not the best is the test of.

Per *Batty, J.*—It is not necessary that the document should be found in the best and most proper place of deposit, and the section read with the explanation attached thereto seems to insist only on a satisfactory account of the origin of the custody and not on the history of its continuance. (1902) 27 B. 452=5 Bom.L.R. 144.

4. Discretion of Court.

——S. 90—Discretion to draw presumptions.

Court is not bound to draw the presumption under S. 90, Evidence Act. It has a discretion in the matter. A.I.R. 1938 All. 345=1938 A.W.R. 234 =175 Ind. Cas. 594.

——S. 90—Discretion of Court to presume genuineness.

In the case of documents purporting or proved to be thirty years old and produced from proper custody, S. 90 of the Evidence Act allows the Court discretion to presume that the signature and every other part of such documents, which purport to be in the handwriting of any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. Under the General Clauses Act (IX of 1897) the word "sign" includes mark with reference to a person who is unable to write his name. A.I.R. 1935 Oudh 289=1935 O. W.N. 387=1935 R.D. 171=11 Luck. 35=154 Ind. Cas. 965.

——S. 90—Presumption as to genuineness—Discretion of Court.

The raising of a presumption under as to the genuineness of a document is a matter which is eminently within the discretion of the trial Court. A. I.R. 1935 Oudh 96=11 O.W.N. 1435=152 Ind. Cas. 861.

——S. 90—Presumption under — Discretion of Court.

Whether genuineness of a document over 30 years old and produced from proper custody should be presumed under S. 90 or not is a matter which is within the discretion of the Court below. 114 Ind. Cas. 307 (Oudh).

——S. 90—Scope—Raising of presumption—Discretion of Court.

The wording of S. 90 shows that it is not compulsory upon any Court before whom a document purporting or proved to be 30 years old is produced, to presume that the said document is genuine. That section only gives a discretion to the Court that if under the circumstances established in a case, it considers proper to raine such presumption, it can do so. 26 All. 581 (P.C.), Foll. 110 Ind. Cas. 415=5 O.W.N. 424.

——S. 90—Document thirty years old—Court if bound to accept contents of.

Court is not bound to presume the correctness of every statement in a document thirty years old. 98 Ind. Cas. 1021=A.I.R. 1927 Cal. 229.

——S. 90—Discretion — Presumption under—Application of—Caution.

Presumption must be cautiously applied—In proper cases presumption may be relied on, whether the document forms foundation of party's title or it is sought to be used as evidence. 11 Cal. 539 and 29 Cal. 740, Foll. 98 Ind. Cas. 147=31 C.W.N. 215 =A.I.R. 1927 Cal. 102.

——S. 90—Raising of presumption under—Discretionary—Evidence let in and found against.

The presumption referred to in S. 90 is one which the Court is not bound to make and notwithstanding that the elements mentioned in that section are satisfied the Court may require the document to be proved in the ordinary manner. 26 All. 581 (P.C.), Rel. on. Where the plaintiffs do not rely upon such presumption but adduce evidence in order to prove the genuineness of a document but such evidence is disbelieved by the Court, they cannot complain if such presumption was not made by the Court. 104 Ind. Cas. 219=55 Cal. 210=A.I.R. 1927 Cal. 870.

——S. 90—Discretion of Court—Refusal to draw presumption when evidence is available.

Direct evidence available—Presumption under S. 90 may be refused to be drawn. 61 Ind. Cas. 125= 8 O.L.J. 23=A.I.R. 1921 Oudh 55.

——S. 90—Discretion of Court—Question regarding presumption.

Any question regarding the presumption to be made in favour of the genuineness of a document under S. 90 is a matter eminently within the discretion of the Trial Court. 61 Ind. Cas. 959=8 O.L.J. 131=A. I.R. 1921 Oudh 36.

——S. 90—Discretion—Presumption — Proof unsatisfactory.

It is not open to a party to rely on the presumption under S. 90 of the Evidence Act and also on proof; and the Court may presume a deed to be genuine even though it is not satisfied with the evidence tendered to prove its execution. 6 O.L.J. 20=1 U.P.L.R. (P.C.) 23=49 Ind. Cas. 419.

——S. 90—Ancient document—Presumption—Discretion of Court.

S. 90 does not lay down any rule whether or not in the circumstances the Court will make the presumption contemplated. Where the original is not proved to be lost or to have been missing or to be in the custody of any person who declined to produce it, no presumption regarding such original can be raised. 19 O.C. 92=36 Ind. Cas. 629.

——S. 90—Discretion—Presumption of genuineness—When not to be drawn.

No presumption could be raised under S. 90 of the Act where the history of the document shows that it was attacked as a forgery many years before. 20 Ind. Cas. 62 (Oudh).

——S. 90—Discretion— Presumption — Genuineness—Practice.

In practice a Court does not generally decide whether it will make the presumption under S. 90 of the Evidence Act or not, until all the evidence in the case is before it. The mere fact that the Court has allowed evidence to be given about the proof of a

deed, does not preclude it from making the presumption under S. 90. 10 A.L.J. 87=16 Ind. Cas. 483.

——S. 90—Discretion—Caution.

The presumption of genuineness in respect of a document alleged to be more than 30 years old must be applied with great caution. 82 P.L.R. 1909 =88 P.W.R. 1909=4 Ind. Cas. 923.

——S. 90—Ancient documents—Proper custody—Presumption—Discretion.

It is in the discretion of the court to presume the genuineness of documents more than 30 years old; but it should be exercised not arbitrarily but in conformity with principles of law and justice. While the presumption should be applied cautiously, care should be taken not to perpetrate injustice by rejecting documents from proper custody capriciously or for inadequate reasons. The mere raising of the question of the genuineness of such documents does not exclude the presumption, for it is then that it will at all be needed. When the court has, after consideration, thrown the *onus* against one party or another, he must prove his case as to the document or fail. If the document is presumed to be genuine, it will be taken as duly proved until it is disproved by rebutting evidence. The mere fact of the ancient document being sealed instead of signed is no ground to refuse to presume the document to be genuine. (1902) 29 C. 740.

——S. 90—Discretion of Court—Question of presumption.

The presumption allowed by S. 90 of the Indian Evidence Act, 1872, is not a presumption which the court is bound to make; but the court has an absolute judicial discretion to say whether in any particular case it is so satisfied as to the execution of a document that it will allow the presumption to take the place of specific evidence as to the signatures which the document purports to bear. 1901 A.W.N. 28.

——S. 90—Presumption—Question of—Discretion of Court.

The question whether to raise a presumption or not, is one for the court to determine, which is a matter for judicial discretion. (1905) 2 C.L.J. 592.

5. Duty of Court.

——S. 90—Duty of Court—Document relied by party—Custody—Origin of possession—Duty of Court—Court, if can, on its own initiative, compare handwriting with other documents, not challenged as fabricated without aid of experts.

The presumption under S. 90, Evidence Act, is rebuttable. It is to be made at the discretion of the Court. The presumption being based on the rule of expediency, unless the surrounding circumstances satisfied the Court that the documents were produced from proper custody, it would be unsound to admit them. The provisions in S. 90, read with the Explanation insist on a satisfactory account of the origin of the possession being given by the party relying upon the documents. The custody might not be in the strictest sense legal custody, but, whether it originated in right or wrong, the origin must be explained. The Court must, therefore, examine the surrounding circumstances tending to establish the connection of the party producing the document with the person with whom the documents should naturally have been. For that purpose, contemporary events assume importance. The Courts' action will be largely influenced by their appreciation in raising the presumption and appraising the value to be attached to the documents.

Where the Judge compares the handwriting with the other documents which are produced before him and which are challenged as fabricated, such a process of comparison by the Court upon its own initiative and without the guidance of an expert and even with it, is, at all times, hazardous and recognizably inconclusive. A.I.R. 1938 Bom. 257=40 Bom.L.R. 202=175 Ind. Cas. 361.

——S. 90—Duty of Court—Deeds produced for the first time—Basis of proprietor of rights—Presumptions under—Executants authority.

Courts should be very careful about raising any presumption under S. 90 of the Evidence Act, in favour of deeds which are produced practically for the first time during the trial of suits in which proprietary rights are set up on the basis of those deeds.

A presumption under S. 90 of the Evidence Act only extends to the genuineness of the document, but does not go further to the extend of holding that the document was in fact executed by a person possessed of the requisite authority. A.I.R. 1937 Oudh 353=1937 O.W.N. 179=1937 R.D. 88=166 Ind. Cas. 930.

——S. 90—Duty of Court—Presumption—Necessity of applying with caution.

The rule of presumption under S. 90, Evidence Act must be applied with exceeding caution in India where forgery and fraud cannot be said to be of rare occurrence. Less credit should be given to ancient documents which are unsupported by any evidence that might free them from the suspicion of being fabricated. The Courts should be very careful about raising any presumption under S. 90 of the Evidence Act in favour of old deeds of *shankalap* which are produced practically for the first time during the trial of suits in which under-proprietary rights are set up on the basis of those deeds. A.I.R. 1937 Oudh 194=1936 O.W.N. 768=1936 R.D. 408=12 Luck. 400=164 Ind. Cas. 494.

——S. 90—Record of Rights—Presumption of possession.

The facts that a Record of Rights was prepared more than thirty years ago does not, in any way, affect the presumption attaching to it is in law. The presumption is a rebuttable one and it is open to the Magistrate to find upon the evidence if the presumption has been rebutted. He is not justified in wholly excluding the document from consideration. A.I.R. 1934 Pat. 86=35 Cr.L.J. 481=15 P.L.T. 147=13 Pat. 153=147 Ind. Cas. 774.

——S. 90—Duty of Court—Consideration of evidence before accepting document.

Documents more than 30 years old—Genuineness disputed—Court should consider external and internal evidence for basing presumption of proper signature and execution. 123 Ind. Cas. 492=31 Bom.L.R. 1279 =A.I.R. 1930 Bom. 39.

——S. 90—Duty of Court—Documents thirty years old—Admissibility—Care and caution.

Considerable care and caution should be exercised in accepting documents, more than 30 years old. Acceptance of genuineness of the document by the parties many years ago, is a matter in its favour. 241 P.L.R. 1913=143 and 204 P.W.R. 1913=19 Ind. Cas. 964.

——S. 90—Duty of Court—Presumption—Caution—Evidence ali unde.

Before a Court can presume a document to be genuine under S. 90 of the Act it should be satisfied *aliunde* that there is a good ground for accepting it as a true document. 81 P.R. 1913=321 P.L.R. 1913=211 P.W.R. 1913=20 Ind. Cas. 868.

6. Evidentiary value.

——S. 90—Principle of—Applicability to ancient transactions—Recital as to necessity—Value in evidence.

In cases of ancient transactions, it must be presumed that the alienation was lawful. The difficulty lies in fixing the length of time that would be necessary to justify the application of that presumption. On the principle underlying S. 90 Evidence Act relating to documents 30 years old, the presumption in favour of existence of necessity may well be applied to transfers more than 30 years old provided that the original parties and witnesses to it are not available at the trial for bearing testimony to the circumstances in which the transaction was concluded. The presumption will operate with greater force in a case where the reversioner fails to bring a declaratory suit during the lifetime of the alienor. It would not be unreasonable to assume that the failure to sue for declaration was due to the existence of evidence proving necessity and the Courts would be justified in placing the onus on the reversioners of proving absence of legal necessity. A.I.R. 1941 Nag. 79=1941 N.L.J. 142=I.L.R. (1941) Nag. 124=192 Ind. Cas. 826.

——S. 90—Principle underlying—Long interval between execution of deed and suit challenging it—Evidentiary value of recitals in deed.

If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration and certainly should not be accepted as proof of the facts. But as time goes by and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance and cannot lightly be set aside. A.I.R. 1940 All. 433=1940 A.L.J. 479=1940 A.W.R. 434=191 Ind Cas. 786.

——S. 90—Deed of transfer—Recitals regarding consideration — Transaction taking place 60 years back and parties to the transaction dead—Rectial may be relied upon as reliable piece of evidence regarding the passing of consideration but as a rule recital in a deed of transfer is no evidence to prove the payment of consideration. A.I.R. 1940 All. 101=1930 A.W.R. 872=1939 A.L.J. 1056=186 Ind. Cas. 515.

——S. 90—Principle of—Recital in old deed—Value in evidence.

As time goes by and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital in a deed consistent with the probability and circumstances of the case assumes greater importance, and cannot lightly be set aside. It may be sufficient civdence to support the deed. A.I.R. 1943 All. 1009 =1935 A.L.J. 119= 4 A.W.R. 990=153 Ind. Cas. 220.

——S. 90-A—Ancient deed—Recitals as to necessity—Value in evidence.

With regard to the value of recitals of necessity in ancient documents executed by limited owners, it is necessary to distinguish the sort of evidence which is not available when both the vendor and the vendee are dead and the sort of evidence which may still be available as regards the necessity for the loan. When both the vendor and vendee are dead, and the transaction is an ancient one, evidence will not be usually available on this point unless possibly the evidence of some other person from whom the vendee made enquires. Therefore, such recitals can be used as evidence to this extent even though the attestors are alive and have been examined. A.I.R. 1934 Mad. 169=66 M.L.J. 342=39 M.L.W. 701=150 Ind. Cas. 1137.

——S. 90—Recitals of ancient document—Evidence of correctness of statements in.

The recitals in a document executed 40 years ago can be treated as cogent evidence of the correctness of the statements made therein. A.I.R. 1934 Nag. 222=31 Nag.L.R. 113=152 Ind. Cas. 362.

——S. 90—Document executed by pardanashin lady—"Duly executed and attested", meaning of—Scope of presumption under—Value of.

The words "duly executed and attested" in S. 90, Evidence Act, merely mean execution and attestation according to the formalities prescribed by law. The question whether the document has been explained to the executant and whether she has fully understood the importance and effect of it, is hardly a question of execution. Where, therefore, a plaintiff founds his title on a sale-deed executed by a *pardanashin* lady, he must establish by positive evidence that the document was sufficiently explained to her and was understood by her, this being not a matter which can be presumed under S. 90, Evidence Act. A.I.R. 1933 Oudh 170 (2) =10 O.W.N. 147=8 Luck. 538=150 Ind. Cas. 346.

——S. 90—Ancient deed executed by pardanashin lady—Presumption of due execution—Value of.

Under S. 90, Evidence Act, the trial Court is entitled to make a presumption of genuineness in the case of ancient documents and the discretion of the trial Court cannot be questioned in appeal.

But the words "duly executed and attested" merely mean execution and attestation according to the formalities prescribed by law. The question whether the document has been explained to the executant and whether she has fully understood the import and effect of it, is hardly a question of execution and it is not, therefore, open to the Court, in the case of an ancient document executed by a *pardanashin* lady, to make a presumption that the document was executed by the lady 'intelligently' *i.e.*, with full knowledge and comprehension.

The question whether the transaction was free from all attempt at undue influence is also not one on which evidence can be dispensed with and in respect of which any presumption can be made under S. 90, Evidence Act. A.I.R. 1931 Oudh 103=5 Luck. 526=8 O.W.N. 55=130 Ind. Cas. 861.

——S. 90—Evidentiary value of ancient documents.

Mere production of an ancient document unless supported by some corroborative evidence of acting under it is not entitled to any weight. An ancient deed must be corroborated by evidence of ancient or modern corresponding enjoyment or by other equivalent or explanatory proof; it is then presumed to have constituted part of the actual transfer of property mentioned because this is the usual course of such transactions, *i.e.*, though absence of proof of possession does not affect its admissibility, it undoubtedly affects the weight to be attached to the document. 89 Ind. Cas. 747=42 C.L.J. 14=A.I.R. 1925 Cal. 1189.

7. Extent of presumption.

——S. 90—Presumption under—If extends to due attestation by attestors thereof.

Ordinarily the presumption under S. 90, Evidence Act, would include due attestation by the persons by whom the document purports to be attested. If a document 30 years old shows that certain persons witnessed it in token of its execution by its maker, and it is produced from proper custody the Court can presume "due" attestation. It is not however, necessary that the endorsement of attestation should also state that the attestor saw the executant sign and that he attested in

the presence of the executant, so as to raise the presumption of due attestation. A.I.R. 1949 All. 733.

——S. 90—Document thirty years old—Presumption—Extent of—Deed not bearing signature of executant—Effect of.

The Courts should be very careful about raising any presumption under S. 90 of the Evidence Act in favour of old deeds of *Shankalap* which are produced practically for the first time during the trial of suits in which under-proprietary rights are set up on the basis of those deeds. But where the deeds in question do not purport to have been signed or even marked by the executants, they cannot be held to be really executed by the persons by whom they are alleged to have been executed.

The presumption that arises under S. 90 of the Evidence Act, only extends to the genuineness of the old documents coming from proper custody; it does not further go to extent of holding that the document was in fact executed by persons possessed of the requisite authority. A.I.R. 1932 Oudh 227=9 O.W.N. 379 =8 Luck. 18=138 Ind. Cas. 513.

——S. 90—Ancient document—Presumption—Extent.

Where the presumption of execution of the document arises in favour of a party under S. 90, Evidence Act, that presumption extends to this also that the mark put on the same indicated that the document was signed by the executant by a sort of symbolic writing which is to be taken to be the signature in the absence of proof to the contrary. A.I.R. 1931 Cal. 596=58 Cal. 686= 33 Ind. Cas. 696.

——S. 90—Presumption—If extends to accuracy of contents.

If a document purporting to be 30 years old is not duly tendered, proved or exhibited, S. 90 cannot be cure the defect. That section only gives discretion to Courts to dispense with proof as to the execution of a document. It raised no presumption whatever as regards the occuracy of the document and cannot be used so as to dispense with formal proof of the contents of the document. 111 Ind. Cas. 361=A.I.R. 1929 Lah. 78.

——S. 90—Extent of presumption.

The presumption of genuineness of a document 30 years old can only dispense with the necessity of its proof, but the question of sufficiency of evidence is not affected thereby. 95 Ind. Cas. 261=A.I.R. 1926 All. 537.

——S. 90—Presumption of authority to execute.

Presumption of genuineness include presumption of execution's authority. A.I.R. 1925 All. 1 (F.B.), Foll. 97 Ind. Cas. 292=49 All. 55=24 A.L.J. 920=A.I.R. 1927 All. 231.

——S. 90—Presumption of authority of scribe to sign for.

The presumption permitted by S. 90 in the case of a document purporting to be 30 years old, includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorized to sign for him. 13 A.L.J. 921 and 15 A.L.J. 121, Overruled. 83 Ind. Cas. 5=All. 31= 22 A.L.J. 857=5 L.R.A. Civ. 775=A.I.R. 1925 All. 1 (F.B.).

——S. 90— Grant — Presumption — Executant's authority—Surrounding circumstances.

The application of S. 90 does not justify the inference that the documents, which are established to be genuine, were in fact executed by persons of the requisite authority, but when a grant has been in operation for a long series of years, it may be impossible to adduce direct evidence of authority. In such a contingency the court may draw an inference from all the surrounding circumstance,.

Wher e the grantee and his successors in interest from generat ion to generation had been in possession for more than 70 years and the grantor had taken no steps to eject the grantees,

Held, that the burden shifts upon the Zamindar plaintiff to prove how he came to acquiesce in the long possession of the grantee and his successors, and if no evidence, forthcoming from his side the grants must be presumed to have been made by persons who possessed the requisite authority. 80 Ind. Cas. 628=27 C.W.N. 964=A.I.R. 1924 Cal. 236.

——S. 90—Presumption—Authority of executant to sign for principal.

The presumption under S. 90 of the Evidence Act, only exonerates the plaintiff from calling executant for the purpose of proving that he signed the document for the principal. He must prove that executant had authority from the principal to sign his name. 85 Ind. Cas. 221=50 Cal. 526=A.I.R. 1924 Cal. 82.

——S. 90—Presumption—If extends to scribe to authority from executant.

Although in the case of sale-deeds more than 50 year old, the presumption of law is that they were executed by the persons who purported to execute them, there is no presumption that the scribe who signed these documents for the executants had authority from the executants to do so. 15 A.L.J. 121 and 60 Ind. Cas. 96, Foll. 73 Ind. Cas. 989=A.I.R. 1923 All. 420.

——S 90—Presumption—If extends to authority to sign.

When another person signs for an illiterate executant, there is no necessary presumption in law that the person who signed had an authority to sign. 61 Ind. Cas. 125 =8 O.L.J. 23=A.I.R. 1921 Oudh. 55.

——S. 90—Nature of presumption—Document more than 30 years old—Proof of execution—Authority to sign—T. P. Act, S. 59.

Though a mortgage purporting to be more than 30 years old was not executed by the mortgagors at all but the scribe on behalf of the executants, the Court could presume under S. 90 of the Evidence Act that the signature was in the handwriting of the scribe and was executed by him but not that he had authority from the mortgagors to sign their names upon the document. The document was not admissible in evidence without such proof. 13 A.L.J. 921=30 Ind. Cas. 908.

——S. 90—Presumption under—If extends to authority of executant.

The authority of the person making a grant, the genuineness whereof is presumed by the Court under S. 90, is not proved by that section. 20 C.W.N. 643=23 C.L.J. 583=23 C.L.J. 583=35 Ind. Cas. 298.

——S. 90—Presumption under—If extends to authority of executants to bind principal.

S. 90 establishes simply that an ancient document was executed by the person whose signature it purports to bear, but it cannot prove the authority of the executants to bind the landlord. 3 C. 557; 6 C. 209, Rel. on. 15 C.L.J. 220=16 C.W.N. 567=13 Ind. Cas. 606.

——S. 90—Old document—Presumption of genuineness—Circumstances raising doubts—Effect on.

The Court may presume the genuineness of a document more than thirty years old, if it be produced from proper custody but the effect of the presumption may be weakened by circumstances which tend to raise doubts as to its authenticity. (1907) 7 C.L.J. 615.

8. Interference in appeal.

——S. 90—Interference in appeal—Presumption under, from copy—Question of law.

Whether a presumption under S. 90 can be raised from a copy of the document is a question of law and it can therefore, be urged at any stage of the litigation, A.I.R. 1946 Bom. 193=47 Bom.L.R. 962=224 Ind. Cas. 169.

——S. 90—Old document bearing seals but no signature—Presumption—Interference.

Where there are strong reasons to doubt the genuineness of a document which, though more than 30 years old, bears only seals and no signature, the Appellate Court would not draw a presumption about its genuineness which the trial Court refused to do. A.I.R. 1942 Oudh 374=1942 O.W.N. 225=17 Luck. 805=199 Ind. Cas. 776.

——S. 90—Trial Court not exercising discretion arbitrarily—Interference by Appellate Court.

Where the trial Court has not in any way acted arbitrarily in exercising the discretion which it is entitled to exercise under S. 90 of the Evi. Act, the Appellate Court should not interfere with the exercise of that discretion. A.I.R. 1939 Oudh 96=1939 O.W.N. 1=14 Luck. 393=197 Ind. Cas. 596.

——S. 90—Presumption—Lower Court drawing presumption—Interference.

It can be presumed under S. 90, Evidence Act, that the testator had a sound disposing state of mind while executing the will. Where a presumption has been raised by a trial Court under that section, a Court of Appeal will be slow to interfere with the exercise of the lower Court' discretion :

Held, however, that the circumstances of the case clearly called for definite proof of the testator's mental capacity when the will was signed. A.I.R. 1938 Lah. 55=176 Ind. Cas. 801.

——S. 90—Second appeal—Question of title—Lower Court erroneously relying on copy in respect of which presumption under S. 90, Evidence Act cannot be made—The High Court can remand the case or arrive at finding itself—Certified copy not thirty years old—Presumption under S. 90, Evi. Act cannot be raised in respect of it. A.I.R. 1936 Lah. 788=166 Ind. Cas. 647.

——S. 90—Discretion—Presumption—Appeal.

The raising of a presumption under S. 90, Evidence Act, as to the genuineness of a document is a matter for judicial discretion and where the trial Court has not exercised a proper discretion in raising the presumption of the genuineness of a document, ordinarily it is not proper for the Appellate Court to overrule the discretion of the trial Court, but where it is constrained to do so, the party producing the document should be given an opportunity of supporting the presumption as to the genuineness of the document. A.I.R. 1935 Oudh 482=1935 O.W.N. 845=156 Ind. Cas. 983.

——S. 90—Interference with discretion of lower Court in the matter of raising presumption.

Ordinarily, the Appellate Court would be slow to interfere with the discretion exercised by the lower Court in the matter of raising presumption under S. 90 of the Evidence Act but the discretion allowed by this section is a judicial discretion which has to be exercised on sound legal principles and after due regard to all the evidence and circumstances. When the Appellate Court is convinced that the lower Court has exercised its discretion arbitrarily without due consideration of all the relevant facts and circumstances of the case, it has to be held that the discretion has not been properly exercised and that the disputed documents are such that their genuineness should not be presumed. A.I.R. 1935 Oudh 289=1935 O.W.N. 387=1935 R.D. 171=11 Luck. 35=154 Ind. Cas. 965.

——S. 90—Discretion of trial Court—Wrong exercise of discretion—Procedure on appeal.

The raising or not of a presumption under S. 90 Evidence Act, is a matter of judicial discretion but it must be exercised judicially.

Where the trial Court did not exercise a proper judicial discretion in raising the presumption of the genuineness of the document and admitting it in evidence without calling on the plaintiffs to prove it, it would not be proper on appeal to overrule the discretion of the trial Court to raise the presumption arising under S. 90 and to reject the document, without sending the case back for re-trial and giving the party producing the document an opportunity of supporting the presumption. A.I.R. 1933 All. 443=1933 A.L.J. 907=145 Ind.Cas. 147.

——S. 90—Ancient document—Admission by trial Court—Interference.

When a document has once been admitted in evidence under S. 90 of the Evidence Act by the trial Court, the Appellate Court is, as a rule, slow in interfering with the discretion exercised by the trial Court in admitting the document and it is only in those rare cases when that discretion has been, on the face of it, perversely exercised that an Appellate Court would set aside the finding of the Judge of the trial Court and eliminate the document from consideration in the stage of appeal. A.I.R. 1933 Lah. 347=34 P.L.R. 356=142 Ind.Cas. 13.

——S. 90—Interference in appeal.

It is at the discretion of the trying Judge either to raise or not to raise the presumption arising under S. 90. And the Court of Appeal cannot overrule his exercise of discretion in that matter without sending the case back for retrial. 108 Ind. Cas. 546=7 Pat. 245=9 P.L.T. 123=A.I.R. 1929 Pat. 51.

——S. 90—Presumption of genuineness by trial Court—Interference in appeal.

In a suit for redemption of the Othis the question was whether the documents evidencing them were genuine. The trial Court presumed that they were genuine, but the first appellate Court refused to draw the presumption and considered that the evidence was not sufficient to establish the genuineness of the documents,

Held, that it was open to the lower Appellate Court to refuse to draw the presumption under S. 90 and to form an independent opinion upon the evidence as to the genuineness of the documents, as the trial Court did not record and communicate to the party affected before the opportunity for receiving evidence had passed, that it was prepared to make the presumption under the section and that the party was shut out from adducing further evidence. 37 Mad. 455, Foll. 108 Ind. Cas. 412 (Mad.).

——S. 90—Presumption—Arbitrary exercised of discretion—Interference in second appeal.

The exercise of the discretion under S. 90 may be challenged in second appeal where it is shown that the exercise was made arbitrarily and not on judicial grounds. 93 Ind. Cas. 13=13 O.L.J. 456=A.I.R. 1926 Oudh 362.

——S. 90—Discretion not prima facie unsound—No interference in second appeal.

Where the lower Court for reasons not *prima facie* unsound had refused to raise the presumption of genuineness under S. 90.

Held, that the High Court should not interfere in second appeal. 69 Ind. Cas. 289=14 M.L.W. 416=1921 M.W.N. 750=A.I.R. 1921 Mad. 456=41 M.L.J. 310.

——S. 90—Presumption—Question of law for fact.

Per *Sankaran Nair, J.*—The presumption as to genuineness of a document 30 years old under S. 90 is one of fact and the High Court cannot interfere in second appeal with a finding given on it by the Lower Court. Per *Tyabji. J.*—The presumption is one of law and the High Court can see if the finding is correct. 26 A. 581, 17 C.W.N. 108, Foll. 26 Ind. Cas. 117 (Mad.).

——Ss. 90—Presumption drawn by trial Court—Not to be lightly interfered with in appeal.

The presumptions dra wn by the Court of first instance especially when it concerns the admissibility of a document under S. 90 of the *w*vidence Act should not be

lightly treated by the Court of appeal. 31 Ind. Cas. 579 (Mad.).

——S. 90—Discretion of Court—Question of custody—Interference in appeal.

The question of custody of a document under S. 90 of the Evidence Act is one to be decided upon circumstances of each case and the Appellate Court will be slow to interfere with the discretion of the lower Court in the matter. 23 Ind. Cas. 773 (Cal.).

——S. 90—Appellate Court's interference.

The presumption under S. 90 is one in which the Court has to exercise its discretion with the due care and once it has been exercised an appellate Court will be very slow to interfere. 57 P.W.R. 1918=44 Ind. Cas. 559.

——S. 90—Appellate Court's interference.

Though in the first Court the presumption under S. 90 of the Evidence Act regarding the genuineness of a document is drawn and the document is filed, an Appellate Court is not bound to draw such a presumption. 37 Mad. 455=11 M.L.T. 69=22 M.L.J. 217=(1912) M.W.N. 117=14 Ind. Cas. 394.

——S. 90—Presumption—Discretion of Court—Interference by High Court.

Under S. 90 a Court has got a discretion to use the general presumption as to the genuineness of a document more than thirty years old and produced from proper custody. But it can call for proof of the execution thereof if there is evidence to doubt its genuineness. 26 A. 581 at p. 586, Rel. Where a Lower Appellate Court does not give reasons for its views as to the applicability of the presumption under S. 90 of the Evidence Act, the High Court will interfere in second appeal. 11 C. 539 Rel. on. 15 C.L.J. 7=17 C.W.N. 108=13 Ind. Cas. 120.

——S. 90—Discretion of Court—Interference by Privy Council.

The Judicial Committee would always be extremely slow to overrule the discretion exercised by a judge under S. 90 of the Evidence Act. (1904) 26 A. 581=9 C.W.N. 105=6 Bom.L.R. 750=30 I.A. 217 (P.C.).

9. Presumption when arises.

——S. 90—Presumptions under—Production of certified copies—If gives rise to.

No presumption under S. 90, Evidence Act, can be raised on the basis of the certified copies. The mere production of the certified copies does not relieve the person producing them from the necessity of producing evidence as regards the execution of the originals. A.I.R. 1939 Lah. 273=41 P.L.R. 377 (2)=187 Ind. Cas. 848.

——S. 90—Presumption under—Execution and contents—Production of 30 years old copy—If gives rise to.

The execution and contents of a lost ancient document cannot be proved merely by the production of a copy, which itself is over 30 years old; but this copy, considered with the other evidence, may give rise to a presumption as to the genuineness of the original. A.I.R. 1937 Lah. 920=175 Ind. Cas. 755.

——S. 90—Presumption under—Entries in bahis of priests—When raised.

In relation to the entries in the *bahis* of the priests, presumption under S. 90, Evidence Act, will be permissible to the Court only if evidence is led to prove the identity, signature and handwriting of the writer; otherwise it will neither be possible to determine the age of the document nor to presume that the signature and every other part of the document alleged to be in the handwriting of a particular person is in that person's handwriting. In cases where no signatures appear on the face of the document and it is not alleged who the writer is, S. 90 will not come into play at all. A.I.R. 1937 Lah. 599=39 P.L.R. 370=I.L.R. (1937) Lah. 732=173 Ind. Cas. 779.

——S. 90—Presumption under—Application—Considerations.

The rule of presumption laid down in S. 90, Evidence Act, must be applied with great caution and ancient documents which are unsupported by any evidence that might free them from the suspicion of being fabricated should not be acted upon and where the lower Courts have exercised their discretion after considering all the circumstances, the discretion will not be lightly interfered with. A.I.R. 1937 Lah. 17=38 P.L.R. 322=166 Ind. Cas. 882.

——S. 90—Presumption as to genuineness—When raised Corroboration by evidence.

The mere production of an ancient document, unless supported by some corroborative evidence of acting under it, is not entitled to any weight. An ancient deed must be corroborated by evidence of ancient or modern corresponding enjoyment or by other equivalent or explanatory proof; it is then presumed to have constituted part of the actual transfer of the property mentioned and the Court may then make the presumption under S. 90 of the Evidence Act. A.I.R. 1937 Oudh 353=1937 O.W.N. 179=1937 R.D. 88=166 Ind. Cas. 930.

——S. 90—Presumption as to genuineness—Essentials to be proved.

No legal presumption can arise as to the genuineness of a document more than 30 years old, merely upon proof that it was produced from the records of Court in which it had been filed at some time previous, and it must be shown that the document had been so filed in order to the adjudication of some question of which that Court had cognizance, and which had come under the cognizance of such Court. The Court cannot assume that the impression of a seal on an old doeument is the impression of the genuine seal of the person purported to have executed it. A.I.R. 1937 Oudh 194=1936 O.W.N. 768=1936 R.D. 408=12 Luck. 400=164 Ind. Cas. 494.

——S. 90—Document signed by another on behalf of executant—Presumption that he was authorised.

Where the agreement bears the signature of the alleged executant and purports to have been signed and executed by another on behalf of the alleged executant, there is nothing in the terms of S. 90 to justify a presumption that the other person had been authorised by the alleged executant to sign or execute the document on his behalf. A.I.R. 1936 Oudh 170=1936 O.W.N. 298=12 Luck. 98=161 Ind. Cas. 269.

——S. 90—Presumptions—When raised.

How far presumptions are permissible to fill in the details which have been obliterated by time is a matter of degree, but where a sale was made nearly 30 years before suit and all the parties to the transaction were dead, it is impossible to expect full and detailed evidence of all the circumstances that gave rise to the transaction and presumptions can be drawn. A.I.R. 1934 Nag. 106=30 Nag. L.R. 192=148 Ind. Cas. 1033.

——S. 90—Presumption—When arises—Pedigree satisfying conditions of Ss. 32 (6) and 90.

Where relationship as described in a genealogical tree is corroborated in material parts by evidence on record and it *prima facie* satisfies all the conditions prescribed by S. 32 (6) and S. 90, presumption ought to be made in favour of its genuineness. 105 Ind. Cas. 81=A.I.R. 1928 Nag. 20.

——S. 90—Presumption—When arises.

Where all the executants are dead, the scribe is dead, the persons who purport to have been the attesting witnesses are dead, the Registrar, before whom the deed was registered is also dead, there is a strong case for apply the presumption under S. 90. 105 Ind. Cas. 581=4 O.W.N. 965=A.I.R. 1927 Oudh 510.

——**S. 90**—When a document is suspicious, on the face of it, and when the very place of importance has been erased and re-written, presumption unde S. 90 does not arise. 95 Ind. Cas. 261=A.I.R. 1926 All. 537.

——**S. 90—Presumption under—Raising of.**

The document was more than 30 years old and was produced from proper custody and all the witnesses were dead.

Held, that the presumption must be made under S. 90 of the Evidence Act that the attestation was duly made. 85 Ind. Cas. 509=12 O.L.J. 1=28 O.C. 8=A.I.R. 1925 Oudh 337.

——**S. 90—Ancient document—Production from proper custody—Presumption under.**

Though the mere fact of a certain document having been produced from a Court where it had been filed does not necessarily bring that document within the requirements of S. 90, yet, the question depends upon the circumstances of each particular case.

The document was 54 years old and was submitted to the Magistrate and Collector with the express purpose that he might take the necessary steps in order to bring the estate under the management of the Court of Wards. The Collector recorded an order which did not throw any doubt upon the genuineness of the document.

Held, that the Court was entitled to accept the document, as presumably genuine under provisions of S. 90. 94 Ind. Cas. 814=4 Pat. 67=A.I.R. 1925 Pat. 442.

——**S. 90—Mortgage-deed more than fifty years old produced from proper custody presumed to be genuine.**

In a redemption suits plaintiff's ancestor was shown to have been in possession in 1840 and the mortgage deed was executed in 1872 and was registered. It was produced by a person who was admittedly one of the alleged mortgagees. The mark of the executant was made by the village *patwari* who also signed before the Sub-Registrar. An old witness examined to prove the execution of the deed was discredited.

Held, that still the deed should be deemed to be genuine and that the presumption mentioned in S. 90, Evidence Act, should be used in its favour. 79 Ind. Cas. 405= A.I.R. 1924 All. 869.

——**S. 90**—Document duly registered by executan ts and over thirty years old is admissible where there is no reason to doubt its genuineness. 31 All. 482, Foll. 75 Ind. Cas. 931=A.I.R. 1924 All. 832.

——**S. 90—Ancient document—Proof of consideration recited not sufficient—Presumption as to genuinness.**

If one is dealing with a document some thirty-five years old the mere fact that the proof of consideration is not at all satisfactory, is by itself a slender ground for holding that the document known to have come into existence was entirely unreal. 81 Ind. Cas. 493=51 Cal. 135=39 C.L.J. 380=A.I.R. 1924 Cal. 693.

——**S. 90—Execution of a deed by another for an illiterate person held proved from Registration endorsement.**

One *G*, executed a sale-deed but he being illiterate it was signed by one *D*, for *G*. The deed was registered and its execution was admitted by *G*, before the Registration Officer. It was more than thirty years old and was produced from proper custody.

Held, that the Court was justified in drawing a presumption from the registration endorsement that *G*, had authorised *D* to sign on his behalf. 80 Ind. Cas. 457=10 O.L.J. 643=A.I.R. 1924 Oudh 265.

——**S. 90—Presumption—If arises—Document not dated.**

Where a document is undated, no presumption can be drawn under S. 90, as it cannot be said that it is thirty years old. It must then be proved in the ordinary way. 73 Ind. Cas. 66=18 M.L.W. 404=1923 M.W.N. 454= A.I.R. 1923 Mad. 674.

——**S. 90—Ancient document never questioned till suit—Consideration may be presumed.**

The passing of consideration for a document which is more than 30 years old and which was never questioned till suit should be take as proved even if the direct evidence is not as strong as might be naturally expected in respect of recent transactions. 70 Ind. Cas. 759=15 M.L.W. 289=A.I.R. 1921 Mad. 624=42 M.L.J. 339.

——**S. 90—Ancient documents—Proper custody—Admission without proof.**

Where the documents are ancient documents, 60 years old, and have been produced from proper custody, that is, from the custody of the lessees who are in possession of the mouza under those documents, the presumption under S. 90 afforded to 30 years old documents will apply to them and they can be admitted without proof. 1921 P.H.C.C. 49=A.I.R. 1921 Pat. 379.

10. Secondary evidence.

——**S. 90—Secondary evidence.**

Where a party relies upon the certified copy of a document, before any presumption as to genuineness of the original can be made under S. 90, it is incumbent on the party to lay the foundation by leading secondary evidence under S. 65. 22 All. 294; 41 All. 592; 6 Cal. 720 and 14 Cal. 486 (P.C.) followed. A.I.R. 1930 All. 550=1930 Al.L.J. 1003=125 Ind. Cas. 460.

——**S. 90**—Where documents are filed, as being copie of documents more than thirty years old which came from proper custody, the presumption, arising under S. 90, as to their genuineness might be made by the Court. 2 L.W. 509 followed. 74 Ind. Cas. 35=16 M.L.W. 839= 32 M.L.T. 89=A.I.R. 1923 Mad. 163.

——**S. 90—Applicability—Copies—Presumption of genuineness of original, when made.**

The presumption under S. 90 applies to copies as well as to originals. If the copy is proved to be a true copy presumption in favour of the genuineness of the original can be made. 16 M.L.W. 462=31 M.L.T. 347=1922 M.W.N. 614=46 Mad. 92=A.I.R. 1923 Mad. 1=70 Ind. Cas. 729 (F.B.).

——**S. 90—Presumption under—Application of—Where copy alone is produced.**

Original document could not be produced—Secondary evidence produced—Presumption applies. 44 All. 683= A.I.R. 1922 All. 321.

——**S. 90—Presumption under—If applies—Original not produced.**

Section 90 may apply even to a case where the original documents is not produced. 63 Ind. Cas. 518=33 C.L.J. 382=A.I.R. 1921 Ca. 334.

——**S. 90—Unimpeachable document—Ownership of property in ancient period—Evidence in unimpeachable old documents is conclusive.**

When the question arises as regards the ownership of property in some ancient period the evidence afforded by some unimpeachable ancient documents should be accepted beyond question. 96 Ind. Cas. 1011=49 Mad. 349=1926 M.W.N. 897=A.I.R. 1926 Mad. 706=50 M.L.J. 699.

——**S. 90—Secondary evidence—Admissibility.**

S. 90 is not limited to cases in which the document is actually produced in Court; secondary evidence of an ancient document is therefore admissible without proof

of the execution of the original when the document is shown to have been lost and to have been last heard of in proper custody. 93 P.R. 1910=128 P.W.R. 1910=186 P.L.R. 1910=8 Ind. Cas. 353.

——S. 90 and S. 65—Copy of ancient document.

Copy of a document is not admissible under S. 90 unless the original is proved to have been lost or destroyed. 7 M.L.T. 117=(1910) M.W.N. 547=5 Ind. Cas. 827.

11. Will (ancient).

——S. 90—Presumption under—Whether extends to due execution of document.

If a document evidencing a will comes from proper custody and is more than 30 years old, a presumption arises under S. 90 of the Evidence Act that it is a genuine document and is validly executed. The presumption also extends to the due execution of the will. A.I.R. 1948 Sind 127.

——S. 90—Will—Presumption of its due execution—Whether amounts to finding that attesting witnesses signed in testator's presence—Succession Act, S. 63.

As the affixing of the signature of the attesting witnesses in the presence of the testator is the ordinary mode of attesting a document, and is the mode by which attestation is defined in S. 3 of the T.P. Act, where under S. 90, Evidence Act the presumption of due execution of a will is drawn, it necessrily amounts to a finding that the attesting witnesses signed in the presence of the testator. A.I.R. 1947 Pat. 449.

——Ss. 90 and 114—Presumption under S. 90—If can be extended to the testamentary capacity of the testator.

Where a will was more than thirty years old and was produced from proper custody on a question whether the presumption under S. 90 of the Evidence Act extended to the testamentary capacity of the testators in addition to its actual execution and attestation,

Held, that a party setting up a will is required to prove that the testator was of sound disposing state of mind when he made his will, but in the absence of any evidence as to the state of the testator's mind, proof that he had executed a will rational in character in the presence of witnesses must lead to a presumption that he was of sound mind, and understood what he was about. This presumption can be justified under the express provisions of S. 90 of the Evidence Act since a will cannot be said to be "duly" executed by a person who was not competent to executed it; and the presumption can be fortified under the more general provisions of S. 114 of the Act, since it is likely that a man who performs a solemn and rational act in the presence of witnesses is sane and understands what he is about. 73 I.A. 223=I.L.R. (1946) Nag. 917=1946 A.L.J. 472=1946 O.A. (P.C.) 179=13 B.R. 78=51 C.W.N. 175=60 L.W. 5=1947 N.L.J. 106=A.I.R. 1947 P.C. 15=227 Ind. Cas. 195=1946 A.W.R. (P.C.) 179=1946 M.WN. 759=49 Bom.L.R. 231=I.L.R. (1947) Kar. (P.C.) 178=(1946) 2 M.L.J. 453 (P.C.).

——S. 90—Applicability to wills—Will, more than thirty years old and produced from proper custody—Proper execution and attestation may be presumed. A.I.R. 1944 Cal. 241=47 C.W.N. 359=I.L.R. (1943) 1 Cal. 392=215 Ind. Cas. 124.

——S. 90—Will—Registration copy of—Due execution proved.

The original will was not forthcoming but there was a copy made on the Register of the Registration Office of which a certified copy had been produced. The endorsement on it was to the effect that the executant having heard the contents word to word verified it and two of the attesting witnesses identified the executant and witnessed the deed and the executant himself as well as those attesting witnesses were personally known to the Registering Officer;

Held, that excluding S. 90 of the Evidence Act, the will of which it was the copy was validly executed. A.I.R. 1938 Oudh. 69=1938 O.W.N. 67=13 Luck. 773=172 Ind. Cas. 812.

——Ss. 90, 32—Will—Original not produced—Preseumption of fact as to genuineness—Ancient documents—Difficulty of adducing direct evidence of execution—Presumption.

Although no presumption of law can be made under S. 90, Evidence Act, as regard the genuineness of a document the original of which has not been produced in Court, yet the Court can make a presumption fact about its genuineness if such presumption is justified by the proved facts and circumstances of the case. In the case of an ancient document the original of which has been lost, it would be impossible to adduce any direct evidence of its execution and therefore for consideration of justice and equity, it is necessary to invoke every legitimate presumption which can be reasonably raised upon the facts and circumstances of the particular case.

Held, that there could be no better or stronger evidence about the existence of the custom of exclusion of daughters in the family than the admission of the ancestor in his will, and that the statement having been made before any controversy had arisen, it was admissible under S. 32, Evidence Act. A.I.R. 1936 Oudh 87=1935 O.W.N. 1376=159 Ind. Cas. 780.

——S. 90—Executant depositng will with Registrar—Identification—Presumption.

Where the executant of a will deposits it with the Registrar and the endorsement by the Registrar shows that the will was so deposited by the executant after indentification by two persons, a presumption as to execution arises under S. 90, Evidence Act. The presumption does not cover the question of the disposing mind, onus of which lies on the persons propounding the will. A.I.R. 1933 Lah. 53=145 Ind. Cas. 241.

——S. 90—Extent of presumption.

The presumption arising under S. 90 applies even to the fact that the testator was in a sound disposing state of mind, for the phrase "duly executed" if effect is to be given to the word "duly" means execution by a person legally competent to execute the document. A.I.R. 1930 Mad. 744=127 Ind. Cas. 619=32 M.L.W. 584=59 M.L.J. 461.

——S. 90—Will—Unregistered—Lost—Copy produced—Genuineness of will—When presumed.

The Court can presume the genuineness even of an unregistered document thirty years old from a copy of such document, if the original is proved to have been duly executed, and further it is also proved that the original is since list. But such a presumption can only be made after a careful consideration of all the circumstances of the case.

A document which purported to be the Will was produced in Court in 1897, was referred to in the registered deed of gift in 1902 was made the basis of the public adoption in 1903 and was referred to in the deed of adoption. It was admitted to be genuine in litigation in 1901 and in other litigations from 1903 to 1909, and mutation of names was made in the revenue Court on the basis of the adoption in 1910. Yet since 1879 when testator dies until 1923 when this suit was filed, no suggestion was made by any one that a will had been forged or that the will produced in 1897 was a forged document. It was only when 44 speculator combined to take 192 shares of half the estate that the suit was launched.

Held, that after a careful consideration of the whole of the evidence it ought to be accepted as proved that a will was executed and that the genuineness of that will would

be presumed from the copy of it ; 16 Cal. 753 (P.C.), Followed. 118 Ind. Cas. 154=A.I.R. 1929 All. 561.

——S. 90—Execution of will suspicious—Delay in probate—Presumption not made.

A will purported to be executed in 1887 was brought to light for the first time in 1907 when it was produced in a Court of Law. In 1910 an application for probate in respect of it was made by a brother of the present applicant but the application was ultimately withdrawn. At that time only one of the attesting witnesses was said to have been alive. Yet no further attempt was made to bring the Will into Court till some ten years later when even that witness was dead. There was no reasonable explanation about the delay after 1910 in making the application for probate. There was no evidence as to the custody of the Will before 1907.

Held, that the applicant cannot get the benefit of S. 90. 75 Ind. Cas. 660=A.I.R. 1923 Nag. 169.

——S. 90—Where a will was more than thirty years old, and all the attesting witnesses except one were dead and the surving attesting witness spoke against the due attestation of the will.

Held, in the circumstances of the case, that presumption as to its genuineness and proper attestation might be drawn under S. 90. 85 Ind. Cas. 558=28 O.C. 91=A.I.R. 1925 Oudh 465.

——S. 90—Ancient wills—Registration of will—Presumption of genuineness.

The will in dispute having been duly registered and the document being over thirty years old, it must under S. 90 of the Evidence Act, be presumed that it was genuine document, and the fact that it was registered, raised the presumption that the testator was of sound mind at the time of the execution of the will. 6 O.L.J. 311=52 Ind. Cas. 837.

——S. 90—Ancient wills—Will thirty years old—Presumption under S. 90 when cannot be drawn.

If the circumstances found, raise grave suspicions as to the genuineness of a will, no presumption under S. 90 of the Act could be drawn. 97 P.W.R. 1916=57 P.L.R. 1917=34 Ind. Cas. 168.

——S. 90—Ancient wills—Whether presumption arises.

The presumption of genuineness of ancient document does not apply to wills in a Probate Court. 23 C.L.J. 82=33 Ind. Cas. 273.

——S. 90—Caution for presumption as to genuineness of will.

The presumption of genuineness under S. 90 of the Evidence Act must be applied with caution. 82 P.L.R. 1909=88 P.W.R. 1909=4 Ind. Cas. 923.

12. Miscellaneous.

——S. 90—Muhammadan ruler granting sanad to Hindus for temple—Ancient document—Interpretation by usage—Ruler granting sanad—**Interpretation put by Judge of that ruler—Admissibility—Copies of ancient documents—Presumption—Discretion.**

Evidence as to the interpretation placed upon an ancient document by persons who lived at, or at a time not remote from, the time of the execution of the document is not only admissible but very valuable. In the construction of ancient grants and deeds, there is no better way of construing them than by usage, and *contemparanea expositio* is the best way to go by. Where, therefore, a *sanad* by Muhammadan ruler has been judicially interpreted by a Judge of that ruler, the judgment so given is admissible in evidence in order to prove the nature of the grant.

The presumption under S. 90 of the Evidence Act in regard to documents thirty years old arises in the case of copies as well as of originals. A.I.R. 1935 Oudh 96=11 O.W.N. 1435=152 Ind. Cas. 861.

——S. 90—Old document containing deposition—Statement—Identity of deponent inherent therein.

Under S. 80 the presumption has to be made as to the genuineness of the statement recorded. No presumption, however, can be made regarding the identity of the deponent : but where the document containing the doposition of a particular person is a very old document, one can turn to the deposition itself to find out whether there is inherent evidence of the identity of the deponent. 7 O.L.J. 542, Rel. on. 94 Ind. Cas. 985=A.I.R. 1926 Oudh 489.

——S. 90—Applicability of presumption under—Statement contained in ancient settlement report, of existence of mortgage and purporting to have been signed by mortgagor.

A statement of the existence of a mortgage contained in a settlement report thirty years old and purporting to have been signed by the mortgagor and coming from proper custody is not an acknowledgment and no presumption can arise as to its execution as the mortgagor did not execute or attest the report supposing the report is a document within the meaning of S. 90. 15 A.L.J. 121=38 Ind. Cas. 162.

——S. 91.

See also **Cr.P. Code (1), Ss. 533 and 164.**

(a) Defects in recording.
(b) Proof.
(2) Deed—Construction.

Synopsis.

(1) Admissibility of external evidence.
(2) Applicability and scope.
(3) Hundi.
(4) Lease.

See also **S. 91. Admissibility of external evidence.**

(5) Mortgage.

See also **S. 91. Admissibility of external evidence.**

(6) Partition.
(7) Pronote.

See also **S. 91. Admissibility of external evidence.**

(8) Sale.

See also **S. 91. Admissibility of external evidence.**

(9) Statements and deposition of witnesses.
(10) Miscellaneous.

(1) Admissibility of external evidence.

——S. 91—Admissibility of external evidence—Deed of divorce not stamped—Oral evidence to prove divorce—Admissibility.

Under Mahomedan Law, divorce is not a contract within the meaning of S. 91 of the Evidence Act, except in those cases where the husband and the wife agree to dissolve a marriage for consideration. Accordingly oral evidence is admissible to prove the factum of divorce if the deed of divorce is not forthcoming, although it is unstamped. 229 Ind. Cas. 279=48 Cr.L.J. 354=48 P.L.R. 532=A.I.R. 1947 Lah. 306.

——S. 91—Admissibility of external evidence—Agricultural land settled under unregistered hukumnama—Tenancy can be proved otherwise—Registration Act (1908), S. 49.

It is open to a landlord to create a tenancy by giving possession and accepting rent, and clearly, therefore,

such a tenancy can be proved by evidence other than the production of the unregistered *hukumnama* by which the tenant takes settlement of an agricultural land from the landlord. A.I.R. 1946 Pat. 407=227 Ind. Cas. 225.

——S. 91—Admissibility of external evidence.

Where all the terms have not been reduced to writing oral evidence is not excluded. A.I.R. 1945 All. 221 =1945 A.L.J. 113=I.L.R. (1945) All. 387=1945 A.W.R. (H.C.) 184=1945 O.W.N. (H.C.) 154.

——S. 91—Admissibility of external evidence—Antecedent debt—Alienation by Hindu—Proof of application of money—Extraneous evidence.

It is true that antecedent debt is often mentioned in deeds executed for the money taken to pay it off, but there is no obligation to mention it and there can be no bar under S. 91 to proving the use to which the money was put by the production of other evidence. A.I.R. 1945 Oudh 172=1945 A.W.R. (C.C.) 5=1945 O.W.N. (C.C.) 20.

——S. 91—Admissibility of external evidence.

A contract to pay does not require a writing, and the mere fact that no oral evidence has been adduced by the parties, is not enough to come to the conclusion that there was no agreement to pay the amount due.

The conduct of a party coupled with a *chitti* acknowledging the amount held sufficient to enable Court to come to the conclusion that the party agreed to pay the amount. A.I.R. 1944 Nag. 124=1944 N.L.J. 99= I.L.R. (1944) Nag. 101=217 Ind. Cas. 277.

——S. 91—Grant prevails over admission.

If the *zamindari* was originally granted or was re-granted in 1751 or 1772, the terms of the grant, if proved, might doubtless prevail even over admissions. A.I.R. 1943 P.C. 48=I.L.R. (1943) Kar. (P.C.) 53 Sup.= 207 Ind. Cas. 9 (P.C.).

——S. 91—Admissibility of external evidence—Pronote—Executant undertaking to pay certain sum to plaintiff with interest on demand inadmissible—Contract.

A creditor lent money under a simple contract and the debtor executed a promissory note in the creditor's favour. In the promissory note, the debtor undertook to pay a specified sum of money to the creditor or his order at a certain interest on demand. The pro-note did not mention what was the consideration of the payment to be made under it. In the suit on the pro-note, the pronote was found inadmissible in evidence for want of a proper stamp under S. 35, Stamp Act:

Held (Per *Collister*, *Bajpai*, *Dar*, and *Mathur JJ.*, *Hamilton*, *J.*, dissenting).—That the pro-note could not be said to contain all the terms of the contract of loan and hence the contract of loan could be proved independently of the pro-note.

Per *Hamilton*, *J.*—That as the pro-note was executed in proof of the debt and not with the intention to create a negotiable instrument for the purposes of payment, the contract of loan could not be proved by oral evidence. A.I.R. 1943 All. 220=I.L.R. (1943) All. 610=1943 A.L.J. 189=1943 A.W.R. (H.C.) 157= 206 Ind. Cas. 578 (F.B.).

[Overrules: A.I.R. 1931 All. 183=53 All. 114= 133 Ind. Cas. 307 (F.B.).

——S. 91—Admissibility of external evidence—Rent suit based on unregistered lease—Rate of rent—Proof.

The terms of S. 91, Evidence Act, are quite explicit in their prohibition of the proof of the terms of the lease *aliunde*, and no other evidence can be given to prove the rate of rent in a suit which is based on the unregistered lease except the lease itself which is inadmissible in evidence under S. 49, Registration Act. A.I.R. 1941 Cal. 102=72 C.L.J. 132=45 C.W.N. 129=193 Ind. Cas. 635.

——S. 91—Admissibility of external evidence.

After reciting the details of the properties, the mortgagor's letter ran: "I am creating a complete equitable mortgage of my one-half share in the said properties. . . and depositing the sale deeds with you.' The letter and the title deeds were handed over to the mortgagee:

Held, that not only were the writing of the letter and the deposit of the title deeds contemporaneous transactions, but the letter was the sole repository of the terms of the bargain. Since it was not registered, it was inadmissible in evidence to prove the mortgage transaction and its terms could not be proved *aliunde* under S. 91, Evidence Act, by parole evidence. A.I.R. 1940 Lah. 285=42 P.L.R. 307=190 Ind. Cas. 463.

——S. 91—Admissibility of external evidence.

If one of the two stamps on a promissory note is not duly cancelled and one stamp alone is not sufficient for such note, it cannot be held that it is sufficiently stamped, and it is inadmissible in evidence.

The pro-note being thus inadmissible, it would be open to the plaintiff who lent the money, in spite of the fact that the pronote is not admissible in evidence to recover his money by proving orally the advance of that loan. But under S. 91, Evidence Act, it would not be open to him to prove the terms or the rate of interest entered in the promissory note. A.I.R. 1940 Oudh 308=1940 O.W.N. 581=1940 A.W.R. 267= 188 Ind. Cas. 184.

——S. 91—Oral contract reduced to writing—Terms of contract—Reference to original oral agreement—Permissibility.

The moment an oral contract is reduced to writing it is not open to any of the parties thereafter to prove the terms of the contract by referring to any original oral agreement. S. 91, Evidence Act, would stand in his way and he would be precluded from proving the terms of the transaction otherwise than by the deed itself. A.I.R. 1950 Pepsu 34.

——S. 91—Admissibility of external evidence—Terms of contract reduced to writing—Admissibility of oral evidence to prove.

Where the terms of the contract were reduced to writing at the same time when it was made, the document only, or if permissible, a secondary evidence of its contents, can be the only evidence available to the parties to prove the contract and oral evidence is not admissible. A.I.R. 1940 Pat. 245=5 Cut.L.T. 45= 22 P.L.T. 666=190 Ind. Cas. 377.

——Ss. 91, 92—Admissibility of external evidence—Endorsement on bond not showing whether payment was towards interest or principal—Oral evidence, if admissible.

Where a debtor makes a payment but an endorsement made by him on the back of the bond does not show as to whether the payment was made towards principal or towards interest, oral evidence to prove that the payment was made towards interest is not admissible. A.I.R. 1939 Oudh 142=1939 O.W.N. 201 =14 Luck. 456=180 Ind. Cas. 121.

——S. 91—Admissibility of external evidence.

In case of a loan and a promissory note, the latter being inadmissible in evidence being insufficiently stamped, a suit on the original consideration can be maintained. It is a loan which constitutes the cause of action and gives rise to it, and it is separate from the note itself, and the fact of a loan can never be a term of the contract contained in the pro-note and therefore it is open to a person to prove that there was a loan independently of S. 91, Evidence Act. A.I.R. 1938 Bom. 286=40 Bom.L.R. 174=175 Ind. Cas. 540.

——**S. 91—Admissibility of external evidence.**

It was not possible to separate the transaction of the alleged loan from that of the promissory note and the making and handing over of the note and the payment of the money formed part and parcel of the same transaction. On account of material alteration after its execution, the pronote became inadmissible in evidence and void under S. 87, Negotiable Instruments Act :

Held, that the plaintiff suing on the pro-note could not prove orally the terms of the contract by setting up a case independent of the note. Though it may be admissible to tender evidence in proof of the fact that a particular sum of money was paid on a particular date, the pronote having been executed to set out the terms of the contract, it could not be used in evidence ; nor could be external oral evidence be given to prove that the money was paid as loan to defendant to be repaid by him to plaintiff, such evidence not being admissible under S. 91, Evidence Act. A.I.R. 1937 All. 439=1937 A.W.R. 232=1937 A.L.J. 235=169 Ind. Cas. 780.

——**S. 91—Admissibility of external evidence.**

A right to collect *bidi* leaves is movable property as defined in S. 2 (9) of the Registration Act. Where the agreement between the plaintiff and the defendant was that the latter would collect the leaves and pay a certain sum to the plaintiff is reduced to writing but the deed is lost, the plaintiff is entitled to give oral evidence to prove the terms of the contract, though the contract was unregistered. A.I.R. 1937 Nag. 116=169 Ind. Cas. 834.

——**S. 91—Admissibility of external evidence.**

In a suit for possession, plaintiff based his title to land on unregistered *patta*. The lower Court allowed the plaintiff to prove his title by the production of rent receipts and by the general circumstances of the case and by using the unregistered *patta* for the "collateral purpose".

Held, the plaintiff was not entitled to prove his title and her right to recover possession in the way he did. 18 Pat. L.T. 1012.

——**S. 91—Admissibility of external evidence.**

An agreement of the parties to create a mortgage, and the terms thereunder cannot be proved by parole evidence while oral evidence would be admissible to prove the circumstances in which the documents of title came to be in the possession of the person who claims to be a mortgagee, and the mortgagee is also entitled, and indeed called upon to prove the factum of the mortgage or deposit. A.I.R. 1937 Rang. 69=14 Rang. 522=168 Ind. Cas. 830.

——**S. 91—Admissibility of external evidence.**

An instrument alleged to be a pro-note was in following terms : "This (one) receipt is hereby executed by *H* and *A*, residents of Hoti for Rs. 43,900, half of which comes to Rs. 21,950 received from firm of *L*, for and on behalf of *M* of Hoti. This amount to be payable after two years. Interest at the rate of Rs. 5-4-0 per per cent. year to be charged. Dated April, 1 1917. Stamp has been affixed" :

Held, that the document could not be intended to be brought within the definition relating to documents which are to be negotiable instruments. Receipt and agreements are not generally intended to be negotiable, and serious embarrassment would be caused if the negotiable net were cast too wide. The document was a receipt containing the terms on which it was to be repaid, and being primarily a receipt even if complied with a promise to pay, it was not a promissory note. As the document did not purport to record all the terms of the contract, and there was nothing to show how the money came to be received, the parties were not prevented from showing that it was paid by way of loan or deposit or for some other purpose. A.I.R. 1936 P.C. 171=44 M.L.J. 23=40 C.W.N. 997=1936 M.W.N. 660=17 P.L.T. 513=38 Bom.L.R. 739=63 C.L.J. 541=38 P.L.R. 1006=1935 A.W.R. 931=63 I.A. 279=1936 A.L.J. 986=17 Lah. 557=71 M.L.J. 712=162 Ind. Cas. 454 (P.C.).

[Overrules 8 Cal. 645.]

——**S. 91—Admissibility of external evidence—Contract by lessor to give khas possession—Proof of other arrangement.**

Where the *kabuliyat* shows a contract that the lessee would get *khas* possession of the lands, an oral evidence to show that there was any other arrangement between the parties, is not admissible under S. 91, Evidence Act. A.I.R. 1936 Cal. 302=166 Ind. Cas. 567.

——**S. 91—Admissibility of external evidence—Contract in writing between *A* and *B*—Oral evidence to prove that *C* was also really a party.**

Where a contract in writing was entered into between *A* and *B* and *A* sought to prove by adducing oral evidence that the contract was in reality between him on the one part and *B* and *C* on the other and that *C* was also, therefore, liable on the contract :

Held, that the evidence was admissible. A.I.R. 1936 Mad. 5=1935 M.W.N. 1084 (2)=43 M.L.W. 218=159 Ind. Cas. 1005.

——**S. 91—Admissibility of external evidence—Promissory note insufficiently stamped—Admissibility—Proof of liability by oral evidence.**

When a promissory note is executed in satisfaction of a pre-existing liability, the inadmissibility of the promissory note by reason of its being deficiently stamped does not preclude the proof of the pre-existing liability by oral evidence. When the loan is contemporaneous with the execution of an inadmissible promissory note, the debt can be proved by oral evidence independently of the promissory note only if the parties intended at the time of the execution of the note that it was collateral to an oral contract by way of giving security for the loan or making conditional payment of the debt, antecedent or contemporaneous. When however, the promissory note forms the substance of the contract with all its terms S. 91, Evidence Act, would preclude proof of the contract otherwise than by document itself and if the promissory note is inadmissible for any reason, the contract cannot be proved by any extraneous oral evidence nor can money be recovered as money had and received. A.I.R. 1936 Nag. 225=9=167 Ind. Cas. 673.

——**S. 91—Admissibility of external evidence—Rate of interest at Rs. 2 per month per cent. mentioned in an inadmissible promissory note—It is a term of contract reduced to writing and S. 91, Evidence Act precludes the promisee from adducing any proof of that agreement otherwise than by promissory note itself.** A.I.R. 1936 Nag. 225=167 Ind. Cas. 673.

——**S. 91, Illus. (b)—Admissibility of external evidence—Suit on inadmissible pro-note—Proof of debt independently of pro-note.**

Where the contract is contained wholly in the pro-note, which is inadmissible in evidence, the plaintiff will be precluded from proving the debt *aliunde*. A.I.R. 1936 Pesh. 146=169 Ind. Cas. 803.

——**Ss. 91, 92—Admissibility of external evidence—Term that certain amount is to be paid by transferee—Oral evidence to prove that amount mentioned will not be paid—Admissibility—Oral evidence as to money sought to have been borrowed has not actually been borrowed—Oral evidence to show amount was not received—Admissibility—**

Tendering of such oral evidence—Other party, if can prove that sale consideration was less than that stated in deed.

Where, under a written document, there is some amount still outstanding which, under its terms, has to be paid by the transferee, then it is not open to the transferee to produce oral evidence to show that there was a separate contemporaneous oral arrangement under which it was agreed that this sum would not be payable, for such a course would be contrary to the provisions of S. 92, Evidence Act.

There is nothing in S. 92, Evidence Act, which would debar a mortgagor from saying that although he admitted having received the full amount, he had not, in fact, received it. On the other hand, if a dispute arose as to whether the exact amount mentioned in the mortgage deed to be paid in future was the amount agreed to be advanced or was more or less, then both parties would be estopped from going behind the recital, because there would be an implied promise on the part of the mortgagee to advance the whole of that amount.

Per *Bennet*, J.—When the terms of a deed of sale have been proved according to S. 91, Evidence Act, no evidence of any oral agreement or statement shall be admitted as between the parties to the deed of sale or their representatives for the purpose of contradicting, varying, adding to or subtracting from, the amount of sale consideration. The acknowledgment of receipt of the whole or part of the sale consideration in a deed of sale is not a term of the deed of sale and oral evidence may be given to show that the amount acknowledged or any part of it was not received. When one party tenders oral evidence to prove that the amount acknowledged or any part of it was not received, this does not give the other party a right to produce evidence of any oral agreement or statement that the amount of sale consideration was less than what is entered in the deed of sale. A.I.R. 1935 All. 529=1935 A.W.R. 658=1935 A.L.J. 560=58 All. 1=156 Ind. Cas. 362 (F.B.).

——Ss. 91, 92—Admissibility of external evidence—Evidence that receipt was fictitious.

Section 91 or S. 92, does not bar evidence to show that a receipt was a fictitious document in the sense that no money was paid. A.I.R. 1935 All. 346=1935 R.D. 89=1935 A.W.R. 197=158 Ind. Cas. 1121.

——S. 91—Admissibility of external evidence.

An agreement for sale to *A* husband of *B* defendant No. 7, was executed in 1919. It was set aside by the consent of parties and was replaced by a deed of assignment executed on September 4, 1923, by *C* in favour of *B*, the wife of the vendee in the prior agreement. This deed was made over to the vendee who did not get it registered. *B* obtained letters of administration of the estate and went into possession. After the relief of specific performance had become barred by time, *C* impeached the assignment. *B* resisted this by relying on doctrine of part performance :

Held, that the document being unregistered was inadmissible in evidence and could not be referred to for any purpose, and no evidence was admissible to prove its contents under S. 91, Evidence Act. A.I.R. 1935 Bom. 208=37 Bom.L.R. 82=156 Ind. Cas. 779.

——S. 91—Admissibility of external evidence.

For purposes of equitable mortgage, all that is necessary is a loan, coupled with a deposit of title deeds relating to the property to be mortgaged, with the intention of creating a charge on the property. No writing is needed for the creation of such a mortgage ; but if the parties choose to put the agreement in writing, that document will exclude all other evidence of the transaction. A.I.R. 1935 Lah. 821=160 Ind. Cas. 773.

——S. 91—Admissibility of external evidence—Document evidencing terms of Contract—Evidence of terms.

If there was a document evidencing the contract between the parties then, that and that alone is the repository of the terms of the contract between them and all else is reduced to silence. A.I.R. 1935 Rang. 473 =160 Ind. Cas. 314.

——S. 91—Admissibility of external evidence.

Where a written statement to a suit for money lent alleged that another person desired to borrow money and that as defendant had got good credit, this person got the defendant to sign a memorandum or stamped receipt :

Held, where there is no written promise to pay, S. 91, Evidence Act, does not apply and where there is no bar from the subsistence of promissory note which is not sufficiently stamped, then there is no reason why the terms of the promise to pay should not be held to be proved by evidence. These terms may either be proved in such case by oral evidence or by circumstantial evidence. A.I.R. 1934 All. 271=3 A.W.R. 555= 147 Ind. Cas. 443.

——S. 91—Admissibility of external evidence—Document of lease compulsorily registrable but not registered—Whether admissible—Relationship of parties determined by terms of lease and embodied therein—Oral evidence.

By a document purporting to be an agreement, the defendants agreed to vacate by a certain date the house in which they were then living and to construct their building on another part of the land. As regards the site, they agreed to vacate half of it and on account of this relinquishment of half the land, they agreed to pay rent of Rs. 2 per annum instead of Rs. 4 per annum which they had previously been paying. They further stipulated that in the event of their not making the above changes by that date, the plaintiff should have the right to eject them. The document was not registered :

Held, that the document was not admissible in evidence for want of registration :

Held, also, that since the relationship of the parties was determined by the terms of the lease and these were embodied in the above-mentioned document, oral evidence to prove those terms was barred by S. 91 of the Evidence Act. A.I.R. 1934 Lah. 743=148 Ind. Cas. 558 (1).

——S. 91—Admissibility of external evidence—Contract of marriage written by third person and not signed by contracting parties—Evidence to prove contents.

A contract of marriage was not signed by either of the parties but was in the nature of a memorandum prepared by a *nikah-khwan* belonging to a *shariah* department of Musal :

Held, that it was open to one of the parties to prove by other evidence, either oral or documentary, that he or she had been married and also the terms. A.I.R. 1934 Lah. 705=154 Ind. Cas. 979.

——S. 91—Admissibility of external evidence—Production of oral evidence to prove terms of written contract.

Section 91, Evidence Act, is an absolute bar to the production of any oral evidence to prove the terms of a contract which has been reduced to writing and if the written contract is inadmissible in evidence, a suit to enforce it must fail. A.I.R. 1934 Lah. 606=37 P.L.R. 494=153 Ind. Cas. 1076.

——S. 91—Admissibility of external evidence.

If the terms under which the loan was made have been embodied in a negotiable instrument or in any other document, no evidence can be adduced in proof of the terms of the contract except the document itself, or secondary evidence of the contents of the document in cases in which secondary evidence thereof is admissible. It follows, therefore, that in such cases, if the document which contains the whole of the terms of the

agreement is not admissible in evidence, a suit to recover the amount of the loan must fail, because the plaintiff is not in a position to prove the debt. A.I.R. 1934 Rang. 389=12 R. 500=152 Ind. Cas. 1038 (F.B.).

——S. 91—Admissibility of external evidence.

In a suit for registration of a usufructuary mortgage bond, or in the alternative to direct the defendant to execute and cause to be registered a bond identical with the bond in suit, or refund the money said to have been advanced with interest, the lower Courts found that the money was advanced by the the plaintiff to the defendant to enable the latter to pay to the plaintiff's mistress partly in satisfaction of her decree and partly to prevent her from taking criminal proceedings against him :

Held, that it was doubtful, in the circumstances of the present case, and having regard to Ss. 65 and 91 of the Evidence Act, if it would have been proper to allow any secondary evidence regarding the nature of the alleged agreement to have been given in these proceedings. A.I.R. 1933 Cal. 196=56 C.L.J. 413=142 Ind. Cas. 520.

——S. 91—Registration Act, S. 49—Admissibility of external evidence—Unregistered bahi **entry —Oral evidence—Admissibility.**

The fact that a *bahi* entry was executed on a particular date does not seem to be a part of the terms of the document and oral evidence as to the same is not inadmissible under S 91, Evidence Act. An entry in a *bahi* which is inadmissible for want of registration may yet be looked into to ascertain the nature of party's possession. A.I.R. 1933 Lah. 194=34 P.L.R. 1033 =143 Ind. Cas. 634.

——S. 91—Admissibility of external evidence—Document purporting to be mortgage—Oral evidence to prove it is sale, admissibility of.

Where a registered document is, on the face of it, a mortgage-deed, the mere fact that the conditions are onerous cannot alter the real nature of the transaction and justify the Court in construing it to be a sale, nor is oral or circumstantial evidence admissible to prove it to be a sale. A.I.R. 1933 Lah. 104=33 P.L.R. 974 =141 Ind. Cas. 494 (1).

——S. 91—Admissibility of external evidence.

Where the meaning of a grant is clear, it is not necessary to examine the documents subsequent to the grant. A.I.R. 1933 Mad. 194=145 Ind. Cas. 588 (2).

——S. 91—Admissibility of external evidence.

Where a cause of action for money is once complete in itself and the debtor then gives a hand-note to the creditor for the payment of money at a future time, if the hand-note is inadmissible in evidence, the creditor may sue for the original consideration in which parole evidence of the transaction may be adduced. A.I.R. 1933 Pat. 575=14 P.L.T. 651=12 Pat. 862=146 Ind. Cas. 471 (F.B.).

——S. 91—Admissibility of external evidence—Registered deed of assignment—Recital of receipt of consideration—Evidence to show non-receipt of consideration and that purchaser has no beneficial interest—Admissibility.

A executed on assignment deed in respect of certain properties in favour of *B* and *C* (*A*'s son). The assignment was expressed to be made in consideration of a certain sum of money to the 'vendor' by the 'purchasers' and the vendor acknowledged receipt of this amount in the body of the deed and in a separate endorsement. *D* advanced money to *C* on the security of *C*'s half share in the assigned properties and obtained from *C* a deed of mortgage in respect of *C*'s half share. *D* did not, however, demand production of the deed of assignment from *C* before making the advance. A memorial of the deed of assignment and the mortgage-deed were duly registered in accordance with the law of registration. As soon as *A* came to know of this mortgage, *A* instituted a suit against *D* alleging that *B* was only another name of *A* and that *C* had no beneficial interest in the properties and had no right to mortgage them. During the trial, he sought to adduce evidence to prove that no consideration was, in fact, paid for the assignment and that the assignment was merely intended to mark out the property so that it might go to his son *C* at his death if he behaved properly. The lower Courts held that this evidence was admissible in order to rebut the presumption of advancement and to show that there was a resulting trust of the properties in favour of *A* and decreed the suit holding further, that *A* was not estopped and that *D* was also guilty of gross negligence in not demanding the deed of assignment from *C*:

Held, that the evidence of the respondent was evidence which directly contradicted the terms of the assignment-deed and ought not to have been received at all. A.I.R. 1932 P.C. 255=63 M.L.J. 418=36 M.L.W. 761=1932 A.L.J. 971=139 Ind. Cas. 891 (P.C.).

——S. 91—Admissibility of external evidence.

In view of S. 49 of the Registration Act, an un-registered document cannot be received as evidence of any transaction affecting immovable property. But a person is not debarred from proving his title to the property independently of that document. A.I.R. 1932 All. 259 =1932 A.L.J. 101=140 Ind. Cas. 42.

——S. 91—Admissibility of external evidence.

Where a person deposited title deeds of his property with the plaintiff Bank and wrote a letter to the Bank saying that he had deposited the title deeds as a guarantor for any possible indebtedness of three others and there was no evidence of preceding agreement:

Held, (*i*) that the letter was the docuent containing the terms of the contract between the parties;

(*ii*) that it was inadmissible for want of registration;

(*iii*) that no equitable mortgage was evidenced thereby. A.I.R. 1932 Bom. 401=34 Bom.L.R. 748=139 Ind. Cas. 745.

——S. 91—Admissibility of external evidence—Balance struck—Oral evidence to prove agreement to pay interest.

The absence of mention of an agreement to pay interest in a balance struck in the creditor's book does not debar him from proving such an agreement independently and by oral evidence. The balance struck in the creditor's book is not such a formal document in which all the conditions of the transaction are usually entered or are expected to be entered. A.I.R. 1932 Lah. 652=34 P.L.R. 508=141 Ind. Cas. 190.

——S. 91—Admissibility of external evidence.

The vendee can enforce specific performance of an agreement to sell even though owing to the fact of the sale deed being in the custody of a third person, he could not get the deed registered in time, provided he is able to prove the terms of the agreement. But an unregistered sale deed cannot be treated as if it were merely a document creating a right to obtain another document, and made the basis of a suit for specific performance. Even if there had been an oral agreement before the execution of the sale-deed, such agreement must be deemed to have merged in the sale deed, and other evidence of such oral agreement cannot be received under S. 91, Evidence Act. A.I.R. 1932 Lah. 276=33 P.L.R. 227=137 Ind. Cas. 41.

——S. 91—Admissibility of external evidence.

The title of a purchaser at an auction-sale in execution of a decree is derived from the sale itself and not from the sale certificate. The sale certificate is merely evidence of title and not the title deed in the sense that the title is conveyed or created by it, and the purchaser, therefore, can establish his title by evidence independent of the sale certificate. A.I.R. 1932 Pat. 80=136 Ind. Cas. 49.

——S. 91—Admissibility of external evidence.

Where a suit for redemption of a mortgage was dismissed on the ground that the mortgage deed could not be proved as it was unregistered and the mortgagor instituted a suit for recovery of possession on the basis of his title offering to pay the amount which he had borrowed from the defendant:

Held, that the mortgage deed could be referred to for the purpose of showing the circumstances under which the defendant obtained possession. A.I.R. 1931 Rang. 40=9 R. 556=129 Ind. Cas. 511.

——S. 91—Admissibility of external evidence—Document embodying only some terms—Evidence of other terms admissible.

Where there is a document which does not contain the entire agreement between the parties but embodies only some of the conditions, oral evidence to prove certain other terms which had been agreed upon and which are not inconsistent with the written instrument is clearly admissible. A.I.R. 1930 All. 615=1930 A.L.J. 1396=128 Ind. Cas. 229.

——S. 91—Admissibility of external evidence—Family settlement—Oral evidence admissible to prove it.

There is no provision of law requiring that a partition of family settlement must be reduced to writing and the writing registered, though of course, when they are reduced to writing, the point of registration may arise.

Where by family arrangement it was settled that *A*, father of *B*, was to pay the family debts and *B* was to pay nothing, and Rs. 1,000 from the joint property were to be paid to *B* as his share and a house was to fall to the share of *A*,

Held, that the alleged arrangement amounted to family settlement and not to a release of his share by *B*. It was not therefore necessary to get the settlement reduced into writing and get the writing registered. Oral evidence on the point of the alleged settlement was therefore admissible. A.I.R. 1930 Bom. 438=32 Bom.L.R. 948=126 Ind. Cas. 890.

——S. 91—Admissibility of external evidence—Resumption of saranjam **not required to be reduced to writing.**

There is no law which requires a resumption of *saranjam* to be reduced to writing. The actual order of resumption therefore need not be produced in evidence. Such resumption can be proved under S.114, Evidence Act, and S. 91 will not govern such cases. 115 Ind. Cas. 369=53 Bom. 12=30 Bom.L.R. 1463=A.I.R. 1929 Bom. 14.

——S. 91—Agreement to lease—Inadmissibility owing to non-registration—Prior oral agreement—Proof—Permissibility.

Where the tenant wrote to the land-lord to grant a lease in pursuance of an oral conversation and the landlord sent a reply which in law amounted to an agreement to lease but which was rendered inadmissible for want of registration and the tenant thereupon sought to fall back on the prior oral agreement,

Held, that if there was a prior oral agrement, it was either the same as that in the letters or it was modified by the letters and that in neither case did S. 91 of the Evidence Act admit oral evidence of the alleged oral agreement. 31 Punj.L.R. 299=12 L.L.J. 77=125 Ind. Cas. 618=A.I.R. 1930 Lah. 675.

——S. 91—Admissibility of external evidence—Grant reduced to form of document—Secondary evidence inadmissible where document not shown to have been lost.

Under S. 91 the only evidence as to a grant when it has been reduced to the form of a document is the document itself unless secondary evidence as to its contents is admissible. Only Clause (*c*), S. 65, which makes secondary evidence of lost originals admissible can be applied to such a case; but where there is no evidence on record that the document has been lost Clause (*c*) is inapplicable and a finding of Court based on existence of an *ijazatnama* which is said to be lost is erroneous in law. 6 O.W.N. 859=10 L.R.A. Rev. 358=A.I.R. 1929 Oudh 447.

——S. 91—Admissibility of external evidence.

Where a document, embodying a contract between parties, should have been, but was not registered, the document itself is inadmissible in evidence and further no evidence can be given of its terms under S. 91. 115 Ind. Cas. 903=6 Rang. 676=A.I.R. 1929 Rang. 60.

——S. 91—Admissibility of external evidence—Terms of contract, originally made by parol, reduced to writing—Oral evidence is not admissible.

The moment an oral contract is reduced to writing it is not open to any of the parties thereafter to seek to prove the terms of the contract referringto the orginal oral agreement and S.91, Evidence Act, applies not only to cases where the contract is brought about or concluded by the writing, but also where the contract having been originally made by parol is subsequently reduced to writing. When the parties reduce the terms of a contract to writing, it clearly indicates the contemplation of the parties that the term would be reduced to a form where there could be no question at all as to what the terms were and the undoubted policy of the law is that whenever parties have taken such precaution it is the document itself that must be produced and proved as evidence of the contract subject of course to any rules as to secondary evidence. 111 Ind. Cas. 677=28 M.L.W. 234=A.I.R. 1928 Mad. 546.

——S. 91—Admissibility of external evidence.

Oral evidence is admissible to prove a condition reduced to writing in a document, where the opposite party is in possession of the document and denies the existence of such a condition. 107 Ind. Cas. 492 =A.I.R. 1928 Lah. 236.

——S. 91—Admissibility of external evidence.

Secondary evidence of a mere note that a mortgage had taken place and oral evidence of a transaction of mortgage, which is itself oral, is admissible. 106 Ind. Cas. 476=5 Rang. 650=A.I.R. 1928 Rang. 32.

——S. 91—Admissibility of external evidence—Contract—Construction—Mercantile contract—Evidence of usage in particular locality is admissible only if necessary to explain ambiguous terms—If such usage is repugnant to the terms of written contract it is inadmissible.

Where ambiguous terms or phrases are found in a mercantile contract evidence of usage is admissible to explain the meaning of the expressions in the particular trade or locality and where a contract is silent in respect of some incidental term or condition which, according to the course of business established in a particular trade it is customary to find included in such a contract, evidence of the custom is admissible to prove that such term or condition formed part of the contract,unless the incorporation of the term or condition in the contract will have the effect of introducing something repugnant to or inconsistent with the tenor of the written agreement. But where the parties to a contract have expressed the agreement at which they have arrived in a written document the terms of which are capable of a reasonable interpretation according to the natural meaning of the words that are used, a trade usage which, if it regulated the rights and obligation of the parties, would alter fundamentally the nature and character of the contract as expressed in the written agreement, can neither determine nor affect the rights and obligations of the parties engaged in the transaction; and as it is inconsistent with the terms of the written agreement evidence of such an usuage is inadmissible; *Humbrey* v. *Dale*, (1857) 7 E. and B. 266 and *Mollet* v. *Robinson*, L.R. 5 C.P. 646, Relied on.

Where plaintiff contracted to supply certain goods to the defendants and the indent provided: "I, the undersi-

gned, request you to purchase yourselves or through your agent on my account and risk the whole or any part of the undermentioned goods on the terms and conditions stated below".

Held, under the indent the relationship of principal and Agent was created between the defendant and the plaintiff; and unless the defendant assented to some other mode of performance, it was the duty of the plaintiff under the indent to create privity of contract between the defendant and the foreign supplier for the purchase of the indent,

Held, further, that the usage that a merchant who under an indent agrees to purchase goods from abroad for and on account of a dealer, "C.I.F. no commission," is entitled to purchase the goods from the supplier as a principal on any terms that he may arrange, and to resell the goods to the dealer upon the terms of the indent, the difference between the price at which the merchant buys from the supplier and the price at which he sells to the dealer being his remuneration for obtaining the goods for the dealer, would be wholly inconsistent with the terms of the indent and would be inadmissible in evidence whether defendant was aware or ignorant of it; 104 Ind. Cas. 268=54 Cal. 549=A.I.R. 1927 Cal. 668.

——S. 91—Admissibility of external evidence.

Where the term of an oral compromise relating to rights in immovable property over Rs. 100 in value are reduced to writing, but the writing is not registered, the Courts will not be justified in ignoring the written compromise and falling back on the oral one. 102 Ind. Cas. 8=A.I.R. 1927 All. 587.

——S. 91—Admissibility of external evidence—Terms of contract reduced into form of an unsigned draft—Document or other evidence is admissible to prove the terms proposed but not entered into.

When terms of contract in respect of immovable property are reduced into the form of a unsigned draft or memorandum of the terms which the parties had agreed should be embodied in a proper document, there would be nothing in S. 91 of the Evidence Act or S. 49 of the Registration Act to exclude the document or other evidence of the terms of the contract: the parties proposed to make but never did make. 95 Ind. Cas. 824=A.I.R. 1926 Nag. 460.

——S. 91—Admissibility of external evidence.

Where the plaintiff alleged a mortgage and the defendant alleged a sale but no registered document was produced,

Held, oral evidence was admissible to prove the nature of the transaction. 84 Ind. Cas. 468=3 Bur.L.J. 238=A.I.R. 1925 Rang. 102.

——S. 91—Admissibility of external evidence.

Agreement not required by law to be in writing or to be registered need not be proved by production of written document but one, the terms of which are reduced into writing should be proved only by the written document and not by oral evidence. 78 Ind. Cas. 1043=A.I.R. 1924 All. 842.

——S. 91—Admissibility of external evidence.

Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not even admissible in evidence. 81 Ind. Cas. 641=28 C.W.N. 70=A.I.R. 1924 Cal. 452.

——S. 91—Admission of external evidence.

The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. 71 Ind. Cas. 650=50 I.A. 77=32 M.L.T. 184=2 Bur.L.J. 25=25 Bom.L.R. 582=1 Rang. 16=50 Cal. 338=38 C.L.J. 41=18 M.L.W. 446=28 C.W.N. 1=1923 M.W.N. 762=A.I.R. 1923 P.C. 50=44 M.L.J. 602 (P.C.).

——S. 91—Admissibility of external evidence—Party in possession of document cannot let in secondary evidence.

Where documents of title were in existence and defendants upon whom the *onus* lay had them in their possession and failed to produce them.

Held, that secondary evidence of the terms and contents of the document cannot be adduced. 68 Ind. Cas. 653=3 P.L.T. 485=A.I.R. 1923 Pat. 111.

——S. 91—Admissibility of external evidence.

It is settled law that a relationship such as partnership, land-lord and tenant and so forth may be proved apart from the documents which embody the terms of that relationship. 74 Ind. Cas. 47=1 Bur.L.J. 111=A.I.R. 1923 Rang. 57.

——S. 91—Admissibility of external evidence.

External evidence is admissible to show that an unstamped acknowledgment was not signed, to supply evidence of the debt connected with it. 21 Bom. 201 (F.B.) and 30 Cal. 687, Ref. 13 M.L.W. 140=A.I.R. 1921 Mad. 71.

——S. 91—Admissibility of external evidence—Document containing terms of loan inadmissible—Lender can sue when loan is provable by other evidence.

The question whether a loan was given and taken, can in certain cases, such as those of collateral security, be distinguished from the question of the terms of the loan and its repayment. Where it can be so distinguished, even if the document embodying the terms is inadmissible, the lender may fall back and sue upon the loan itself and prove it by other evidence. An implied contract to repay money lent always arises from the fact that the money is lent. 65 Ind. Cas. 37=15 S.L.R. 135=A.I.R. 1921 Sind 80.

——S. 91—Admissibility of external evidence—Admission—Effect of—Document inadmissible.

In a suit for possession of properties the defence was that plaintiff, had waived his rights by an agreement by which he gave up all his rights in the estate on condition that defendant paid Rs. 1,000 to the gowshala. *Held*, that the document was inadmissible in evidence for want of registration though the plaintiff admitted execution of the document. The document was not admissible even in so far as it related to moveable property. 1 Lah. 436=56 Ind. Cas. 595.

——S. 91—Admissibility of external evidence—Intention of parties—Extrinsic evidence.

Under S. 91, no extrinsic evidence can be let in as to the sense in which the words used in a document were understood by the parties. A document shall in cases of doubtful construction be construed strictly against the grantor. The words "up to" or "until" a certain day in a contract may be construed as exclusive or inclusive of the day to which they are applied. 45 Cal. 481=22 C.W.N. 416=45 Ind. Cas. 305.

——S. 91—Admissibility of external evidence—Transfer of property—Oral evidence.

Where a disposition of property is not required by law to be in writing and no question arises as to the terms of such a disposition, oral evidence is admissible to prove the existence of such a disposition. 20 O.C. 33=38 Ind. Cas. 671.

——S. 91—Admissibility of external evidence—Licence—Parol evidence.

The grant of a mere licence need not be in writing and may be proved by parol evidence. 12 N.L.R. 75=34 Ind. Cas. 471.

——S. 91—Admissibility of external evidence—Compromise of suit—C.P.C., O. 23, R. 3—Oral evidence.

Where the compromise is reduced to writing under O. 23, R. 3 no extraneous evidence, oral or documentary regarding the terms of the compromise is admissible. 11 N.L.R. 110=29 Ind. Cas. 838.

——S. 91—Admissibility of external evidence—Explanation 3—Recitals in Document Relationship Oral evidence Document defining relationship Gift.

The fact of the existence of a particular legal relationship may be established by oral evidence though the terms which govern the relationship may be expressed in writing. Though a deed of gift executed by a Mahomedan is inadmissible in evidence for want of registration oral evidence is admissible to show that there has been a valid gift under Mahomedan Law. 18 O.C. 122=2 O.L.J. 97=28 Ind. Cas. 180.

——Ss. 91 and 92—Admissibility of external evidence—Power-of-attorney—Right of third party to adduce other evidence of the power—Evidence Act, Ss. 91 and 92.

There is no rule of law that the only evidence of an agent's authority admissible in evidence is a written power of attorney. The fact can be proved by evidence *aliunde*, and so far as third parties are concerned none-the-less so because the agent was appointed under a written document executed by the principal. 33 P. R. 1913=11 P.L.R. 1913=279 P.W.R. 1912=16 Ind. Cas. 950.

——S. 91—Admissibility of external evidence—Receipt—If payment can be proved by other evidence.

Where a receipt granted for payment made is lost the party relying on the payments need not prove the loss of receipt but may prove payments by other evidence. 13 Ind. Cas. 150 (All.)

——S. 91—Admissibility of external evidence—Authority to adopt—Evidence of conduct.

Succession to adoptive father's properties and long course of conduct on the basis of adoption prove adoption. When there is such proof even though there is a Anumathi patra it need not be proved. 4 Ind. Cas. 400 (Cal.)

——S. 91—Admissibility of external evidence—Confession—Exclusion of oral evidence.

No evidence of the terms of a confession to a Magistrate can be given except the record, if any, made under S. 364 of the Cr.P. Code. The confession of an accused made to a Magistrate holding an enquiry is a matter which must be reduced to the form of a document within the meaning of S. 91 of the Evidence Act. 35 All. 260=11 A.L.J. 286=14 Cr.L.J. 211=19 Ind. Cas. 307.

——S. 91—Admissibility of external evidence—Lost document—No proof of loss—Admission by defendant of execution but plea of payment—Payment endorsed on document—Plaintiff whether can succeed.

Where a suit is based upon a lost document the loss of which however the plaintiff is unable to prove, he cannot succeed on the mere admission by the defendant of execution of the same when it is followed by a plea of payment duly endorsed thereon. 49 P.W.R. 1911=12 Ind. Cas. 246.

——S. 91—Admissibility of external evidence—Contract—Rights governed by.

Where a contract is reduced to writing, in order to define and give evidence of a transaction between the parties, the writing should regulate their rights and liabilities. (1905) A.C. 454. 9 M.L.T. 17=(1910) M.W.N. 618=8 Ind. Cas. 302.

——S. 91—Contemporaneous oral agreement.

Whether evidence of contemporaneous oral agreement in addition to that contained in the deed, can be proved. (1904) 9 C.W.N. 147=32 C. 96=31 I. A. 188 (P.C.).

——S. 91—Admissibility of external evidence—Criminal Procedure Code, S. 511—Proof of previous conviction.

Previous convictions should be proved by copies of judgments or by any other documentary evidence of the fact of such previous convictions; and an examination of the accused in respect of those convictions is, having regard to S. 342. Cr.P. Code without legal warrant or justification. 5 C.W.N. 670=28 C. 689.

2. Applicability and Scope.

——Ss. 91 and 92—Applicability—Document containing only terms of contract but not containing signatures of both parties or date—Effect of.

The mere fact that both the parties to a contract have not signed it would not make it an oral one so as to take it out of the provisions of Ss. 91 and 92, Evidence Act. These sections do not require the whole contract to be embodied in the writing but only the "terms". Hence even when the signatures are absent or the proposal and acceptance are not entered in it, it would still be hit by Ss. 91 and 92, provided the terms are reduced to writing. Of course, all the terms must be there. When all the terms of the contract are there, Ss. 91 and 92 would be attracted even if there are no signatures and no proposal and acceptance or date embodied in the document. I.L.R. (1949) Nag. 849=A.I.R. 1949 Nag. 389.

——Ss. 91 and 92—Applicability and scope—Suit for specific performance of contract of reconveyance—Defendant relying on written agreement denied by plaintiff—Latter relying on oral contract—If debarred from leading oral evidence.

The plaintiff alleged that he executed a sale-deed in favour of the defendant for Rs. 225 on condition that if that sum was paid to the defendant within a certain period he would reconvey the property to the plaintiff. He further alleged that he left the sale-deed with the defendant to be registered along with an agreement of reconveyance which was to be reduced to writing. The plaintiff came to know that the defendant had written out an agreement relating to reconveyance of land quite different from the land sold to him, and brought a suit for the specific performance of the contract of reconveyance according to the terms agreed between the parties and which terms were to be incorporated in a written document. Defendant contested the suit and relied upon a written agreement, the terms of which, he contended did not entile the plaintiff claim specific performance of an oral agreement upon to which the plaintiff relied. The defendant further contended that under Ss. 91 and 92, Evidence Act, the plaintiff was debarred from leading any oral evidence to vary the terms of a written contract. Overruling this contentions:

Held, that the contention based on the provisions of Ss. 91 and 92, Evidence Act, presupposed that there was a contract between the parties as alleged by the defendant and that the trial Court was right in holding that the contract relied upon by the defendant was not the contract between the parties and that the contract between the parties was the contract upon which the plaintiff relied. A.I.R. 1949 Assam 80.

——S. 91—Scope—Proof of fact of grant as distinct from its terms—Admissibility of other evidence.

Although the terms, of a grant can be proved under S. 91 of the Evidence Act only by the production of the document containing the grant or by secondary evidence, the fact of the grant can be proved by such evidence which is admissible as a copy of an entry in a public record. 22 Luck. 522=1947 O.W.N. 421=1947 A.W.R. (C.C.) 301=A.I.R. 1948 Oudh 307=1947 O.A. (C.C.) 301.

——Ss. 91 and 92—Scope and effect—Will self-contained—Condition precedent contained in separate agreement—Evidence of—Admissibility.

Where a will is self-contained in all respects, it is not permissible to import into it any condition precedent alleged to be contained in some other collateral agreement in view of the provisions of Ss. 91 and 92, Evidence Act. A condition precedent to a legacy cannot be imported from outside into the will which bequeaths the legacy. 21 Luck. 314=(1946) O.W.N. (C.C.) 136=223 Ind. Cas. 206=

1946 O.A. (C.C.) 100=1946 A.W.R. (C.C.) 100=A.I.R. 1946 Oudh 193.

——**Ss. 91 and 92—Applicability and scope—Letters and deed of agreement constituting the contract—Admissibility of letters to explain clause in the agreement.**

Where a number of letters and the formal deed of agreement together really constitute the contract between the parties, such letters are admissible in evidence to explain the clauses in the agreement and Ss. 91 and 92 of the Evidence Act do not stand in the way of such admission. I.L.R. (1946) All. 231=223 Ind. Cas. 365=1946 A.L.J. 122=1946 A.L.W. 142=1946 O.W.N. (H. C.) 134=1946 A.W.R. (H.C.) 186=A.I.R. 1946 All. 406.

——**S. 91—Applicability and scope—Illus. (b), if applies to contract of loan of money.**

Illustration (*b*) of S.91, Evidence Act, does not refer to a contract of loan of money and it can only apply when the bill of exchange is in consideration of a sum of money which is not given as a loan. A.I.R. 1943 All. 220=1943 A.W.R. 157=1943 A.L.J. 189=I.L.R. (1943) All. 610 =206 Ind. Cas. 578 (F.B.).

——**S. 91—Applicability and scope—Other proof of transaction not excluded.**

Although S. 91 of the Evidence Act bars proof of the terms of a document otherwise than by production of the document, it does not exclude other proof of the transaction itself. A.I.R. 1941 Pat. 142=7 B.R. 117=190 Ind. Cas. 756.

——**Ss. 91, 63 (5)—Applicability and scope—Written agreement—Proof of the terms.**

Where the terms of the agreement to compromise were reduced to writing, under S. 91 of the Evidence Act no evidence can be given in proof of the terms of the agreement except the document itself or secondary evidence of its contents. But S. 63 (5) permits oral accounts of the contents of a document being given by some person who has himself seen it. A.I.R. 1940 Nag. 116=1940 N.L.J. 85=186 Ind. Cas. 851.

——**Ss. 91, 92—Applicability to wills.**

Sections 91 and 92, Evidence Act, apply only to contracts, grants and dispositions of property and a will is neither a contract not a grant nor a disposition of property until the death of the testator makes it operative. Consequently, a registered will can be revoked by an unregistered document and S. 92 (4) is no bar. A.I.R. 1938 Mad. 616=(1938) 1 M.L.J. 47=47 M.L.W. 719=1938 M.W.N. 699=182 Ind. Cas. 949.

——**Ss. 91, 92**—Sections 91 and 92, Evidence Act do not preclude evidence being given to show that at the time when the payment was made, the debtor expressly stated that it should be appropriated towards interest. A.I.R. 1937 All. 640=1937 A.L.J. 792=1937 A.W.R. 615=I.L.R. (1937) All. 732=171 Ind. Cas. 422.

——**S. 91—Applicability and scope.**

In the case of a sale of property of value less than one hundred rupees, the non-registration of document which is produced in evidence of the sale is not fatal to the validity of the transfer if a prior oral sale independent of the sale-deed, and delivery of possession in pursuance thereof can be established. In such a case, it will be a very artificial application of S. 91, Evidence Act to say that the contract between the parties is contained only in the unregistered sale deed and that there could be no other proof of the sale. A.I R. 1937 Mad. 265=44 M.L.W. 949=1937 M.W.N. 536=168 Ind. Cas. 681.

——**Ss. 91, 92—Applicability and scope—Minor not party to pro-note—Obligation arising external to that under pro-note—Minor, if can be sued.**

In a case where the obligation is external to the obligation arising on the making of the promissory note and the minor is not a party to the pro-note, the bar of Ss. 91 and 92, Evidence Act will not apply and a suit against the minor is maintainable. A.I.R. 1937 Mad. 1=1936 M.W.N. 919=44 M.L.W. 775=169 Ind. Cas. 261.

——**S. 91—Applicability and scope.**

Where the loan is not antecedent to, and independent of the promissory note, but is contemporaneous with it, the lender, when the note turns out to be invalid, can fall back upon the original contract, express or implied, arising from the loan.

Section 91, Evidence Act, merely provides that the contract embodied in the bill shall be proved by the bill itself; and this does not mean that it has destroyed or superseded the original right, and the section does not stand in the way of falling back upon the original loan. ('36) 160 Ind. Cas. 1069=43 M.L.W. 48=A.I.R. 1935 Mad. 206=67 M.L.J. 912.

——**S. 91—Scope of.**

Section 91 of the Evidence Act, precludes proof of the terms of a contract but it cannot exclude proof of the mere fact that a certain sum of money passed from the hands of one person to another. A.I.R. 1936 Nag. 225 =167 Ind. Cas. 673.

——**S. 91—Scope of—"In proof of such matter"—Whether includes the term "in disproof of it."**

The term "in proof of such matter" in S. 91, Evidence Act, must carry with it the term "in disproof of it" because if evidence were to be admitted on one side it would have to be admitted on the other. A.I.R. 1935 All. 58=1935 A.L.J. 304=4 A.W.R. 1342=154 Ind. Cas. 1070.

——**S. 91—Applicability and scope.**

As it is not obligatory on a Magistrate to record a confession under S. 164, Cr.P. Code oral proof of an unrecorded confession made to a Magistrate before the inquiry or trial is not excluded by the terms of S. 91. A.I.R. 1934 All. 351=3 A.W.R. 459=36 Cr.L.J. 45=56 All. 730=1934 A.L.J. 178=152 Ind. Cas. 174.

——**S. 91—Applicability and scope—Acceptance of rent at rate specified in unregistered document.**

Where a document is compulsorily registrable, but is not registered, it cannot be used for the purpose of showing that it embodies the contract between the parties so as to introduce the restrictions of S. 91, Evidence Act. A.I.R. 1934 Bom. 194=36 Bom.L.R. 359=58 Bom. 419 =150 Ind. Cas. 555.

——**S. 91—Applicability and scope—Simultaneous payment and taking of instrument—Effect of—Circumstances of each case.**

Section 91, Evidence Act, does not apply to cases in which the parties agree that the negotiable instrument shall be taken as conditional payment only and not in accord and satisfaction of the original debt.

A lender takes a negotiable instrument only as a conditional payment and in satisfaction of the loan. In cases where thehanding over of the money and of the instrument is simultaneous, it cannot be said that the instrument is the sole repository of the terms of the agreement. It is not the time when, but the terms upon which, the loan was made that matters, and whether the promissory note or bill of exchange was given at the time when the money was handed over to the borrower or subsequently, in either case, it is necessary for the Court to ascertain the terms of the agreement upon which the loan was made, the question as to what those terms were being a question of fact to be determined according to the particular circumstances obtaining in each case. A.I.R. 1934 Rang. 389=12 Rang. 500=152 Ind. Cas. 1038 (F.B.).

——**S. 91—Applicability and scope—Oral agreement — Oral adjustment — Memorandum not signed - Whether can be used for proving oral adjustment.**

Where an oral adjustment is not signed and the writing is nothing more than a memorandum of the oral adjustment, the memorandum which is incomplete for want of

signature or other formalities is not only no bar to evidence being given of the oral adjustment but can be used as evidence for the collateral purpose of proving the oral agreement. A.I.R. 1933 Sind 324=27 S.L.R. 308 =147 Ind. Cas. 432.

——Ss. 91, 92—Applicability and scope.

Sections 91, 92, Evidence Act, only apply when the document in question, on the face of it, contains or appears to contain all the terms of the contract. A.I.R. 1932 Bom. 151=34 Bom. L.R. 26=56 Bom. 180=137 Ind. Cas. 478.

——S. 91—Applicability and scope — Exception— Dekkhan Agriculturists' Relief Act, S. 10-A overrides Ss. 91, 92, Evidence Act.

The object of S. 10-A of the Dekkhan Agriculturists' Relief Act, namely, the decision as to the real nature of the transaction by admission of the oral evidence which otherwise would be excluded by the ordinary law, whether S. 92 or the like of the Evidence Act, is to override not merely Evidence Act, S. 92, but also where necessary S. 91. 31 Bom. L.R. 1266=54 Bom. 30=A.I.R. 1930 Bom. 79.

——S. 91—Applicability.

The provisions of S. 91 are not applicable to permission granted by Municipality under S. 114 for connecting the private drain with the Municipal drain. 120 Ind. Cas. 221=A.I.R. 1930 Nag. 130.

——S. 91—Applicability and scope—Arbitration—Agreement.

The agreement to refer to arbitration is not a contract, grant or other disposition of property and so S. 91 does not apply to it. 116 Ind. Cas. 853=A.I.R. 1929 All. 415.

——S. 91—Applicability and scope — Even third party can prove a contract reduced to writing only by such writing.

Whereas in S. 92 the Legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract, no such limitations are imposed under S. 91. Having regard to the juxtaposition from Ss. 91 and 92 and the deliberate omission from S. 91 of such words of limitation it must be taken that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing. A.I.R. 1917 P.C. 207, Dist. 109 Ind. Cas. 18=A.I.R. 1928 Mad. 459.

——S. 91—Applicability and scope—Pyatpaing.

The pyatpaing is signed not for the purpose of recording a contract but for the purpose of reporting to the revenue authorities for revenue purposes what has been done. Such documents are referred to as evidence of what actually has taken place. But they do not purport to record in a formal manner the terms of the contract. It is not, therefore, a document within S. 91. 106 Ind. Cas. 503=5 Rang. 679= A.I.R. 1928 Rang. 53.

——S. 91—Applicability and scope.

Section does not apply if a party does not attempt to prove the terms of the document. 92 Ind. Cas. 1028=1926 M. W. N. 45=A. I. R. 1926 Mad. 402.

——S. 91—Applicability and scope—A receipt for money.

A receipt acknowledging payment of money is not a contract or a grant, nor in the ordinary sense of the terms is it a disposition of property within the meaning of S. 91 and so oral evidence is admissible where the receipt is found to be suspicious or is unregistered. 23 Mad. 92, Foll. 80 Ind. Cas. 57=27 O.C. 380=A.I.R. 1925 Oudh 257.

——S. 91—Applicability and scope—Deed not produced—Proof of transaction by other evidence is not barred.

Where it was contended that the plaintiff, not having produced **Bainukasha** deed, was not entitled to adduce evidence of the transaction and therefore failed to establish his title.

Held, all that S. 91 provides is that when the terms of a contract or of a grant or any other disposition of property have been reduced to the form of a document, no evidence shall be given in proof of the terms of such a contract, grant or disposition of property except the document itself. This, however, refers only to the method of proof of the terms of contract grant or disposition of property: it does not exclude other proof of the transaction itself and this beeing so the Courts are entitled to consider the other evidence adduced in proof of **Bainukasha** transaction. 80 Ind. Cas. 187=A.I.R. 1922 Pat. 222.

——S. 91—Applicability and scope — Contract— Oral loan—Collateral security — Evidence—Oral, admissibility of.

S. 91 only applies where, by the intention of parties, a contract has been reduced to writing or where the parties intended that the document should be the expositor of their intention. Where a document was executed by way of collateral security for a previous oral loan, **held,** that oral evidence was admissible to prove the terms of such contract. 13 S.L.R. 180= 57 Ind. Cas. 394.

——Ss. 91 and 92—Applicability and scope—Oral evidence—Admissibility.

There is no legal objection to the admissibility of oral evidence which is admitted as a natural consequence of the admission of a documentary evidence. 21 C.L.J. 596=30 Ind. Cas. 398.

——S. 91—Applicability and scope—Police diary—Entries in—Oral evidence.

S. 91 has no application to matters entered in a special diary under S. 172 of the Cr.P.C. Oral evidence is admissible to prove statements made to the Police by witnesses who heard them made. 18 Cr.L.J. 1022 =11 Bur. L.T. 138=42 Ind. Cas. 766.

——Ss. 91 and 92 — Applicability and scope — Decree of Court—"Any matter required by law to be reduced to the form of a document".

Any matter required, etc., in S. 91 does not cover the case of a decree; so oral evidence may be admissible of an alleged oral agreement varying the terms of a decree. 24 Ind. Cas. 391 (Cal.).

——S. 91—Applicability and scope—Confession— Statement of accused at departmental enquiry—Proof.

A statement made by an accused at a departmental enquiry is not within S. 91, I.E.A. as it is not required by law to be reduced to the form of a document. Such confession can be proved at the time of the prosecution. 36 All. 222=15 Cr.L.J. 569=12 A.L.J. 306=25 Ind. Cas. 321.

——Ss. 91 and 92 — Applicability and scope—Registration indorsement.

A statement recorded by the Sub-Registration Officer on the back of the document cannot be taken as a part of the document and cannot be admitted in evidence under Ss. 91 and 92 of the Evidence Act. 14 O.C. 80 =10 Ind. Cas. 718.

——S. 91—Applicability and scope—Oral evidence—Search list.

S. 91, Evidence Act does not apply to the case of a search list prepared under S, 103, Cr. P, C, When a

search has been conducted under S. 103 Cr. P. C. evidence can be given regarding the things seized during the search and the places in which they were found in addition to the search list. If the narrative of an extrinsic fact is reduced to writing, it may be proved by parol evidence, though such writing is required by law. 34 Mad. 349=8 M.L.T. 451=21 M.L.J. 281=11 Cr.L.J. 576=(1910) M.W.N. 677=8 Ind. Cas. 178.

[See also 33 Mad. 413=9 M.L.T. 135=11 Cr. L. J. 716=8 Ind. Cas. 809].

——**S. 91—Applicability and scope — Contract—Factum of contract.**

S. 91 of the Evidence Act prevents only the terms of a contract grant, or disposition of property which have been reduced to writing from being proved by oral evidence, but not the fact of the contract itself which can be proved orally. 24 W. R. 425 foll. 18 P. W. R. 1909=4 Ind. Cas. 314.

——**S. 91—Applicability and scope — Collection papers.**

The section does not apply where collection papers are filed in a rent suit, and the suit is based partly on **Kabuliat** and partly on collection of rent. 2 Ind. 636 (Cal.).

——**Ss. 91, 92—Applicability and scope—"Terms** of the contract"—Question as to parties contracting—Oral evidence—Admissibility—Proof that obligor signed as member of a firm.

The question as to who the contracting parties are is not one relating to the terms of the contract within the meaning of **Ss.** 91, 92 of the Evidence Act, and oral evidence is admissible to show that a person who signed a deed did so not only for himself but also as an agent for others, **e. g.**, as a member of a firm. (1906) 18 M.L.J. 1=31 M. 45=3 M.L.T. 259.

——**S. 91—Applicability and scope—'Documents'—Rough note made by a stranger for his own convenience.**

Held, that a mere rough note in writing made by a third person (here by a priest) of an agreement by the husband to provide for the wife in case of future separation, solely for his own convenience and not signed by the parties is not a document within the meaning of S. 91, Evidence Act, in which the terms of the contract can be said to be embodied. (1905) 7 Bom L.R. 602.

——**S. 91—Applicability and scope—Dying declaration.**

S. 91 does not apply to dying declaration as it is not such a matter required by law to be reduced to the form of a document. The precise statement made ought to be proved by the person who heard it. 36 Cal. 659=13 C.W.N. 680=10 Cr.L.J. 186=2 Ind. Cas. 841.

——**S. 91—Applicability and scope—Search list—Evidence of what took place at search.**

S. 91 has no application where the writing is not evidence of the matter. A search list is clearly not evidence of the fact stated therein and oral evidence may be given as to what took place at the time of the search. 33 M. 413=9 M.L.T. 135=8 Ind. Cas. 809=11 Cr.L.J. 716.

——**S. 91—Scope—"Grant".**

Quaere.—Whether in S. 91 of the Evidence Act the word "grant" is confined only to grant of property. 13 M. L. J. 283=27 M. 30.

3. Hundi.

——**S. 91—Hundi—Hundi embodying only part of** contract inadmissible—Evidence of terms of whole contract not excluded.

If a hundi is an embodiment of the whole of the contract between the parties and it is not admissible in evidence and cannot be looked at for the purpose of finding out the terms of the contract, other evidence to prove the terms of such contract cannot be allowed. But where the hundi embodies only a part of the contract between the parties, it cannot be said that the whole contract is reduced to the form of a hundi and S. 91 does not exclude evidence showing the terms of the whole contract which cannot be determined from the hundi alone. 116 Ind. Cas. 293=51 All. 530=1929 A. L. J. 333=A. I. R. 1929 All. 254.

——**S. 91—Hundi.**

Bill of exchange or hundi does not necessarily embody whole contract between parties. 116 Ind. Cas. 293=51 All. 530=1929 A.L.J. 333=A.I.R. 1929 All. 254.

——**S. 91—Hundi—Insufficiently stamped hundi—Secondary evidence of loan.**

Where the money, even though advanced a short time before the actual execution of the hundi which was insufficiently stamped, was advanced on the security of the hundi and the agreement between the parties was that the loan should be made in consideration of the hundi,

Held, the plaintiffs have no cause of action independent of the hundi and as the hundi, insufficiently stamped is inadmissible in evidence and as S. 91 of the Evidence Act forbids secondary evidence, the plaintiffs must fail. 66 Ind. Cas. 201=2 Lah. 330=A.I.R. 1922 Lah. 307.

——**S. 91—Hundi inadmissible—Oral contract cannot be proved.**

Where the terms of any contract have been reduced to writing and that writing is, for any reason, inadmissible, the promisee must lose his money. Therefore, where advancing of a loan and the execution of the hundi are simultaneous transactions, and the contract for repayment is embodied in the hundi, but the hundi is inadmissible in evidence due to insufficient stamp, the creditor cannot rely on the original consideration. 60 Ind, Cas. 107=3 L.L. J. 157=A.I.R. 1921 Lah. 217.

4. Lease.

See also S. 91—Admissibility of external evidence.

——**S. 91—Lease—Tenancy for one year created by** oral agreement and delivery of possession—Subsequent execution of **sarkhat** embodying terms, by tenant only—Such document not registered—Admissibility—Transfer of Property Act, S. 107.

A tenancy for a definite period of one year only can be established by proof of an oral agreement accompanied by delivery of possession. When the terms of such a contract are embodied in the **sarkhat** executed by the tenant only, the Court can look only to the **sarkhat** for proof of the terms of the contract. The mere fact that it was executed some days after the lease had been entered into is immaterial.

A **sarkhat** executed only by the tenant and purporting to be merely an agreement by the tenant to hold the property for a certain period and showing that a valid lease was already in existence, that is, that it had been preceded by an oral agreement and delivery of possession some days previously, does not create a

valid lease so as to make the registration of the document compulsory under S. 107, T. P. Act, and its non-registration would not exclude it from evidence. It is admissible as showing the terms of the contract previously entered into by the parties and it is only evidence which is admissible to prove those terms. A. I. R. 1942 Oudh 408=1942 O. W. N. 357=1942 A.W.R. C.C. 237=18 Luck. 201=200 Ind. Cas. 593.

——Ss. 91, 92—Lease—Registered lease, if can be varied by later unregistered agreement.

Section 91 of the Evi. Act, applies to cases in which contracts, grants or dispositions of property are contained in one document and to cases in which they are contained in more documents than one. But when the agreement in question cannot be admitted in evidence owing to its not have been registered, it is not permissible to vary the terms of a registered lease by a later unregistered agreement. A.I.R. 1937 Oudh 341=1937 O.W.N. 477=1937 R.D. 244 (2)=13 Luck. 270=168 Ind. Cas. 263.

——S 91—Lease.

Where a lessee executes a registered **kabuliyat** in favour of the lessors and it is accepted by the lessors by means of an unregistered **amalnamah**, no valid lease is constituted, as the **kabuliyat** executed by the tenant is not a lease; nor can the acceptance of the lessor be proved either by the **amalnamah** or by oral evidence. A.I.R. 1935 Pat. 291=16 P.L.T. 451=14 Pat. 672=157 Ind. Cas. 98 (F.B.).

——S. 91—Lease.

With the object of leasing certain home-farm lands within a **zamindari** for a term of seven years, an auction was held by the **zamindar**. The defendant's bid was the highest and he paid the deposit required. The plaintiff subsequently leased the land to others. In a suit for ejectment, the defendant alleged that there was a subsequent auction list and a **muchilikka** and as these were unregistered, there was no valid lease;

Held that as the plaintiff did not produce the auction list or **muchilikka,** he could not be allowed to prove that the bargain between the parties was reduced to writing in these documents. A.I.R. 1933 Mad. 451=37 M.L.W. 672=64 M.L.J. 676=1933 M.W.N. 672=144 Ind. Cas. 27.

——S. 91 — Lease—Lease deed unregistered—Proof aliunde.

Though an unregistered lease deed which requires compulsory registration should be excluded so far as it is evidence of the lease, other evidence indicative of the creation of tenancy, can be considered in establishing the tenancy. 111 Ind. Cas. 358=A.I.R. 1928 Nag. 338.

——S. 91—Lease—Deed invalid—Proof aliunde.

Even if the registration of a lease deed be invalid, the tenancy can be proved otherwise without proving the written lease which may be inadmissible for want of registration. 41 Cal. 347, Foll.

The tenancy can also be proved by the doctrine of part performance. 105 Ind. Cas. 172=8 P.L.T. 829=A.I.R. 1928 Pat. 89.

——S. 91—Lease.

Where an **amalnamah** evidencing a settlement of land is inadmissible in evidence for want of registration no evidence is admissible on the question as to the persons for whom the settlement was made or as to the extent of their shares settled. 63 Ind. Cas. 863 (Cal).

——S. 91—Lease—Inadmissible under B. T. Act.

Oral evidence cannot be given of the terms of a sub-lease in excess of the period sanctioned by S. 85, Bengal Tenancy Act, though it is registered, for it is inadmissible in evidence. 24 C. L. J. 539=38 Ind. Cas. 489.

——S. 91—Lease—Inadmissible — Oral evidence—Registration Act, S. 49.

Oral evidence to prove the rate of rent is admissible, when the tenant's **Kabuliat** becomes inadmissible for want of registration. 41 Cal. 347=19 C.L. J. 428=25 Ind. Cas. 509.

——S. 91—Lease—Oral evidence.

Where a written rental agreement is inadmissible in evidence, oral evidence, though not admissible to prove the terms of the tenancy or period of the lease is still admissible to prove that the relationship of land-lord and tenant exists between the parties. 28 M.L. J. 361=27 Ind. Cas. 804.

——S. 91—Lease—Unregistered—Admissibility to prove relationship of land-lord and tenant.

Where an unregistered lease is inadmissible in proof of a lease there is nothing to prevent the evidence of witnesses who speak to the existence of the relationship of land-lord and tenant between the parties being admitted. A tenancy can be proved without the lease if there be any. 41 C. 347 Foll. 49 Ind. Cas. 843. (Nag.).

——S. 91—Lease—Unregistered—Oral evidence.

No oral evidence can be given to prove the terms of a lease contained in an inadmissible document. 42 Ind. Cas. 629. (Nag.).

——S. 91—Lease — Unregistered lease — Adverse possession.

An unregistered lease can be a guide to ascertain the rights acquired by adverse possession after the lease. 33 Ind. Cas. 524. (U.P.B.R).

——S. 91—Lease—Evidence of consideration for contract—Consideration no term of contract—Landlord—Tenant—Enhancement of rent.

Where the parties entered into a contract that one of them, the raiyat should hold a certain quantity of land on payment of a certain amount in certain instalments—**Held,** that evidence can be let in of the consideration for such a contract, consideration being no term of the contract. 11 C.W.N. 62=4 C.L.J. 320=33 C. 607.

5. Mortgage.

See also S. 91 Admissibility of external evidence.

——Ss. 91 and 92—Applicability—Equitable mortgage—Letter recording transaction giving list of deeds deposited—Admissibility without registration — Oral evidence of mortgage—Admissibility. 26 Pat. 260=A.I.R. 1948 Pat. 251.

——S. 91—Mortgage—Interest in a mortgage-deed—Oral evidence.

Where a mortgage deed contains a stipulation for compound interest, all evidence of an alleged oral agreement to the effect that only simple interest was agreed upon will be wholly inadmissible. Because if the mortgagor alleges that the parties never agreed to compound interest but only to simple interest, all evidence in support of the allegation will be excluded by S. 91, and if his case is that he agreed in writting to pay compound interest, but the parties entered into a simultaneous oral agreement that only simple interest should be paid, then evidence of such oral agreement will be excluded by S. 92. 119 Ind. Cas. 92=1929 A.L.J. 866.

——S. 91—Mortgage.

The mortgage sought to be redeemed was passed in 1866. Plaintiff gave sufficient details of the alleged mortgage. It was not proved that there was ever an unregistered instrument of mortgage. The mortgage was proved by circumstantial evidence, **viz.**, recitals in deeds referring to the property as having been so mortgaged and extracts from account books which mentioned the fact of the mortgage, as well as a transaction by which a half-share in the mortgage was transferred to the defendant's father,

Held, that because the terms of the contract had not been reduced to the form of a document and as at the time of the alleged mortgage an oral agreement with transfer of possession sufficed to create a mortgage, S. 91 would not apply,

Held, further, that S. 49, Registration Act, would also not apply, because there was in fact no document tendered in evidence which ought to have been, but was not in fact, registered. 115 Ind. Cas. 379=52 Bom. 875=30 Bom. L. R. 1277=A.I.R. 1928 Bom. 484.

——S. 91—Mortgage—Mortgage requiring registration—Oral evidence inadmissible.

A mortgage was executed before applicability of Transfer of Property Act for Rs. 80. Further advance of Rs. 80 was taken on the same land after the application of the Act to Burma. The mortgage deed was not registered. The mortgagor brought a suit for redemption on payment of Rs. 160 and tried to prove the mortgage by oral evidence.

Held, that the mortgagor could not get out of the registration by taking money in instalments. Oral evidence was, therefore, inadmissible. 117 Ind. Cas. 59=A.I.R. 1928 Rang. 242.

——S. 91—Mortgage.

Where an earlier mortgage is substituted by a subsequent mortgage but the subsequent mortgage is invalid for want of legal attestation, the mortgagee can fall back on the earlier mortgage as there is no valid substitution of the old security by the new one, provided his rights under the earlier mortgage are not otherwise barred. 98 Ind. Cas. 695=A.I.R. 1927 Nag. 83.

——S. 91—Mortgage—Area of demised land—Antecedent documents may be consulted only for identifying land.

Where the question is as to the extent or area of the Mahal settled with the defendants it is not the duty of the Court and it would be contrary to its duty to admit any antecedent documents for the purpose of contradicting the terms of the settlement made. Any antecedent documents and maps can be used solely for the purpose of identifying the thing demised. 88 Ind. Cas. 103=26 P.L.R. 257=2 O.W.N. 403=41 C.L. J. 386=3 Pat. L. R. Civ. 114=6 P. L. T. 349=6 L. R. P. C. 109=27 Bom. L. R. 819=1925 M.W.N. 403=A.I.R. 1925 P. C. 122=48 M. L. J. 611 (P.C.).

——S. 91—Mortgage.

All the terms of the contract are conveyed by the word "Mortgage", so the fact of mortgage apart from its terms cannot be proved but only the fact of transfer of possession where there is such transfer, can be proved. 84 Ind. Cas. 987=3 Bur. L. J. 231=2 Rang. 441=A.I.R. 1925 Rang. 61.

——S. 91—Mortgage.

Authorised maps and entries made in authorised revenue registers corroborative of oral testimony as to documentary transactions can only be admitted where evidence other than the documents themselves is admissible at all. So, a mortgage which ought to have been by registered instrument cannot be proved by authorised maps and entries made in authorised revenue registers: A.I.R. 1923 Rang. 196, **Overruled.** 84 Ind. Cas. 987=3 Bur. L. J. 231=2 Rang. 441=A.I.R. 1925 Rang. 61.

——S. 91—Mortgage—Suit on mortgage—Original mortgage deed not produced—Defendant pleading payment and discharge — Non production of mortgage-deed is not fatal—Question of payment must be gone into on merits.

If the mortgage is totally denied, the plaintiff cannot prove the **factum** of the mortgage without producing the original mortgage deed, but if the defendants do not deny the **factum** of the mortgage but what they allege is that the mortgage has been discharged by payment, it is necessary for the Judge to find whether the mortgage had in fact been discharged or not. The non-production of the original mortgage might be an important factor in considering whether the mortgage had been discharged or not, but that is no ground in itself for dismissing the suit on the mortgage in such a case. 61 Ind. Cas. 412=19 A. L. J. 185=A.I.R. 1921 All. 218.

——S. 91—Mortgage—Other evidence inadmissible.

Where the plff. relies upon a mortgage-deed produced by her but not proved she is precluded by S. 91 from giving other evidence of the terms of the transaction. (1915) 11 U.B.R. 56=29 Ind. Cas. 607.

——Ss. 91 and 92—Mortgage—Agreement to exonerate one of several mortgagors from personal liability.

An agreement by which one of several mortgagors procures a release of his own personal liability is admissible in evidence though not endorsed on the back of the mortgage bond according to its recitals. 42 Ind. Cas. 615 (Cal.)

——S. 91—Mortgage—Admissions—Unregistered mortgage—Admission at mutation—Proof of, if can be given.

An unregistered mortgage, inadmissible in evidence for want of registration, cannot under S. 91 of the Act be proved by an admission at mutation proceedings inasmuch as the section excludes all evidence in proof of the contract except the document itself. 276 P.L.R. 1913=20 Ind. Cas. 280.

——S. 91—Mortgage—Mis-description—Mortgaged property—Form of relief to be granted.

Extrinsic evidence is admissible to show the mistake of description in a deed of a mortgage and the omission of a prayer for rectification is, a matter of form at the most. 30 M. 397; Foll. 34 Mad. 51=8 M.L.T. 289=(1911) 1 M.W.N. 36=8 Ind. Cas. 390.

6. Partition.

——S. 91—Unregistered partition 'koorchit'—Oral evidence to prove its terms—Admissibility. (1947) 1 M.L.J. 90=A.I.R. 1948 Mad. 26.

——S. 91—Partition—Maintenance case in Criminal Court—Award — Admissibility of, in subsequent civil suit, on point of separation of joint family — Oral evidence on this point, if excluded by S. 91.

One **S** advanced a sum of money to one **M** on the security of a mortgage. A suit was brought on the basis of this mortgage bond and in it were impleaded, besides **M**, his three sons. The two younger sons **B**, and **A** set up the plea that some time prior to the execution of the mortgage, they had separated from their

father and elder brother had sided with their mother, who had brought a maintenance suit against their father. The proceedings in the Criminal Court ended in a compromise brought about by certain **punchas** or arbitrators. The sum and substance of the compromise was that a portion of the land which was later mortgaged was to be assigned to **B** and **A** and their mother for their maintenance. The Court which tried the mortgage suit dismissed it as against **B** and **A**. Eventually in execution of the decree, the mortgage property was sold and was purchased by the mortgagee **S**. When subsequently, he took out a writ for delivery of possession, **B** and **A** made an application under O. 21, R. 100 of the Civil P.C. This application was dismissed and thereupon they instituted a suit:

Held, (i) that the award of the arbitrators was not admissible in evidence in the suit;

(ii) that the provisions contained in S. 91 of the Evi. Act did not apply so as to exclude oral evidence of separation in the joint family. Although in so far as the award created a charge in favour of the mother of the plaintiffs on a portion of the mortgaged property, oral evidence to show that such a charge ever existed was inadmissible, yet oral evidence to show that at or about the time the charge was created, there had been a disruption in the joint family of which **M** was the head, was quite clearly relevant. The matter would, no doubt, have been otherwise if it had been shown that the award operated not merely to create charge but a deed of partition. A.I.R. 1942 Pat. 432=23 P.L.T. 354=21 Pat. 601=201 Ind. Cas. 196.

——S. 91—Partition—Partition deed inadmissible —Other evidence.

Where in a suit for partition a deed evidencing partition between the parties is inadmissible owing to its non-registration, other evidence is admissible to prove the factum of separation in order to defeat the plaintiff's claim. It is for that purpose and that purpose alone that the evidence in the case must be adduced by the defendant. A.I.R. 1938 Pat. 603=177 Ind. Cas. 682.

——S. 91—Partition.

Partition of movables between uncle and minor nephews—Terms of partition that to equalise shares uncle to pay debts and minor to execute pro-note in favour of uncle — Pro-note executed by mother as guardian of minor — Partition lists prepared but not registered—Suit on pro-note:

Held, that plaintiff could not adduce evidence to prove the terms of the partition under S. 91, Evidence Act, as the partition lists could not be tendered in evidence being unregistered. A. I. R. 1937 Mad. 638=45 M. L. W. 639=(1937) 1 M. L. J. 676=175 Ind. Cas. 246.

——S. 91—Partition—Ekrarnama reciting fact of partition executed by parties through guardians — Admissibility to prove fact of partition.

A deed of ekrarnama excuted by certain defendants through their respective guardian and reciting the fact of a partition through arbitrators is admissible in evidence as proof of the fact that there had been a partition if it could be shown that tbe two persons who purported to act as guardians or agents were acting on behalf of their respective wards or principals. A.I.R. 1934 Pat. 48=146 Ind. Cas. 937 (2).

——S. 91—Partition.

A partition is not required by law to be effected by a document and therefore, S. 91, Evidence Act, would not bar oral evidence in regard to partition. A.I.R. 1933 Nag. 270=144 Ind. Cas. 312.

——S. 91—Partition—Partition deed not registered—Oral evidence—Admissibility.

Even though an un-registered partition deed may not be admissible to prove the terms contained therein still the fact of partition as alleged can be proved by oral evidence. A.I.R. 1933 Rang. 249=145 Ind. Cas. 833.

——S. 91—Partition.

Fact of partition may be proved by oral evidence although deed embodying terms of partition cannot be proved for want of registration. 41 Bom. 466 and A.I.R. 1926 Mad. 402, Foll. 32 M.L.W. 233=128 Ind. Cas. 561=54 Mad. 27=59 M.L.J. 558 =A.I.R. 1930 Mad. 883.

——S. 91—Partition.

An unregistered partition deed in admissible to prove the factum of partition, but its terms cannot be proved. A.I.R. 1924 Mad. 292; A.I.R. 1924 Pat. 641; 43 Mad. 244, **Rel. on.**

Where a deed of partition is unregistered, the combined operation of S. 49, Registration Act, and of S. 91, Evidence Act, would be to shut out all evidence to prove the terms of the deed; still separate status and separate possession are provable by other independent evidence: 41 Bom. 466; 44 Bom. 881, **Rel. on.**

Though a deed of partition is unregistered, the fact of partition and the fact of separate status and separate possession are provable, the reason being that these facts are not part of the "transaction" as contemplated by S. 49 of the Registration Act or of the "disposition" as contemplated in S. 91 of the Evidence Act. 99 Ind. Cas. 448=A.I.R. 1927 Nag. 113.

——S. 91—Partition— Registration Act, Ss. 17 and 49—Document evidencing partition—Oral evidence not allowed.

Where a document is intended to be the evidence of a partition effected between the parties thereto it requires registration under S. 17 and if un-registered is inadmissible in evidence according to the provisions of S. 49. Oral evidence as to the terms of such a document is shut out by S. 91 of the Evidence Act. 69 Ind. Cas. 859=A.I.R. 1924 Lah. 286.

——S. 91—Partition — Oral evidence should not be given to prove un-registered partition agreement.

Where a partition is made by an un-registered document, oral evidence is inadmissible to prove it. But if the partition has been acted upon by the parties to the other's knowledge, part performance may be proved. But this is limited to cases in which specific performance can be claimed. As the Court cannot entertain a suit for partial partition specific performance of on agreement to partially partition cannot be claimed. Hence part performance cannot be proved where there has ben only an agreement of partial partition, but can be proved where the agreement has been one of entire partition. 76 Ind. Cas. 42=4 P.L.T. 657=2 Pat. L. R. 37=A.I.R. 1924 Pat. 244.

——S. 91—Partition.

Where the defendants alleged that the plaintiff had executed certain unregistered deeds by which the inheritance of a common ancestor was

partitioned, and the plaintiff in his pleadings by necessary implication admitted the said allegation,

Held, that oral partition being permissible S. 58 of the Evidence Act made evidence on this point unnecessary and therefore the provisions of Ss. 91 and 92 of the Evidence Act would not prevent defendants from relying on the partition. 76 Ind. Cas. 855=1 Rang. 405=A.I.R. 1924 Rang. 155.

——S. 91—Partition.

Partition deed inadmissible—Oral evidence is admissible to prove fact of partition but not contents. 41 Bom. 466, Foll. 76 Ind. Cas. 852= A.I.R. 1923 Lah. 392.

——S. 91—Partition.

Unregistered partition deed — Evidence as to fact of partition cannot be let in aliunde. 74 Ind. Cas. 47=1 Bur. L.J. 111=A.I.R. 1923 Rang. 57.

——S. 91—Partition.

Where the deed of partition was unregistered,

Held, it was competent for the plaintiff to say that there was in such and such a year a partition between himself and his brothers but he could not go further and say what benefit he took under that partition or what share he had in a given property by reason of that partition.

It is of the very highest importance, specially in the interests of a community that is growing commercially, that it should be thoroughly understood that, if parties enter into agreements in writing, they are thereby protected from having their opponents giving evidence of what, they say, were oral arrangements. These rules ought to be rigidly enforced for that very purpose. 70 Ind. Cas. 953 =45 All. 21=20 A.L.J. 777=A.I.R. 1922 All. 493.

——S. 91—Partition.

A partition may be proved by oral evidence though the partition-deed cannot be proved for want of registration. 61 Ind. Cas. 399=3 U.P.L.R. (Lah.) 43.

——S. 91— Partition—Unregistered — Admissibility of.

The 'factum' of a partition as distinguished from its terms, may be proved by evidence apart from the deed of partition itself. Per Beamen, J.— A fact, which does not necessarily constitute a term in any real sense, of a contract, grant or other disposition of property may be proved, although the writing in which the terms of the grant or other disposition of property are embodied, cannot be proved for want of registration. 41 Bom. 466=19 Bom. L.R. 322=40 Ind. Cas. 83.

——S. 91 — Partition — Unregistered deed— Other evidence—Registration Act (1877), S. 49.

Where a partition deed is intended to be the only appropriate evidence of the partition, oral evidence to prove a partition is not admissible under S. 91 Evidence Act and under S. 49 Registration Act it is not admissible if it is not registered. 12 C.L.J. 25=15 C.W.N. 375=6 Ind. Cas. 346.

——S. 91—Partition — Secondary evidence — Loss of award effecting partition—Admissibility of oral evidence.

Where an award effecting partition is lost, there is nothing in S. 91 of Indian Evidence Act to prevent one of the parties from proving aliunde that a partition did take place but no secondary evidence of the details of such partition can be given. 29 P. R. 1915=29 P.L.R. 1916=27 Ind. Cas. 489.

7. Pro-note.

See also S. 91, Admissibility of external evidence

——S. 91—Pro-note—Promissory note—Extraneous evidence.

Where the promissory note in suit contains all the terms of the contract but it is not admissible under S. 35, Stamp Act, it is not open to the plaintiff to fall back upon any so-called independent cause of action and to prove the alleged loan by any other evidence than the promissory note itself which is inadmissible. In such a case, the suit cannot be decreed. A.I.R. 1946 All. 150=1945 A. L. J. 483=1945 A.W.R. (H. C.) 315=1945 O.W.N. (H. C.) 304: I.L.R. (1946) All. 82.

——S. 91—Stamp Act, S. 35—Limitation Act, S. 19—Pronote—Promissory note and receipt executed in lieu of previous transactions insufficiently stamped—Penalty paid in respect of receipt—Decree on acknowledgment in receipt —Interest—Interest Act, S. 1.

Where a promissory note and a receipt executed in lieu of the amount due on previous transactions are insufficiently stamped, but the necessary penalty is paid in respect of the receipt and thus it becomes admissible in evidence, the creditor is entitled to a decree on the basis of the acknowledgment contained in the receipt.

In such a case, however, interest on the original loan calculated only upto the date of the receipt, can be allowed. Interest from that date upto the institution of the suit should not be allowed. Under the Interest Act, interest can be allowed only if the amount claimed is a certain sum which is payable at a certain time by virtue of a written instrument. A.I.R. 1942 Oudh 388=1942 A.W.R. 222=18 Luck. 191=1942 O.W.N. 343=200 Ind. Cas. 515.

——S. 91—Pro-note.

Per Full Bench (Stodart, J. contra).—If the promissory note embodies all the terms of contract and it is properly stamped, no suit on the debt will lie. Section 91, Evidence Act, and S. 35, Stamp Act, bar the way. But if it does not embody all the terms of contract, true nature of transaction can be proved and where an instrument has been given as collateral security or by way of conditional payment, a suit on the debt will lie. A.I.R. 1938 Mad. 785=48 M.L.W. 220=(1938) 2 M.L.J. 189=1938 M.W.N. 722=I.L.R. (1938) Mad. 933=177 Ind. Cas. 236 (F.B.).

[Overrules (1) A.I.R. 1926 Mad. 1148=98 Ind. Cas. 75; (2) A.I.R. 1935 Mad. 206=156 Ind. Cas. 250.]

——S. 91—Hand-note—Promise of re-payment sole consideration—Implied contract.

Where there is an express promise of re-payment put into writing as part of the loan transaction, if the plaintiff recovers at all, it must be on the contract actually made and not on some implied contract. Whether a hand-note is the sole consideration for the advance, and not merely a conditional payment or a collateral security, is a question of fact. A.I.R. 1937 Pat. 572=18 P.L.T. 640=16 Pat. 527=171 Ind. Cas. 881.

——S. 91—Pro-note.

Where a promissory note is given for an antecedent debt and the note turns out to be inadmissible in evidence being insufficiently stamped, a suit can be brought on the original debt. A.I.R. 1936 Mad. 179=1935 M.W.N. 855=43 M.L.W. 145=70 M.L.J. 267=59 Mad. 268=161 Ind. Cas. 273. (F.B.).

——S. 91—Pro-note—Suit on distinct oral agreement of loan—Defendant repudiating—S. 91, whether applies.

Where a plaintiff, conceding that an under-stamped pro-note is invalid for purposes of creating an obligation avers the existence of a distinct oral agreement of loan and sues for money had and received and the defendant repudiates the promissory note as being merely a colourable document and neither party relies on the document as embodying the substance of the contract, S. 91, Evidence Act, does not come into play and the promissory note can be used as a corroborative evidence on the point of actual payment of money. A.I.R. 1936 Nag. 225=167 Ind. Cas. 673.

——S. 91 — Pro-note — Insufficiently stamped hand-note—Admissibility for proof of debt.

Although the hand-note is not admissible in evidence for the purpose of proving the loan, it can be used for certain collateral purposes, that is, a purpose foreign and not subordinate to the purpose for which the document was executed. So, if the document was inadmissible for the purpose of proving the debt, it cannot be used to support the statement of the plaintiff's witnesses who come to prove the debt. A.I.R. 1935 Pat. 375=14 Pat. 233=16 P.L.T. 475=158 Ind. Cas. 962.

——S. 91—Pro-note — Insufficiently stamped pro-note—Proof by other evidence.

In a suit for recovery of money on the allegation that the defendant had borrowed a certain amount from the plaintiff and that the promissory note which had been executed was insufficiently stamped and hence inadmissible, the plaintiff is entitled to prove the transaction by other evidence in the absence of the promissory note. A.I.R. 1934 Oudh 57=10 O.W.N. 1271=9 Luck. 267=146 Ind. Cas. 751.

——S. 91—Pro-note—Promissory note inadmissible—Suit on receipt.

Where a transaction of loan and the execution of a promissory note are simultaneous and intended by the parties to be part of the same transaction, no evidence can be adduced in proof of the transaction of the loan except the promissory note itself and if the promissory note is inadmissible in evidence, a suit cannot be brought on the basis of a receipt executed by the defendant for the amount covered by the promissory note.

Receipt of money by one person from another does not by itself entitle the latter to recover it, unless it is established that the person receiving the money agreed expressly or impliedly to re-pay it to the person who paid it. A.I.R. 1933 All. 109=140 Ind. Cas. 117.

——S. 91—Pro-note.

Where there is a cause of action complete in itself before the promissory note and independently of it, the plaintiff can prove it though the promissory note is inadmissible. A.I.R. 1933 Mad. 117=64 M.L.J. 79=37 M.L.W. 157=1933 M.W.N. 663=140 Ind. Cas. 833.

——S. 91—Pro-note.

Though the plaintiff may be precluded from proving the terms of the contract when the promissory note is inadmissible in evidence as insufficiently stamped, the loan, i.e., the actual delivery of money, and the fact that there was no intention to deliver the money gratuitously or in satisfaction of any obligation can be proved, and the plaintiff can recover the money advanced. A.I.R. 1933 Nag. 57 (2)=29 N.L.R. 131=144 Ind. Cas. 745.

——S. 91—Pro-note—Promissory note—Stamp insufficient—Other evidence of loan, admissibility—Evidence as to rate of interest.

If the hand-note evidencing a transaction of loan be inadmissible in evidence for want of proper stamp, the transaction can be proved by other evidence independent of the hand-note.

But evidence as regards the rate of interest cannot be given independently of the hand-note. A.I.R. 1933 Pat. 584 (1)=147 Ind. Cas. 706.

——S. 91—Pro-note—Debt and pro-note simultaneous—Suit on original consideration—Maintainability—Endorsee's right to sue on.

Where the execution of a promissory note and the transaction of loan are contemporaneous, the debt can be proved only by the note, and if the note is insufficiently stamped and cannot be admitted in evidence, a suit cannot be maintained on the original consideration for the note.

[The question whether the endorsee of a promissory note can sue on the original consideration where the promissory note is inadmissible in evidence was left open.] A.I.R. 1932 Mad. 687=36 M.L.W. 432=139 Ind. Cas. 361.

——S. 91—Pro-note—Insufficiently stamped pro-note—Oral proof of advance.

In spite of the provisions S. 91, Evidence Act, it is open to a party who has lent money on terms recorded in a promissory note which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the advance of the loan. But no proof of the terms of the contract can be given if the writing happens to be inadmissible in law.

Per **Hasan C. J.**—An oral contract of loan may be wholly or partly executed as soon as it is completed and the parties may choose to reduce it to writing after a long interval of time. But once it is reduced to writing the only evidence admissible in proof of it is the writing. The written contract, therefore, wholly displaces the oral contract in so far as the manner of proof is concerned. On that reasoning and on the assumption that S. 91, Evidence Act applies, it follows that no proof can be given of the contract if the writing happens to be inadmissible in law and the distance of time between the oral contract and the writing will make no difference. Another case may be of an oral contract of loan followed by a written contract after an interval of a day or two. In either case, if S. 91, is applicable, oral evidence is not admissible in proof of the contract. A.I.R. 1932 Oudh 235=9 O.W.N. 585=7 Luck. 666=139 Ind. Cas. 298.

——S. 91—Promissory note—Execution of fresh note in renewal—Second note not duly stamped—Suit on first note—Maintainability.

The defendant had executed a promissory note to the plaintiff on November 10, 1922. On September 7, 1925, another promissory note was executed in

renewal of the previous one and an endorsement was made to the following effect: 'On November 7, 1925 in lieu of the present promissory note, a second promissory note of the amount of Rs. 1,350 has been executed and this promissory note has become void.' The plaintiff instituted a suit in 1927 on the second promissory note and finding that it was not properly stamped, amended the plaint by basing the suit on the promissory note of 1922 and relying on the endorsement on it as an acknowledgment:

Held, that S. 91, Evidence Act, did not, in any way, preclude a suit on the promissory note. A.I.R. 1931 All. 560=1931 A.L. J. 522=134 Ind. Cas. 254.

——S. 91—Pro-note.

If a debtor gives to his creditor a promissory note in payment of the debt but the pro-note turns out to be invalid for want of stamp, the creditor is entitled to enforce payment of the debt as if no such instrument had been taken by him. Section 91, Evidence Act does not preclude proof of the original debt in such a case. A.I.R. 1931 Nag. 113=27 N.L.R. 56=134 Ind. Cas. 283.

——S. 91—Hand-note—Want of stamp—Extrinsic evidence of loan—Admissibility.

It is a well-established principle of law that every loan carries with it a contract to re-pay and if a hand-note, which forms the evidence of the transaction cannot be accepted in evidence for some reason or other, there is nothing in law to prevent the plaintiff from giving other evidence as regards the loan. A.I.R. 1931 Pat. 293=13 P.L.T. 52=11 Pat. 135=133 Ind. Cas. 685.

——S. 91—Promissory note.

A contract of simple money debt is not required by law to be in writing. It may offer better evidence but it is not necessary for the validity of the contract. It is on this principle that when the promissory notes or other negotiable instruments are found unenforceable for defective stamp and other reasons, the creditor is permitted to fall back on his contract of loan and oral evidence is admitted to prove the contract independently of the promissory notes. 127 Ind. Cas. 894=26 N.L.R. 320=A.IR. 1930 Nag. 298.

——S. 91— Pro-note—Debt evidenced by pro-note—Debt proved independently of the pro-note.

Where a person has contracted a debt and has also executed a pro-note in favour of his creditor, the creditor can bring a suit for the money lent and evidenced by a pro-note and can prove the debt independently of the pro-note, S. 91 does not stand in his way. 119 Ind. Cas. 865=6 O.W.N. 649=A.I.R. 1929 Oudh 399.

——S. 91—Pro-note.

Even if a chit produced is a promissory note and as such inadmissible is evidence for want of stamp, it is open to a creditor to prove his original debt. 116 Ind. Cas. 111=A.I.R. 1929 Sind 164.

——S. 91—Pro-note payable to bearer—Admissibility in suit on original obligation.

A promissory note made payable to bearer on demand offends against the provisions of S. 25, Paper Currency Act, and is therefore void and cannot be the basis of a claim in any Court of law. But the creditor can sue on the basis of any obligation independently of the execution of the promissory note. (1914) 2 U.B.R. 13; 40 Mad. 727; 40 Mad. 585; 6 M.L.W. 630 and A.I.R. 1922 Mad. 181, **Rel. on** and if there is other evidence outside the promissory note of the obligation sued upon, the promissory note in question is admissible as evidence to be read in conjunction with that of other evidence to arrive at a decision as to whether the independent obligation is proved. Where there is no other evidence, while the promissory note is still admissible in evidence, there can be no decree on the basis of it alone. 115 Ind. Cas. 630=50 All. 839=26 A.L. J. 729=A.I.R. 1928 All. 371 (S.B.).

——S. 91—Promissory note—Debt provable independently.

Where a debt may be proved independently of the promissory note, that is, without the assistance of the promissory note in evidence, the plaintiff may be given an opportunity to produce such proof and on his satisfying the Court as to the loan he will be entitled to a decree. 108 Ind. Cas. 912=26 A.L. J. 416=A.I.R. 1928 All. 297.

——S. 91—Pro-note—Pro-note by several persons jointly—Subsequent oral agreement making the executants severally liable can be proved.

A subsequent oral agreement, by which the joint and several liability of the executants under the promissory note for the balance due on it is split up with the consent of all parties into a several liability on the part of each of the executants, is not abnoxious to S. 91. 107 Ind. Cas. 646=27 M.L.W. 820=A.I.R. 1928 Mad. 173=54 M.L. J. 150.

——S. 91—Pro-note inadmissible—Other evidence of loan is admissible.

A suit by a creditor for recovery of money paid as a loan on a promissory note does not necessarily fail if the instrument upon which it is based is found to be inadmissible in evidence on account of its being insufficiently stamped or no stamped at all, if he can prove the loan by some other evidence. A.I.R. 1921 Pat. 318; 1 P.L.T. 203; 7 Cal. 256; 3 Cal. 314; 9 All. 351 and A.I.R. 1927 Bom. 437, Foll.; A.I.R. 1926 Pat. 432 and 9 M.L.T. 281, **Dist. from.**

Kulwant Sahay, J.—Even in cases where the lending of the money and the execution of the promissory note are contemporaneous, the plaintiff is entitled to maintain a suit for recovery of the money lent and to adduce evidence other than the instrument or the promissory note itself, in order to prove the loan. He cannot, however, give any other evidence as regards, the rate of interest, but he may be entitled to a reasonable amount as compensation by way of interest apart from the contract contained in the hand-note. 111 Ind. Cas. 482=7 Pat. 845=9 P.L.T. 471=A.I.R. 1928 Pat. 426.

——S. 91—Pro-note inadmissible—Suit on original loan.

Where the contract may be considered as contained wholly in the promissory note or bill of exchange as in Ill. (b) to S. 91, if the plaintiff cannot sue on the promissory note he cannot sue at all; but secondly, if the promissory note may be regarded as a conditional payment of the amount of the loan in which case if the promissory note is insufficiently stamped, it is only a worthless piece of paper and the plaintiff can sue on the loan and thirdly, the promissory note may be passed as security for the loan in which case there is no necessity for the plaintiff to sue on the promissory note at all and whether it is properly stamped or not he can bring a suit on the loan. 102 Ind. Cas. 138=29 Bom. L.R. 432=A.I.R. 1927 Bom. 437.

——S. 91—Pro-note.

When a loan has been granted on the security of a negotiable instrument, there is no cause of action independent of the negotiable instrument itself, and when that negotiable instrument is inadmissible in

evidence the suit must fail: 63 P.R. 1917 and A.I.R. 1922 Lah. 307, Foll. 95 Ind. Cas. 704=A.I.R. 1927 Lah. 89.

——S. 91—Pro-note ineffective—Suit lies on original transaction.

A creditor can fall back on the original transaction and recover his money on its basis when it is found or conceded that the document or instrument which he had obtained from the debtor was ineffective to establish any contractual relation of debtor and creditor between them so as to serve as a basis for a suit in a Court of law: 6 N.L.R. 125, **Foll.**

Although Ss. 91 and 92 prohibit any secondary evidence of the terms of a written contract, they do not exclude proof of a statement of a fact recited therein. Where, therefore, an insufficiently stamped pro-note is not admissible to prove the specific term of the contract embodied therein, namely, the unconditional undertaking or promise to pay the sum with its interest, it could be used as a mere acknowledgment or statement containing defendant's admission of receipt of money and of his own liability therefor to the person from whom he took it. The pronote failing to take effect as such, the creditor could also treat the contract as non-existent and ask for refund of consideration on the ground that it failed. 104 Ind. Cas. 470=10 N.L.J. 45=A.I.R. 1927 Nag. 241.

——S. 91—Pro-note.

Where a suit is brought on a promissory note and the plaintiff cannot have recourse to it as a piece of evidence, S. 91 is not a bar to the plaintiff succeeding in his suit if he can prove his claim by other evidence: 24 Bom. 360, **Foll.** 95 Ind. Cas. 847=28 Bom. L.R. 631=A.I.R. 1926 Bom. 357.

——S. 91—Pro-note.

Debt covered by pro-note cannot be proved by independent prior agreement where pro-note is inadmissible for want of stamp: 38 Mad. 660, **Foll.**; 85 Ind. Cas. 389=20 M.L.W. 943=A.I.R. 1925 Mad. 351.

——S. 91—Pro-note inadmissible — Independent evidence of loan allowed.

Where a suit was based on the promissory note but it was not stated in the plaint that the pormissory note was the only evidence of the loan and the main allegation in the plaint was that the defendant borrowed Rs. 110 in each from the plaintiff and it was stated that the loan was evidenced by a promissory note,

Held, that there were two distinct actions though contemporaneous, one of the loan and the other of a promissory note and if the promissory note was found to be inadmissible for want of proper stamp the plaintiff should be allowed an opportunity to prove the loan independently of the promissory note: 6 O.C. 16; 34 A. 158, **Foll.** 74 Ind. Cas. 813=26 O.C. 361=A.I.R. 1924 Oudh 249.

——S. 91—Promissory note—Loss not proved—Secondary evidence of note is inadmissible.

Where a promissory note, upon which a suit is based is lost but the loss is not proved secondary evidence of the note is inadmissible. The language of S. 91 is uncompromising and whenever the terms of a contract are reduced to writing and that writing is, for any reason, inadmissible in evidence, the promisee must lose his remedy. The test is "has the creditor a complete cause of action independently of the document which is inadmissible?" 67 Ind. Cas. 565=A.I.R. 1922 Lah. 417.

——S. 91—Pro-note.

Where the hand-note was executed and was sought to be used only with a view to bind the defendant in order to afford evidence of the loan having been given, it is open to the plaintiff to prove his case by other evidence if the hand-note be held to be inadmissible in evidence, for want of stamp. 60 Ind. Cas. 652=2 P.L.T. 184=A.I.R. 1921 Pat. 318.

——S. 91—Promissory note—Inadmissible in evidence—Original consideration.

(Per **Curiam Pratt, J. dissentiente**).—Where money is lent and a promissory note is given therefor the creditor can sue for the money due as on the original contract of loan if the promissory note cannot be proved. 12 Bur. L.T. 137=10 L.B.R. 55=54 Ind. Cas. 84 (F.B.)

——S. 91—Promissory note—Unstamped—Suit on original consideration.

Where a hundi is unstamped and therefore inadmissible in evidence, a decree may be given on the orginal consideration if it is admitted in the pleadings and if the claim on the original consideration is in time. 29 C.L.J. 508=51 Ind. Cas. 945.

——S. 91—Promissory note—Claim for interest under inadmissible pro-note—Damages in lieu of interest.

Where a pronote is inadmissible in evidence oral evidence is not admissible under S. 91 of the Act to prove the terms of the contract for payment of interest and therefore the claim for interest under the document cannot be maintained but the Court may allow damages in lieu of interest. 17 C.L.J. 399=19 Ind. Cas. 840.

——S. 91—Promissory note—Unstamped—Inadmissible—Suit on original consideration.

Where a promissory note is inadmissible in evidence for want of stamp a decree could not be given on the consideration as there was no independent obligation to pay apart from the note. 10 M. 94; 17 M.L.J. 126, **Foll.** 38 Mad. 660=14 M.L.T. 520=(1914) M.W.N. 58=26 M.L.J. 19=21 Ind. Cas. 864.

——S. 91—Suit on a promissory note—Note alleged but not proved, to be lost—Independent evidence to prove consideration not admissible.

The plaintiff sued to recover principal and interest upon a promissory note. He did not produce the note, but he alleged that it had been lost. **Held,** that the plaintiff could not be permitted to give evidence **aliunde** to prove the transaction which resulted in the making of the note, although if its loss were proved he might give secondary evidence of the contents thereof 1908 A.W.N. 91=5 A.L.J. 162.

8. Sale.

——S. 91—Sale—Unregistered sale-deed—Evidential value.

Where contract of the sale of the immovable property has been reduced to writing and is followed by delivery of possession, S. 91 does not debar in any way the proof of delivery of possession as the means of conveying the property. The party can use the unregistered document in proof of the terms of contract or the transaction between himself and the vendor. Only he cannot use the unregistered document to prove that the title passed to him by means of the document. 10 P.L.T. 449=A.I.R. 1929 Pat. 620.

——S. 91—Sale.

The document that was executed was not a document recording the terms of the contract for sale, but it merely recited that the land had been sold for a certain amount and recorded an agreement as to repurchase by the heirs of the vendor,

Held, that oral evidence as to the contract for sale was not rendered inadmissible by the document. 120 Ind. Cas. 232=7 Rang. 414=A.I.R. 1929 Rang. 293.

——S. 91—Sale.

S. 49, Registration Act, must be read together with S. 17 of that Act, and S. 91, Evidence Act and a fair interpretation of S. 49 does not preclude an unregistered document which is required by law to be registered from being given in evidence as to the terms of the contract for sale. 120 Ind. Cas. 232=7 Rang. 414=A.I.R. 1929 Rang. 293.

——S. 91—Registration Act, S. 49—Sale.

Unregistered sale-deed cannot be admitted in evidence nor can oral evidence be allowed. 110 Ind. Cas. 735=6 Rang. 125=A.I.R. 1928=Rang. 124.

——S. 91—Sale.

A deed of sale conveying immovable property worth less than Rs. 100, although it does not confer any title for want of registration, still having regard to S. 91 of the Evidence Act it may be used as evidence of nature and terms of transaction. 93 Ind. Cas. 115=30 C.W.N. 254=A.I.R. 1926 Cal. 705.

——S. 91—Sale.

When the existence of a sale is in question and not its terms, oral evidence is admissible.

The word "terms" in S. 91 is applicable to both classes of documents, **i,e.**, documents which are reduced to writing and which are required by law to be written. 95 Ind. Cas. 584=1926 M.W.N. 384=A.I.R. 1926 Mad. 812.

——S. 91—Sale.

An agreement to sell may be an oral agreement, and such agreements are not required by law to be reduced to the form of a document, within S. 91. By Explanation 3 to the section even if a statement was made in a document of sale, which was not registered, of the prior oral agreement to sell, evidence as to the prior oral agreement is excluded from the provisions of the section.

Per **Carr, J.**—Where the transaction has gone beyond a mere contract for sale and amounts to an abortive sale, S. 91 of the Evidence Act is applicable; and oral evidence to prove the contract is not admissible. 10 L.B.R. 241, **Foll.** 81 Ind. Cas. 857=3 Bur. L.J. 78=2 Rang. 285=A.I.R. 1924 Rang. 214 (F.B.).

——S. 91—Sale—Sale-deed to X and 'others'—Evidence to show who the 'others' are is admissible.

Where a vendor agrees to sell land to several named persons and in drawing up agreement of sale, the name of one person is mentioned and without naming the rest the word "others" is used, the Evidence Act does not prevent evidence from being let in, as to the persons who are meant by the word "others". Provisions of Ss. 91 or 92 are not contravened thereby nor does the case fall within Ss. 93 to 97. 65 Ind. Cas. 973=15 M.L.W. 371=1922 M.W.N. 185=30 M.L.T. 177=A.I.R. 1922 Mad. 100=42 M.L.J. 475.

——Ss. 91—Sale.

Unregistered sale deed for Rs. 20—Proof of title by delivery is admissible. 8 C.P.L.R. 1, **Foll.** 18 N.L.R. 8=A.I.R. 1922 Nag. 58.

——S. 91—Sale.

S. 91 applies to an agreement to sell. When such agreement has been reduced to writing and the document is not produced, oral evidence of what took place when the agreement was made, is not admissible to prove the agreement. 61 Ind. Cas. 896=A.I.R. 1921 Nag. 166.

——Ss. 91, 92 and 95—Sale—Contract in writing—Dispute as to extent—Conflict between body and schedule—Oral evidence—Fixing of price.

Where in an agreement for the sale of the land it was imposible to reconcile the statement in the body of the agreement with the recital in the schedule as to the extent of the land to be conveyed, extrinsic evidence is admissible to explain the facts that led to the execution of the agreement, in order to reconcile the different statements regarding the property sold. In a contract of sale of land, the presumption is that, in fixing the price, regard was had on both sides to the quantity which both supposed the estate to consist of though there may be considerations which may rebut or weaken the presumption. (1920) M.W.N. 726=A.I.R. 1921 P.C. 40=25 C.W.N. 385=61 Ind. Cas. 361 (P.C.).

——S. 91—Contract—Sale—Proof of payment of earnest money—Obiter dictum.

Where a receipt for earnest money is inadmissible, S. 91 of Evidence Act allows proof **aliunde** of payment. 18 P.R. 1917=28 P.W.R. 1917=37 Ind. Cas. 822.

——S. 91—Contract—Sale of land—Oral evidence of payment of earnest money admissible.

In the case of an unregistered agreement to sell land, oral evidence of earnest money having been paid can be admitted under S. 91 of the Act when the receipt part of the document is severable from the actual agreement part thereof. 98 P.R. 1916=37 Ind. Cas 132.

——S. 91—Sale—Sale-deed not produced — Oral evidence.

The purchaser of a land under a registered sale deed must prove his title by producing the sale deed or lay the foundation for the reception of secondary evidence. No oral evidence of the sale is admissible under S. 92. 23 C.L.J. 122=34 Ind. Cas. 956.

——S. 91—Sale—Unregistered sale for less than Rs. 100—Delivery of possession.

Plaintiff can rely upon oral sale accompanied by delivery of possession in a case where a sale-deed was executed but not registered as the consideration was less than Rs. 100. 20 O.C. 33=38 Ind. Cas. 671.

——S. 91—Intention of parties—Sale—Mortgage.

No oral evidence is admissible to prove that a registered deed which purports to be a sale is really a mortgage. 9 Bur. L.T. 174=34 Ind. Cas. 153.

——Ss. 91, 95, 97—Sale — Deed containing false description — Evidence as to the plot intended to be sold—Admissibility — Maxim—"Demonstratio falsa non nocet".

The general rule laid down in S. 91 of the Evidence Act is subject to the exceptions embodied in Ss. 95 and 97. Where in a sale-deed the lands are described by wrong survey numbers, but can otherwise be identified clearly the maximum **demonstratio falsa non nocet** applies. Evidence is also admissible to show the plot intended. (1907) 30 M. 397=2 L.T. 336.

——S. 91—Sale certificate—Extraneous evidence.

Sale certificate being evidence of title, extraneous evidence can be given to prove title. 9 C.L.J. 346=1 Ind. Cas. 62.

9. Statements and deposition of witnesses.

——S. 91—Statements of witnesses — Oral contents of documents only are excluded.

S. 91, Evidence Act merely excludes the oral contents of a deposition but does not make it inadmissible in evidence. 68 Ind. Cas. 36=18 N. L. R. 192=23 Cr.L.J. 500=A.I.R. 1923 Nag. 39.

——S. 91—Statements by witnesses.

It is not necessary under S. 162 that statements made in the course of the investigation should be reduced to writing. S. 91 of the Evidence Act therefore has no application and it is quite open to the prosecution to prove by the oral statements of the police officer what the contents of the statements made to the police by the witnesses were. 88 Ind.Cas. 449=18 S.L.R. 342=A.I.R. 1921 Sind 16.

——S. 91—Statements to police—Oral statement.

S. 91 does not apply to an oral statement made to an investigating police, as it is not a matter which is required by law to be reduced to writing. 7 A.L.J. 468=11 Cr.L.J. 235=6 Ind. Cas. 101.

——S. 91—Statements and deposition of witnesses.

S. 91 even if it covers a deposition, merely excludes oral evidence of its contents but does not make the document itself inadmissible nor prevent its being otherwise proved. 74 Ind. Cas. 445=9 O.L.J. 593=24 Cr.L.J. 781=A.I.R. 1923 Oudh 119.

——S. 91—Deposition of witness—Other evidence inadmissible.

The record by Court of a deposition is the only evidence admissible of the statements alleged to have been made by the witness and if it is not shown to have been read out to the witness he can't be convicted of perjury. 42 Mad. 561=36 M.L.J. 296=9 L.W. 349=(1919) M.W.N. 183=25 M.L.T. 356=20 Cr.L.J. 379=50 Ind. Cas. 987.

——Ss. 91 and 80 — Deposition of witness—Evidence—Attunde—Inadmissible.

Where a deposition is not taken in accordance with S. 360 Cr.P.C. it is inadmissible in evidence and other evidence is shut out by S. 91 of the Evidence Act. 18 Cr.L.J. 966=11 Bur. L. T. 202=42 Ind. Cas. 326.

10. Miscellaneous.

——S. 91—Miscellaneous.

There is nothing in the Transfer of Property Act to suggest that no transfer of an interest in immovable property can be effected without a writing duly registered or that non-registration of every document which effects a transfer of such interest renders it inadmissible in evidence. 102 Ind. Cas. 277=A.I.R. 1927 Sind 206.

——S. 91—Miscellaneous.

A contract by a borrower that he will "make his nephew arrange for you (the lender) in some way or other to go on working the forest within the years for which written permit has been obtained" was held by their Lord-ships only to mean that the borrower will only cause or induce the nephew to the making of a fresh contract. **Quaere**:—Whether evidence of a contemporaneous verbal arrangement in addition to what is contained in a deed between parties can be proved? (1904) 9 C.W.N. 147=32 C. 96=31 I.A. 188 (P.C.).

——S. 92.

See also Deed—Construction and Evidence Act, S. 91.

Synopsis,

1. Ambiguity
2. Applicability and Scope
   See also S. 92, Third parties
3. Compromise
4. Consideration
5. Decree
6. Discharge
7. Document requiring registration
8. Evidence of Conduct
9. Fraud
10. Gift
11. Intention
12. Interest
13. Interpretation
14. Lease
15. Mistake
16. Mortgage
17. Negotiations
18. Oral agreement
19. Oral evidence
20. Partition deed
21. Pro-note
22. Sale
23. Surrounding circumstances
24. Terms of contract
25. Third parties
    See also Evidence Act, S. 92—Applicability and Scope.
26. Usage
27. Variation of Terms
28. Miscellaneous.

1. Ambiguity.

——S. 92—Ambiguity.

Suhrawardy, J.—Where the wording of the contract is capable of different interpretations the Court is not only justified, but it is its duty, to put a proper construction upon the terms of the contract and is justified in finding with what intention a particular expression was used as a matter of pure construction. 113 Ind. Cas. 37=55 Cal. 808=A.I.R. 1928 Cal. 737.

——S. 92—Ambiguity.

Where the document of a grant is produced in evidence and contains no latent ambiguity extrinsic evidence of intention can hardly be admissible. 106 Ind. Cas. 399=6 Pat. 638=9 P. L. T. 25=A.I.R. 1928 Pat. 66.

——S. 92—Ambiguity.

Where the terms of the deed are ambiguous, the subsequent conduct of the parties is admissible for the purpose of interpretation. 84 Ind. Cas. 478=40 C.L.J. 322=29 C. W. N. 166=A.I.R. 1925 Cal. 346.

——S. 92—Ambiguity.

Where the words used in an award are perfectly clear, oral evidence as to their meaning is not admissible; it would only be admissible in case those words are ambiguous or are capable of more than one interpretation. 78 Ind. Cas. 80=A.I.R. 1925 Lah. 180.

——S. 92—Ambiguity — Former transactions admissible only to explain ambiguous terms in a contract.

Evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract, where such meaning is doubtful, but not where the meaning is plain; nor is it admissible to enlarge or vary the terms of the contract. To admit it in the latter case would be to contravene the provisions of S. 92. Incidents which are impliedly contained in a written contract, whether by construction of the terms or by implication of law, cannot be varied by extrinsic evidence. 87 Ind. Cas. 67=47 Bom. 924=25 Bom. L.R. 1063=A. I. R. 1924 Bom. 247.

——S. 92—Ambiguity—Deed silent as to yearly or monthly rate of interest—Evidence cannot be given.

A document provided "I shall pay the principal with interest at the rate of 1-8-0 per cent." but it was not mentioned whether the rate of interest aforesaid would be per mensem or per annum.

Held, that the document is ambiguous and under clause 6 of S. 92 no evidence could be given to clear up that ambiguity. 18 C.W.N. 592, **Foll.** 79 Ind. Cas. 420=4 P.L.T. 577=A.I.R. 1924 Pat. 96.

——S. 92—Ambiguity.

Where the contract clearly provides that the goods were to arrive by the steamer **Frauenfels**,

Held, that parties cannot be allowed to adduce parol evidence to contradict the written document which is perfectly plain and explicit. 76 Ind. Cas. 286=A.I.R. 1924 Sind 127.

——S. 92—Ambiguity.

A surety bond which was executed on a specific occasion must be taken to have been executed for the purpose of the occasion, and it cannot be assumed that it had reference to any other circumstances of a different date. On the face of it there is no difficulty in giving it an intelligible meaning as constituting a personal pledge. Extrinsic evidence is not admissible in these circumstances to affect its meaning. 67 Ind. Cas. 423=26 C.W.N. 737=1922 M. W. N. 376=36 C. L. J. 5=16 M.L.W. 80=24 Bom. L. R. 971=31 M. L. T. 129=30 P.W.R. 1922= A.I.R. 1922 P. C. 46=43 M. L. J. 66 (P.C.).

——S. 92—Ambiguity.

The construction of grants must depend upon the interpretation of all the terms of each instrument and except in a case of ambiguity, extrinsic evidence would not be admissible. Each case must be considered on its own facts in order to ascertain the effect of the grant, resort must be had to the terms of the grant itself and to the whole circumstances so far as they can be ascertained. 70 Ind. Cas. 273=27 C.W.N. 328=36 C. L. J. 196=A.I.R. 1922 Cal. 461.

——S. 92—Ambiguity.

If the meaning of a term in the original agreement is doubtful assistance might be sought from the conduct of parties. Apart from ambiguity, the mere fact that the parties have acted on an erroneous construction of an instrument furnishes in itself no reason why the Courts should not follow the general rule that an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed. 68 Ind. Cas. 937=37 C. L. J. 556=A.I.R. 1922 Cal. 300.

——S. 92, proviso (6)—Ambiguity—Evidence of conduct of parties—Admission.

Where a deed of transfer raises an ambiguity as to the nature of interest in the property it purports to convey, extrinsic evidence (including evidence as to the course of dealing with the property) may be taken into consideration in construing the deed. If there is an inadvertent admission as to the nature of certain property it is open to both sides to give evidence as to whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement. 52 Ind. Cas. 443 (Cal).

——S. 92 (2)—Ambiguity—Oral evidence—Admissibility of.

A mortgage bond contained the following stipulation for interest. 'I have borrowed from you Rs. 300 .... I shall pay ..... for the aforesaid sum every year ..... calculating interest at ten **kalams** of paddy every year'. On a question arising as to whether ten **kalams** were the interest on Rs. 100 or all the 300 rupees. **Held**, that the document was silent as to the basis on which calculation was to be made and therefore oral evidence was admissible under proviso 2 of S. 92 of the Evidence Act, to show what the parties really intended. (1920) M.W.N. 239=11 L.W. 352= 27 M.L.T. 309=56 Ind. Cas. 476.

——S. 92 (6)—Ambiguity—Explanation.

In a suit upon a promissory note executed by the defendant in favour of the plaintiff bank, it appeared that the bank used to fix a period for payment and that the defendant in his application for the loan in a printed form added 'six months' period, the officer of the bank accepted the application. **Held**, that the application form, and endorsement thereon were admissible for fixing the date of payment and that the suit was governed by Art. 69 or 80 of the Limitation Act, the starting point of limitation being six months after the date of the note. 38 M.L.J. 70=27 M.L.T. 81 =(1920) M.W.N. 75=11 L.W. 28=56 Ind. Cas. 384.

2. Applicability and scope.

See also S. 92, Third parties.

——Ss. 92 and 91—Applicability and scope—Agreement to resell property sold embodied in a letter—Admissibility.

In a suit for specific performance of a contract to resell certain property sold, the letter containing the

agreement to resell was objected to as being inadmissible in evidence as it was not registered and that the agreement being part of the terms of the original sale it could not be proved by any other way except by another registered instrument.

Held: The transaction, as a whole was in reality a combination of two agreements—one to be performed by the seller by the execution of the sale deed and the other to be performed by the purchaser by the execution of another sale deed. The two parts of such a transaction may or may not be embodied in one document. The sale may be by a registered instrument but the terms of the contract to be performed by the purchaser may or may not be in writing and may or may not be registered. It is doubtful if to such a composite transaction, consisting of a grant or disposition of property and a collateral agreement, S. 92 of the Evidence Act in terms applies. But assuming it does, proviso 2 to that section clearly enables the proof of the agreement of re-sale as this would be a separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms. Further, an agreement of re-sale does not require registration, as it does not create an interest in or over any immovable property. I.L.R. (1950) All. 32.

——**S. 92—Applicability—Applies only as between** parties to an instrument but not between one of the parties and a third party.

Under S. 92 of the Evidence Act the prohibition with reference to the proof of an oral agreement applies only as between the parties to an instrument or representatives in interest and not between one of the parties to an instrument and a third party. 62 L.W. 221=1949 M.W.N. 136=A.I.R. 1949 Mad. 852=(1949) 1 M.L.J. 295.

——**S. 92, Proviso 4—Applicability—Document not** compulsorily registrable but registered—If outside purview of proviso.

It is erroneous to hold that proviso 4 to S. 92 of the Evidence Act comes into operation only when the document is compulsorily registrable and is registered. As soon as the parties get it registered, whether it is compulsorily registrable or not, it comes within the purview of proviso 4 to S. 92. 1948 A.M.L.J. 1.

——**S. 92, Proviso (2)—Applicability and scope—** Separate collateral contract by parol—Need for strict proof.

A separate collateral contract by parol on a point about which the written principal contract is silent, is viewed with suspicion by a Court of law and must be proved strictly. Not only the terms of such a contract but the existence of an **animus contrabandi** on the part of all parties to it must be clearly shown. The omission of any reference to the subject-matter of the parol contract by itself cannot be a ground for holding that there was no collateral contract by parol. I.L.R. (1948) 2 Cal. 11.

——**S. 92, Proviso 4—Applicability — Mortgage** followed by mortgagee being put in possession with a view to the adjustment of the profits towards principal and interest—Suit on mortgage—Proof of agreement if barred.

Where after the execution of a mortgage, the mortgagee, is put in possession of the mortgaged property so that the rent and profits of the property might be adjusted towards the principal and interest, there is nothing in the provisions of S. 92, Evidence Act, to bar the proof of this agreement in a suit on the mortgage. All that is done by the agreement is to provide for a method of payment which does not in any way affect any of the provisions of the mortgage deed. It cannot be said that the proviso 4 to S. 92 of the Evidence Act has any application to such a case. 23 Luck. 74=A.I.R. 1948 Oudh 129=1947 O.W.N. 523 =1947 O.A. (C.C.) 350=1947 A.W.R. (C.C.) 350.

——**S. 92, Provisos (2) and (3)—Applicability—** Deed of mortgage by conditional sale—Oral contract for sale—Admissibility.

An oral contract for sale which is inconsistent with a deed of mortgage by conditional sale is inadmissible in evidence under S. 92 of the Evidence Act. Proviso (2) to that section is inapplicable as it refers to a separate oral agreement not inconsistent with the terms of the written agreement. Proviso (3) is equally inapplicable if the alleged oral agreement for sale does not constitute a condition precedent to the attaching of any obligation under the mortgage by conditional sale. A.I.R. 1947 Cal. 453.

——**S. 92—Applicability—Contract of agency—** Clause providing for reduction of rate of commission by mutual consent—Subsequent agreement reducing rate—Oral evidence of—Admissibility.

Where, in a written agreement between a principal and agent, there was a term that the parties would be at liberty to reduce the rate of commission by mutal consent, and the parties subsequently reduce the rate of commission, oral evidence of such reduction of commission by mutual consent would be admissible in evidence. S. 92, Evidence Act, does not bar the admission of such evidence, because what is done is in pursuance of and in compliance with the original agreement or contract of agency and not to vary or modify it. 224 Ind. Cas. 273=A.I.R. 1946 All. 489= 1946 A.W.R. (H. C.) 619.

——**S. 92—Applicability—Registered maintenance** deed in favour of Hindu widow — Subsequent oral arrangement putting widow in possession of land to be held for life in lieu of maintenance—Evidence of—Admissibility. 24 Mys. L.J. 115.

——**S. 92 — Applicability and scope — Third proviso—Condition precedent to sale—Proof.**

The proof of a condition precedent to the execution of a sale-deed is permitted by the third proviso to S. 92, Evidence Act. A.I.R. 1945 All. 39=1944 A.L.J. 454.

——**S. 92—Applicability and scope—Section refers to dispositive documents and not to decrees.**

The words "any matter required by law to be reduced to the form of a document" in S. 92, Evidence Act refer only to dispositive documents and not to a decree to which the words "the parties to any such instrument" are inapplicable. A.I.R. 1943 Cal. 634=I.L.R. (1943) 1 Cal. 195=211 Ind. Cas. 154.

——**S. 92—Applicability and scope.**

When the remission of a part of contract is an one-sided act on the part of the promisee, S. 92 (4)

cannot be invoked. A.I.R. 1943 Cal. 181=76 C.L.J. 115=47 C.W.N. 213=I.L.R. (1943) 1 Cal. 101=206 Ind. Cas. 439.

——S. 92, Proviso 6—Applicability and scope —Document perfectly plain—No extrinsic evidence is admissible.

Where a document, itself is a perfectly plain, straight forward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. There may be cases where such extrinsic evidence is required, and it will, therefore, be admitted. But it can only be in such cases where the terms of the document themselves require explanation, and then evidence can be led within the restriction laid down by the proviso 6 to S. 92, Evidence Act. A.I.R 1943 Oudh 392=1943 O.W.N. 325=1943 A.W.R. 75=19 Luck. 265=210 Ind. Cas. 526.

——S. 92—Applicability and scope.

Section 92 (3), Evidence Act, does not permit the terms of a written contract to be varied by contemporaneous oral agreement.

Under S. 92 (3), an oral agreement to postpone liability under a pro-note which is unequivocal in its terms must be proved and is not to be inferred merely from circumstances that the parties have other dealings or from possibility or probability that at the time he executed the pro-note, the promissor had in mind that he was not likely to be called upon to discharge his liability until settlement of other dealings was made. A.I.R. 1943 Sind 67=I.L.R. (1942) Kar. 516=208 Ind. Cas. 51.

——S. 92—Applicability and scope.

Section 92, Evidence Act, is not affected by the Negotiable Instruments Act. A.I.R. 1943 Sind 67=I.L.R. (1942) Kar. 516=208 Ind. Cas. 51.

——S. 92—Applicability and scope.

Section 92 does not bar the setting up of a contract to operate as an adjustment of a decree. A.I.R. 1941 Lah. 149=1941 A.W.R. 657=43 P.L.R. 192=1941 O.W.N. 815=I.L.R. (1941) Lah. 383=194 Ind. Cas. 1 (F.B.)=1941 R.D. 574.

——S. 92—Applicability and scope—Expression "between the parties to any such instrument".

The words "between the parties to any such instrument" as used in S. 92, Evidence Act refer to the parties who, on the one side and the other, came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed regarding their relations to each other under the contract. A.I.R. 1941 Pat. 211=7 B. R. 817=194 Ind. Cas. 739.

——S. 92, Proviso 3—Applicability — Whether can be applied to nullify effect of document.

Section 92, proviso 3, Evidence Act, speaks of the existence of a separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property which may be allowed to be proved. This clearly pre-supposes that in a case to which it could be applied, the contract, grant or disposition of property itself remains intact, but that the condition precedent pleaded must, in its very nature, be extraneous to the contract, grant or disposition itself and, as agreed, must come into existence before the obligation attaches thereunder.

Where, in a case on a promissory note, the facts pleaded do not aim at proving a condition precedent to the attaching of the legal liability to the document, but lay the axe at the very foundation of it, nullifying entirely the effect of the promissory note and its existence, S. 92, proviso 3, is not applicable and such evidence will not be allowed. A.I.R. 1940 Bom. 54=41 Bom. L.R. 1263=187 Ind. Cas. 41.

——S. 92—Applicability and scope — Deed — Displacing of—Evidence.

An evidence of a strong kind is required to displace a written document executed in solemn form and duly registered. It cannot be displaced by mere oral evidence. A.I.R. 1940 Nag. 70=1939 N.L.J. 573=I.L.R. (1941) Nag. 669=188 Ind. Cas. 181.

——S. 92—Applicability and scope.

The proof of any fact which would invalidate a sale-deed on grounds such as fraud, intimidation and illegality is admissible under the first proviso to S. 92, Evidence Act. A.I.R. 1940 Pat. 575=19 Pat. 424=188 Ind. Cas. 859.

——S. 92—Applicability and scope.

Illustrations to proviso 1 to S. 92, Evidence Act are not meant to be exhaustive. A.I.R. 1939 Nag. 20=1939 N.L.J. 33=180 Ind. Cas. 370.

——S. 92—Applicability and scope.

It is always open to a plaintiff in a pre-emption suit to prove by evidence the real nature of the transaction sought to be pre-empted. Section 92, Evidence Act has no application to such a case for the simple reason that plaintiff in a pre-emption suit is not a party to the document which embodies the transaction sought to be pre-empted. A.I.R. 1938 All. 519=1938 A.L.J. 668=1938 A.W.R. 493=177 Ind. Cas. 468.

——S. 92—Applicability and scope.

Sections 91 and 92, Evidence Act, apply only to contracts, grants and dispositions of property and a Will is neither a contract nor a grant, nor a disposition of property until the death of the testator makes it operative. Consequently, a registered Will can be revoked by an unregistered document and S. 92 (4), Evidence Act, is no bar. A.I.R. 1938 Mad. 616=(1938) 1 M.L.J. 444=47 M.L.W. 719=1938 M.W.N. 699=182 Ind. Cas. 949.

——S. 92—Scope—Recitals of fact mentioned in document, if can be contradicted by evidence.

Section 92 of the Evidence Act debars a person who is a party to a contract from adducing any evidence which may "contradict, vary, add to or subtract from the terms", but there is no justification for holding that the recitals of facts mentioned in the document cannot be contradicted by evidence. A.I.R. 1938 Mad. 320=(1938) 1 M.L.J. 236=1938 M.W.N. 1142=174 Ind. Cas. 309.

——S. 92—Applicability and scope.

Where two deeds on their face appear to be separate transactions, it cannot be shown that it was agreed to be treated as one, by proof of another agreement not evidenced by writing. A.I.R. 1938 Pat. 242=175 Ind. Cas. 831.

——S. 92—Applicability and scope—Expression "between parties to such instrument."

The words in S. 92, Evidence Act, "between the parties to any such instrument" refer to the persons who, on the one side and the other, come together to make the contract or disposition of property, and do not apply to questions raised between the parties on the one side only of a deed regarding their relations to each other under the contract. A.I.R. 1936 All. 258=1935 A.W.R. 1343 =1935 A.L.J. 1273=58 All. 548=162 Ind. Cas. 117.

——S. 92—Applicability and scope.

There is nothing in S. 92, which prevents a judgment-debtor from proving by oral evidence that a decree has been adjusted by payment of a smaller sum than the sum decreed. A.I.R. 1935 Mad. 424=1935 M.W.N. 335=42 M.L.W. 384=156 Ind. Cas. 834.

——S. 92—Applicability and scope — Applicability to person not party to deed nor representative of party.

Section 92, Evidence Act does not apply to a person who is neither a party to the deed nor the representative-in-interest of any party thereto. Oral evidence can be admitted to establish that the deed was executed with the knowledge and consent of such person. A.I.R. 1935 Rang. 122 =156 Ind. Cas. 162.

——S. 92—Applicability and scope.

Section 92, Evidence Act, forbids the admission or consideration of evidence as to the intentions of the parties, or to contradict the express terms of the document and no presumption can legitimately be drawn from the fact that there had been previous transactions between the parties of a similar character. A.I.R. 1933 P.C. 178= 1933 A.L.J. 1193=37 C.W.N. 993=35 Bom. L. R. 877=14 L. 466=58 C.L.J. 52=60 I. A. 273=1933 M.W.N. 755=65 M.L.J. 150=38 M.L.W. 68=10 O.W.N. 797=35 P.L.R. 1=143 Ind. Cas. 659 (P.C).

——S. 92, Proviso 4—Applicability and scope—Registration of mortgage—Successor of executor seeking to prove that it was mortgage and not sale —Applicability of proviso.

Proviso 4 to S. 92, Evidence Act, does not apply to a case where no document evidencing sale was registered by the Sub-Registrar and only a mortgage is registered, and the successor in interest of the executor of the document seeks to prove that the transaction entered into between the parties was really a mortgage and not a sale. A.I.R. 1933 Lah. 318=145 Ind. Cas. 697 (1).

——S. 92—Applicability and scope—Letter indicating lease to be executed later—Admissibility of—Registration Act, S. 49.

A letter which is clearly in the nature of a memorandum and which does not include all the terms but shows that a lease embodying all the terms was to be executed later, cannot attract provisions of S. 92, Evidence Act or S. 49, Registration Act. A.I.R. 1933 Lah. 61=33 P.L.R. 323=14 Lah. 137=142 Ind.Cas. 754.

——S. 92—Applicability and scope — Person not party to instrument.

Section 92, Evidence Act, does not apply to a person who is not a party to the written deed in question. The fact that a family settlement arrived at between three claimants to an estate provides for certain relations or dependents does not make these latter persons parties to the deed. A.I.R. 1932 Oudh 168=9 O. W. N. 291=138 Ind. Cas. 128.

——S. 92, illus. (i)— Applicability and scope—Applying for payment of debt by sending receipt.

The practice of applying for payment of a debt by sending a receipt for the money is not unknown in India and is referred to in S. 92, illus. (i) to the Evidence Act. A.I.R. 1932 Pat. 332=13 P.L.T. 545=140 Ind. Cas. 104.

——S. 92—Applicability and scope.

Though S. 92 contemplates that no party to an instrument or his representative should be allowed to uphold the written contract and yet try to establish a contemporaneous oral agreement so as to vary the terms of it, does not prevent even a party to such an instrument from establishing any fact which would make the document itself invalid or establish any fraud or show the transaction to be illegal for the effect of such a plea is not to vary the terms of the document, but to nullify it. A.I.R. 1930 All. 786=1930 A.L.J. 926.

——S. 92—Contract—Applicability and scope.

A contract of simple money debt is not one required by law to be reduced to the form of a document. 127 Ind. Cas. 894=26 N.L.R. 320= A.I.R. 1930 Nag. 298.

——S. 92—Applicability and scope — Conveyance creating joint tenancy—Parol evidence to prove severance is admissible—S. 92 has no application to such case.

Where property is purchased in the name of several persons jointly, a joint tenancy is created and parol evidence is admissible to prove that the joint tenants have become tenants-in-common. The evidence is tendered not for the purpose of contradicting or varying the terms of the conveyance but of proving facts from which it may be inferred that accepting the conveyance as creating a joint tenancy, the purchasers have subsequently so dealt with their respective interests thereunder that the joint tenancy has become a tenancy-in-common. 116 Ind. Cas. 385 =29 M.L.W. 44=56 I.A. 112=A.I.R. 1929 P.C. 72=56 M.L.J. 643 (P.C.)

——S. 92—Applicability and scope.

In a suit instituted for recovery of a certain sum due on a hundi, the defendants pleaded that they had compounded with the plaintiffs' creditors by agreeing to pay them 12 annas in the rupee in full settlement of their claims of which they had to pay 4 annas in the rupee in cash and to execute hundis on the balance payable at a future date. The defendants said that the plaintiffs had agreed to the terms and in pursuance thereof received 4 annas in cash but declined to receive the hundis tendered to them.

Held, that the evidence of the defendants could not be excluded and S. 92 did not apply as the defendants did not attempt to contradict, add to or subtract from the terms of the contract as contained in the hundi. 114 Ind. Cas. 97 = 23 S. L. R. 294=A.I.R. 1929 Sind. 153.

——S. 92—Applicability and scope.

The provisions are to be read independently of English decisions. 100 Ind. Cas. 1029=49 All. 680=25 A.L.J. 349=A.I.R. 1927 All. 422.

——S. 92—Applicability and scope.

The liability in relation to a promissory note or negotiable instrument, attaches by or from delivery, and S. 46 of the Negotiable Instruments Act provides that as between the parties to an instrument (that means to say the immediate parties) it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein. Similarly it may be shown that the instrument was delivered conditionally, that is to say, as a collateral undertaking, given to the creditor, to be enforced only in the event of the debtor failing to discharge some contemporaneous undertaking. There is no difference in substance but only in illustration and application between the provision in S. 46 of the Negotiable Instruments Act, and proviso 3 to S. 92 of the Evidence Act. 100 Ind. Cas. 332=49 All. 464=25 A.L.J. 305=A.I.R. 1927 All. 292.

——S. 92—Applicability and scope—Companies Act—Company must be deemed a separate entity from share-holders—Though presumption is that all transactions are true, they can be proved to be otherwise.

Where a company is duly incorporated under the Indian Companies Act, the Court should start with the presumption that it is a separate entity from any individual although that individual may practically hold all the shares, but it would not necessarily follow that every alleged transaction between such individual and the company would be valid or that it would represent a real transaction, and S. 92 of the Evidence Act would not prevent Court from enquiring into the truth of the transactions but the **onus** will be on the Crown. 102 Ind. Cas. 49=29 Bom. L.R. 447=51 Bom. 372=A.I.R. 1927 Bom. 371.

——S. 92—Scope and applicability — Contract reduced to writing—Rule excluding any other evidence does not apply when there is complete oral contract before writing.

The rule of evidence that where the terms of a contract have been reduced to writing, you cannot give any other evidence of the contract than the written document itself, applies only if the document was intended to be the embodiment in writing of the transaction and not if there was a complete oral contract before the writing was given and the document does not express and was never intended to express the whole agreement between the parties. 20 W.R. 150; A I.R. 1923 P. C. 50 and 43 Cal. 895, **Rel. on.** 102 Ind. Cas. 871=45 C.L. J. 233=31 C.W.N. 703=A.I.R. 1927 Cal. 538.

——S. 92—Applicability and scope.

Where a sale-deed is taken jointly in the name of two persons but it is silent as to the respective shares of each, S. 92 is no bar to the proof of facts which would establish their right to separate items of property conveyed to them by the deed. 10 All. 421, Foll. 101 Ind. Cas. 653=38 M.L.T. 247=1927 M.W.N. 168= A.I.R. 1927 Mad. 1102=52 M.L. J. 557.

——S. 92—Applicability and scope.

Where a bond providing for labour by the maker in lieu of interest is silent as to payment of wages and there is no negative covenant precluding the maker from claiming wages for work done S. 92 does not bar evidence as regards wages paid for work done by the executant. 101 Ind. Cas. 39=25 M.L.W. 601=A.I.R. 1927 Mad. 531.

——S. 92—Applicability and scope—Sections do not conflict with each other—In S. 92 subsequent representation is relied upon as true; in S. 115 it is relied upon as binding upon the party making it.

Where a party seeks to give evidence of a subsequent oral agreement modifying the terms of the written grant, he puts forward that agreement as true and relies upon the truth of that agreement. In the case of an estoppel, the party who pleads it does not profess to show that the representation made is true. On the contrary his case very probably is that the representation is false but that the person who made it should not be allowed to show that it is false. Sections 92 and 115 deal with two entirely different topics and there is no conflict between the two. 90 Ind. Cas. 875=1925 M.W.N. 596=A.I.R. 1926 Mad. 39= 49 M.L. J. 396.

——S. 92—Applicability and scope—Fact of lease deed in suit being part of **benami** transaction of transfer by sale can be proved.

Where the defendant denied the alleged agreement to take the land on lease, but admitted the execution of the lease-deed, but alleged that to protect his property from creditors he had transferred his land **benami** to the name of the plaintiff and that the document was made in furtherance of this **benami** transaction.

Held, that in effect his case is that there was no agreement of lease at all and that the deed is merely a fiction. He is therefore not debarred from producing oral evidence of this allegation. Evidence may be given—firstly to show that there was no disposition at all. The rule operates only when there has been in fact a disposition, the whole of which was meant by the intention of parties to be embodied in the form of a document. 7 M.H.C. 189; **Foll.** 95 Ind. Cas. 512= 5 Bur.L. J. 2=A.I.R. 1926 Rang. 94.

——S. 92—Applicability and scope.

S. 92 merely prescribes a rule of eivdence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. 86 Ind. Cas. 332=27 Bom. L.R. 787=3 Rang. 106=3 P.L.R. 227=30 C.W.N. 242=6 L.R.P.C. 57=2 O.W.N. 279=A.I.R. 1925 P.C. 75=48 M.L.J. 339 (P.C.).

——S. 92—Applicability and scope.

When the evidence was not of an oral agreement varying the terms of a written contract between the parties to the instrument, but of a different contract :

Held, S. 92 has no application and the evidence is admissible. 84 Ind. Cas. 124=40 C.L.J. 67=A.I.R. 1925 Cal. 94.

——S. 92—Applicability and scope.

Where the contract was made in writing and the terms were not varied either by a contract in writing or by oral agreement,

Held, the rights and liabilities of the parties must be determined according to the true construction to be placed on the contract. When a reference to that showed that payment was to be made against the tender of documents and not against delivery of goods, and when none of the relative documents were tendered at the time of demanding payment but only the goods were tendered, the purchasers committed no breach of their contract by not taking up the goods. It was not open to the vendors to show that notwithstanding the form of the contract the parties intended payment to be against delivery of goods and not against tender of documents. 86 Ind. Cas. 399=A.I.R. 1925 Lah. 74.

——S. 92—Applicability and scope.

Section 92 applies to all parties to a document whether the dispute is between the parties on the one side and the other or between the parties on the same side. Parties on one side to a transaction cannot be allowed to show that the transaction though purporting to be a sale was a mortgage. 77 Ind. Cas. 923=11 L.B.R. 351=1 Bur.L.J. 160=A.I.R. 1922 L.B. 37.

——S. 92—Applicability and scope—Deccan Agriculturists' Relief Act, S. 10-A—Sale or mortgage—Court can determine real nature of transaction.

Defendant executed a sale-deed in favour of plaintiff, at the same time there was an oral agreement to re-convey on payment of purchase money, and an unregistered **kabuliyat** was executed subsequently embodying the terms of the agreement. In plaintiff's suit for possession, defendants pleaded that the transaction was only a mortgage.

Held, S. 10-A of the Deccan Agriculturists' Relief Act empowers a Court notwithstanding the provision of S. 92 of the Evidence Act, to inquire into and determine the real nature of such a transaction. The plaintiff whose title is based on the sale-deed, cannot succeed, if defendants prove the transaction to be only a mortgage. 65 Ind. Cas. 356=15 S.L.R. 160=A.I.R. 1922 Sind 39.

——S. 92, proviso (6)—Applicability and scope—Plain document—Extrinsic evidence.

A party cannot alter the nature of a document clearly a sale-deed, after putting the signature, by adding something when it is registered, to make it mean something other than it really appears to be. When a document is clear, perfectly plain and straight-forward, other extrinsic evidence of the relation of the language to the existing facts is unnecessary, S. 92, proviso 6 allows evidence to be put in only to explain the terms of a document then required. 44 Bom. 710=22 Bom.L.R. 831=58 Ind. Cas. 574.

——S. 92, proviso (3)—Scope.

The oral agreement contemplated in S. 92, proviso (3) only suspends the operation of the obligation and an oral agreement which is a defeasance would contradict the written agreement and would therefore be inadmissible. 6 Cal. 433, Rel. 42 Ind. Cas. 372 (Nag.)

——S. 92, proviso (1)—Applicability and scope—If exhaustive.

The first proviso to S. 92, Evidence Act does not exhaust all the circumstances which may invalidate a document or entitle a person to a decree. 20 C.W.N. 1067=37 Ind. Cas. 126.

——S. 92, proviso 4—Applicability and scope—Rescission of contract.

Where a lease was given by plaintiff to defendants on a low rent as defendant promised to procure a loan for plaintiff and an agreement was executed as part of the contract by which the defendant agreed to cancel the lease deed on failure to procure the loan. **Held,** that it was outside the operation of S. 92, Evidence Act, whether it be regarded as itself the contract or as evidence of an oral agreement to the same effect. 30 M.L.J. 302=(1916) 1 M.W.N. 129=32 Ind. Cas. 941.

——S. 92, proviso (1) — Scope — Contract Act, S. 30 — Gaming and wagering transactions—Documents — Oral evidence — Scope of S. 92, proviso (1) of the Evidence Act:—

Per **Curiam**: A party pleading that trnsactions evidenced by documents are by way of wager only and not genuine commercial transactions is entitled under S. 92, proviso (1), of the Evidence Act to give parol evidence to substantiate such plea. 9 C. 791 overruled; Per **Woodroffe J.**—Proviso (1) to S. 92 is not exhaustive, i. e., merely confined to cases of fraud, intimidation, illegality, want of due execution or capacity, want of failure of consideration and mistake. Where the validity of a transaction evidenced by documents is impeached, the court is not precluded from inquiring into the real nature of the transaction between the parties and will allow oral evidence of the facts which would invalidate these documents. (1905) 1 C.L.J. 155=9 C.W.N. 305=32 C. 437 (F.B.)

——Ss. 92, 99—Applicability and scope—'As between the parties'—Oral evidence to prove that what purports to be a usufructuary mortgage is in fact a sale—Liberty of third parties to prove.

The rule of exclusion laid down in S. 92 does not apply to the case of a third party who is not a party to the document. (1904) 28 A. 473=1906 A.W.N. 89=3 A. L. J. 314.

——S. 92—Applicability and scope—Contemporaneous written agreement—Registration Act, S. 7.

S 92 of the Evidence Act is no bar to the admissibility in evidence of a contemporaneous written document notwithstanding that it contradicts, varies, adds to, or subtracts from, the terms of the other document, provided the document is registered, if registration is compulsory. (1903) 27 M. 348.

——S. 92—Applicability of—Both parties claiming under the same instrument executed by a third party —Sale—Gift—Oral evidence, admissibility of.

S. 92 of the Evidence Act applies only to cases arising between parties to the instrument or their privies; and is not applicable to a case where the plaintiff bases his case under an instrument as a deed of gift in his favour and the defendant bases his case on the same instrument as a sale benami in his favour. (1903) 27 M. 329.

——S. 92—Applicability—Criminal case—Parties to contract—Nature of contract.

(Per **Fox, C J.**)—In a criminal proceeding by one party to a contract against another involving the determination of the nature of the contract oral evidence is not admissible except according to S. 92. (Per **Hartnoll, J.**)—S. 92 does not apply to criminal proceedings (Per **Twomey, J.**)—S. 92 applies to a criminal proceeding by a private prosecutor. 3 Bur. L. T. 124=5 L.B.R. 241=11 Cr. L. J. 738=8 Ind. Cas. 952.

——S. 92, Proviso (2)—Applicability and scope—Contract—Other terms—Letter.

Where the principal terms of an agreement have been embodied in a letter, other terms could be proved by oral evidence and S. 92 is no bar. 6 M.L.T. 368=13 C.W.N. 326=4 Ind. Cas. 85.

——S. 92—Applicability and scope—Document collateral to a permanent lease of immovable property not affected by S. 92.

An agreement to pay Rs. 500 a month to a lessor, in consideration of receiving from him a permanent lease of portions of his zamindari, which agreement was come to before, but reduced to writing after the execution of the lease was **held** to be not affected by S. 92 of the Evidence Act. Where it was not inconsistent with the lease its provisions formed no part of the holding under the lease, and it was not rent, nor recoverable as rent, but a mere personal obligation collateral to the lease. (1902) 6 C.W.N. 865=25 M. 603=29 I.A. 138=4 Bom. L. R. 839=12 M.L.J. 479 (P.C.).

3. Compromise.

——S. 92—Compromise — Addition of terms—Written agreement—Oral evidence.

Where the agreement of compromise by which the plaintiff withdrew a criminal case did not refer to an agreement which the plaintiff was putting forward, **Held,** that plaintiff was adding a new term to the agreement which settled the terms of the compromise which he could not do under S. 92. 18 Bom. L. R. 90=32 Ind. Cas. 938.

——S. 92—Compromise—Additional evidence if legally admissible.

An order of Court adjourning a case and incidentally noting the fact of an agreement made out of Court between the parties as a ground of adjournment does not purport to be and is not a record of the terms of the compromise; and additional evidence to add to the terms of the compromise is not inadmissible under S. 92. 29 Ind. Cas. 860 (Mad.).

——S. 92, proviso (2)—Compromise decree—Part of agreement, not entered in compromise deed.

Where a part of the agreement between the parties is not entered in the compromise deed, the case is not covered by S. 92, proviso 2 of the Evidence Act and the parties could not adduce oral evidence of the same. 11 A. L. J. 770=21 Ind. Cas. 305.

——S. 92—Compromise—Oral evidence—Independent agreement.

Where a litigation is compromised by the parties by means of a written agreement 'of all matters in dispute' it is not open to the parties to tender oral evidence of separate agreement as not having been included in the compromise though concerning a matter dealt with by it. 17 Ind. Cas. 43 (Mad.).

——S. 92—Compromise — Criminal case — Oral evidence.

It is not necessary that a compromise in a criminal case should be reduced to writing. Oral evidence of the circumstances that led up to a compromise in a Criminal Court is admisssible under S. 92 of the Evidence Act. The parties have only to communicate to the Court the result of their deliberations and the Court is bound to take notice of their conclusions. 8 Cr. L. R. 54.

——S. 92 — Compromise — Decree recorded as satisfied—Oral evidence of contract—C. P. Code, O. 21, R. 2.

The fact that the liabilities under the decree form the consideration for a compromise, did not prevent that compromise from being a new and independent contract which might form the basis of a suit which might be proved by oral evidence and such evidence would not amount to 'contradicting, varying adding to or subtraction from, the terms of the decree. 53 Ind. Cas. 527 (Nag.).

4. Consideration.

——S. 92 — Consideration — Scope — Evidence of intention of parties to deed—Evidence to contradict recital as to payment of consideration—Admissibility.

In ascertaining the intention of the parties to a document, no evidence other than the deed itself wil be admissible to prove the intention except when there is a latent ambiguity. But evidence is admissible for the purpose of contradicting a recital in the deed, e. g., as to the payment of consideration. 17 Pat. 318, cons. and followed. 27 Pat. 122=A.I.R. 1949 Pat. 364.

——S. 92—Consideration—Scope—If a term of contract—Evidence to show that recital as to nature of consideration is incorrect—Admissibility.

S. 92 of the Evidence Act does not preclude a party from showing that a recital as to the nature of the consideration for the contract embodied in the deed is incorrect; consideration for the deed is not a term of the contract. 53 Mys.C.R. 1=28 Mys. L. J. 66.

——S. 92—Consideration—Scope of prohibition—Letter relinquishing right to property—Passing of consideration not mentioned—Oral evidence to prove passing of consideration is admissible under proviso 2—Doctrine of part-performance held applicable to facts of case—Transfer of Property Act (1882), S. 53-A.

In a suit brought by **A** against **B** to recover a plot of land, it was contended by **B** that **A** had by a letter given to **B** relinquished his right to the property, stating that he had no further connection with the said property and that **B** could himself enjoy the property which was given to **A's** wife, **B's** sister, by her father under the deed of gift in the year 1933. **B** was in possession of the property all along. The letter did not mention any passing of consideration. But it was found that this letter was preceded by a mediation as a result of which **B** gave up a claim to recover Rs. 350 from **A** in consideration of **A's** giving up the right to the property which belonged to his wife as aforesaid. The defendant **B** also pleaded the application of the doctrine of part-performance. The plaintiff contended that as the letter did not disclose any consideration oral evidence in support of the passing of consideration could not be admitted and as there was also no writing evidencing the contract with reasonable certainty the doctrine of part-performance could not be applied:

Held, that so long as the passing of the consideration was not a term of the contract, evidence adduced to show that it did pass, even though the contract did not recite it, was not within the scope of the prohibition in S. 92, Evidence Act, and oral evidence of the same could be admitted under proviso 2 as it was not in any way inconsistent with the terms of the letter:

Held further, that there being nothing in the letter which created any confusion or any doubt as to what the terms were, the doctrine of part-performance was applicable and precluded the plaintiff from recovering possession. A.I.R. 1946 Mad. 452=(1946) 1 Mad. L. J. 346=59 Mad. L. W. 278=1946 Mad. W. N. 287.

——S. 92—Consideration — Assignment stating that consideration for it was in cash—Whether it can be shown that it was not in cash but in goods.

Evidence of the manner in which the consideration was paid is not evidence tending to vary the terms of a written contract. Where, therefore, the assignment states that the consideration was paid in cash, a party can show that the actual consideration was paid, not actually in cash, but in goods. A.I.R. 1940 Pat. 379=189 Ind. Cas. 423.

——S. 92, Proviso 1—Sale-deed—Consideration—Payment of consideration in kind by proving contemporaneous oral agreement.

If one party to a document can show that he did not receive the consideration specified though the document recites that he did, the other party should be allowed to show that the consideration was paid in full, not in cash, but in kind. The two are **ejusdem generis**. A contemporaneous oral agreement to be paid in kind may not be enforceable because that would be varying the contract, but once the consideration is actually paid and accepted in kind in full discharge of an obligation expressed as Payable in cash, then that can be proved because a discharge of the obligation "entitles a party to a decree." A. I. R. 1939 Nag. 20=1939 N. L. J. 33=180 Ind. Cas. 370.

——S. 92—Consideration—Evidence of absence or failure of consideration.

Evidence of the absence or failure of consideration can always be adduced under proviso (1) to S. 92 of the Evidence Act. A.I.R. 1938 Mad. 320=(1938) 1 M.L.J. 236=1938 M.W.N. 1142=174 Ind. Cas. 309.

——S. 92—Consideration—Evidence that party has not received sum actually stated to have been lent—If admissible.

It is always open to one of the parties to show that he has not received the sum actually stated to have been lent and such evidence is expressly rendered admissibile by reason of the proviso 1 of S. 92 of the Evi. Act, A.I.R. 1936 All. 157=1935 A.W.R. 1486=160 Ind. Cas. 76.

——S. 92—Consideration—Oral evidence to show the real consideration.

Consideration for a **kabuliyat** need not appear on its face Oral evidence to show that the real consideration is a settlement of doubtful rights is admissible. A.I.R. 1935 Cal. 368=60 C. L. J. 477=62 Cal. 346=159 Ind. Cas. 98.

——S. 92, Proviso 3—Consideration—Promissory note—Oral evidence that consideration was not payment of money but construction of a sluice.

Under proviso (3) to S. 92, Evi. Act, oral evidence that the real consideration for a promissory note was not payment of money as recited in the note but it was the construction of a sluice, is admissible. A.I.R 1935 Mad. 310=1935 M.W.N. 405=41 M. L. W. 298=157 Ind. Cas. 278.

——S. 92—Consideration.

In a suit on a pro-note executed in consideration of the amount due on a previous note, the defendant pleaded that he had paid a certain amount before the execution of the second note and prayed that credit should be given to him for this amount on the ground that there was an agreement contemporaneous with the second note that accounts should be subsequently looked into and the liability of the party determined accordingly, notwithstanding the particular figure inserted in the second note and that the consideration should be deemed to have failed to the extent of this amount:

Held, that even assuming that the plea of contemporaneous agreement was inadmissible in evidence under S. 92, Evi. Act, the plea could be considered as one of partial failure of consideration, which could be heard uuder S. 44 of the Negotiable Instruments Act. A.I.R. 1935 Mad. 253=40 M. L. W. 706=67 M. L. J. 650=1934 M.W.N. 1382=154 Ind. Cas. 579.

——S. 92, Proviso 1—Consideration—Recital in bond that consideration has passed—Evidence to prove absence of consideration—Admissibility.

The recital in a bond or in a promissory note that consideration has passed amounts only to an admission of the fact and, like any other admission, may be disproved as being incorrect. The admission, no doubt, throws the burden of proof on the party whose admission it is, to prove that the admission is wrong, but nonetheless, it is open to that party to prove that his own admission is, in fact, incorrect. Proving that there was no consideration for a document in suit does not amount to varying the terms of the contract and in no way militates against the main provisions of S. 92. A.I.R. 1934 All. 496=148 Ind. Cas. 1124.

——S. 92 — Consideration — Promissory note mentioning cash consideration—Absence of money passing—Real consideration, if can be proved.

A had to pay a sum of Rs. 50 to **B** in consideration of the latter withdrawing a suit. **A** had no ready cash to pay to **B** but **C** agreed to pay to **B** for him. **B** accepted that mode of payment and had his suit dismissed. A promissory note was executed by **A** in favour of **B** mentioning cash consideration though actually no cash was paid:

Held, that the fact that no money was actually produced and changed hands, would not alter the rights and obligations of the parties arising from the arrangement, and there was nothing in the transaction which could attract the application of S. 92, Evi. Act. A.I.R. 1933 All. 576=1933 A.L J. 1364=146 Ind. Cas. 607.

——S. 92, Provisos 1 and 3—Consideration—"Any obligation", meaning of—Agreement that consideration be paid on happening of contingency, admissibility of.

The words "any obligation" in proviso 3 to S. 92, means "any obligation" whatever under the contract and not some "particular obligation" which the contract may contain.

Where one party to a document alleged that the consideration stated in the document to have passed did not really pass, and the other party set up an agreement to the effect that consideration was not to be paid until a particular contingency happened:

Held, that evidence of the agreement could be given and received, and that if taken as a recital of a term the agreemet might come under S. 92, proviso (1). A.I.R. 1932 Cal. 708=36 C.W.N. 451=59 Cal. 1111=143 Ind. Cas. 241.

——S. 92—Consideration—Want of consideration—Evidence as to.

Section 92, Evi. Act, does not preclude proof to show total want of consideration even though there is a recital in the deed that consideration was received in cash. ('31) 32 P.L.R. 577=134 Ind. Cas. 102.

——S. 92—Consideration—Want of consideration or failure of consideration may be proved—But party cannot prove that amount of consideration agreed upon was more or less than that stated in document.

It is open to a party to prove want of consideration or failure of consideration or a difference in kind of consideration, but it is not open to him to prove a variation in the amount of consideration. The difference in kind, that is the consideration mentioned, must be wholly absolute; a mere omission to mention some portion of the consideration will not come within the proviso, since such an omission is clearly a variation in the terms of the contract. Recitals then as to the kind of consideration or as to the actual payment of consideration may be shown to be false. Recitals as to the amount of consideration cannot be shown to be false since the amount of consideration is clearly a term of the contract. It is therefore not open to parties to the document to give evidence that the amount of consideration agreed upon was more or less than what is stated in the document. 124 Ind. Cas. 508=1930 M.W.N. 156=31 M.L.W. 446=A.I.R. 1930 Mad. 659=58 M.L.J. 240.

——S. 92—Consideration.

In the case of consideration mentioned in a written document, it is open to the party contesting to show that there was no consideration, or that the consideration was different: 107 Ind. Cas. 658=A.I.R. 1929 Nag. 91.

——S. 92—Consideration.

Section 92 does not debar a party from showing by oral evidence the real character of the consideration fixed between the parties. What is not allowed is to contradict the terms of the document: 119 Ind. Cas. 738=7 Rang. 292=A.I.R. 1929 Rang. 240.

——S. 92—Consideration.

S. 92, Evidence Act, permits a party to a contract reduced into writing to establish, among other matters want or failure of consideration. A.I.R. 1927 All. 292, **Foll.**; 108 Ind. Cas. 158=26 A.L.J. 183.

——S. 92—Consideration.

Where the deed in suit recited the debt as a cash loan

Held, that defendant should be allowed to prove by oral evidence that the document in suit was not for a cash loan, but for the rent partly overdue and partly falling due later, and that the payment of the rent was made: 109 Ind. Cas. 189=5 Rang. 822=A. I. R. 1928 Rang. 79.

——S. 92—Consideration—Oral evidence on a matter on which deed is silent is admissible.

A purchaser of property at an auction sale agreed to sell back the land to the owner on condition that he paid the interest on purchase money paid by him at the auction for 16 months at 4 per cent. per mensem; the owner paid the sum of interest and the purchaser gave him the conveyance; the purchase money was not paid at the time of registration but the document was registered under S. 75, Registration Act. The document was silent as to any payment as purchase money or otherwise and there was no recital of receipt of consideration.

Held, that oral evidence can be adduced to show that no consideration passed. 106 Ind. Cas. 358=5 Rang. 636=A.I.R. 1928 Rang. 47.

——S. 92—Consideration—Suit for money—Sarkhat with unobliterated stamp produced—Loan can be proved by other oral evidence.

Where plaintiff sued defendant for a certain amount for which the defendant had executed a **sarkhat** bearing an unobliterated one anna stamp and there was no promise to pay contained in the sarkhat, but there was only an acknowledgment that a certain amount had been borrowed,

Held, that if the plaintiff was able to prove **aliunde** by oral evidence that the defendant had the money, then he was entitled to a decree. 103 Ind. Cas. 634= 25 A.L.J. 567=A. I. R 1927 All. 503.

——S. 92—Consideration—Suit on pro-note—Plea of forgery of figures.

Plaintiff sued defendant for a certain sum due on the promissory note. The defendant denied taking the principal sum mentioned in the promissory note, **viz**., Rs. 1,300, and denied signing the promissory note in the form it had assumed when the case was brought. He admitted that his signature appeared on the note, but said that when he signed it, the only entries were the figures Rs. 300, at the top of the paper, and signature at the bottom.

The case was decreed in favour of the plaintiff not because the trial Court was satisfied that the loan alleged had been made, but because the defendant had not succeeded in proving affirmatively that the note as produced was a forgery,

Held, that all the defendant admitted was that his signature appeared on the document filed and the case to be decided was not whether the plaintiff had been proved to have committed forgery but whether the plaintiff had proved that he lent the Rs. 1,300, to the defendant as he alleged and the burden of proving this loan rested on the plaintiff. 105 Ind. Cas. 361=5 Rang. 527=A.I.R. 1927 Rang. 319.

——S. 92—Consideration.

An unregistered letter is inadmissible in evidence to show that a deed of mortgage and a deed of sale executed previously were not to be acted on and no money was due under the former and no property passed under the latter: 26 M.L J. 151, **Foll.** 103 Ind. Cas. 421=A.I.R. 1927 Lah. 626.

——S. 92—Consideration—Deed—Recital of consideration—Oral evidence to show it incorrect being admissible, opposite party can let in oral evidence to prove the contrary.

Where there is a recital in a document of the payment of a certain sum of money as consideration, oral evidence is admissible to prove that the recital is incorrect as a matter of fact. Such a recital being only an averment of fact, if one party is allowed to show by oral evidence that a recital in a document is incorrect in fact, the other party must certainly be allowed to show by similar evidence that it is not incorrect and that the recital was deliberately put in, and for the purpose of showing it he must be allowed to prove what the real consideration for the document was. S. 92 does not bar such proof, for such proof is adduced not for the purpose of varying or altering any term of the written contract but only to show that the recital in it is correct. To shut out oral evidence for the purpose will be to allow a gross fraud to be perpetrated: 36 All. 537, **Foll.**; 22 All. 370 (P.C.) and 33 All. 340 (P.C.), **Foll.** 91 Ind. Cas. 612=22 M.L.W. 848=A.I.R. 1926 Mad. 35=49 M.L.J. 414.

——S. 92—Consideration—Variation from recited consideration cannot be proved.

Where the consideration entered in the sale deed was Rs. 16,000 and the defendant pleaded that the real consideration was, Rs. 18,000 and that by an oral agreement between the parties Rs. 2,000 had been left with the plaintiff for payment of his expenses in the event of any litigation arising over the transfer,

Held, that such an oral agreement is inadmissible in evidence under S. 92. 92 Ind. Cas. 787=A.I.R. 1926 Oudh 301.

——S. 92—Consideration.

By proviso of S. 92, it is open to a party or his representative to show that there is no consideration for the agreement which may have been reduced into writing and which may have been even registered. 22 All. 370, **Foll.** 82 Ind. Cas. 347=22 A.L.J. 850=5 L.R.A. Civ. 731=47 All. 7=A I.R. 1924 All. 865.

——S. 92—Consideration—Want of consideration for pro-note could be proved.

It is open to defendant who admitted the execution of the promissory note to plead want of consideration. A.I.R. 1922 All. 213, **Dist.** 74 Ind. Cas. 353=45 All. 679=21 A.L.J. 669=4 L.R.A. Civ. 315=A.I.R. 1924 All. 70.

——S. 92—Consideration—Pro-note passed to safeguard the plaintiff against a probable claim—Evidence is admissible.

In a suit on a pro-note the defence was that the promissory note in suit was passed to secure plaintiff mortgagee against any claim that might be made by the prior mortgagees, who had been paid off and from whom the defendant had failed to obtain a re-conveyance and that the note was to be returned when the reconveyance was executed,

Held, that the plea was as to the existence of a condition precedent and the same should be allowed to be proved according to S. 92, Proviso (3). 87 Ind. Cas. 37 =25 Bom. L.R. 867=A.I.R. 1924 Bom. 44.

——S. 92—Consideration—Pro-note proved void —Other consideration may be proved.

If a pro-note is void or is inadmissible, e.g., for wan of stamp, plaintiff can fall back on independent consideration if there be any. 77 Ind. Cas. 78=26 O.C. 378=A.I.R. 1924 Oudh 243.

——S 92—Consideration—Oral evidence to vary consideration in registered sale-deed is not admissible.

While want or failure or difference in kind of the consideration may be proved, evidence to vary the amount of consideration in a registered sale-deed is inadmissible, though it is open to the parties to prove by oral evidence that the actual consideration was different from what was mentioned in the deed or that there was no consideration for the deed. If such a course were permissible the protection intended by the legislature to be afforded by the adoption of the rule embodied in S. 92 of the Evidence Act would be completely nullified. 32 I.A. 113; 33 All. 340 (P.C.) **Foll.** 75 Ind. Cas. 557=27 C.W.N. 496=37 C.L. J. 552=A.I.R. 1923 Cal. 570,

——S. 92—Consideration.

Parol evidence is admissible to prove a debt, acknowledged in writing by the debtor, when such acknowledgment being unstamped is inadmissible in evidence. 74 Ind. Cas. 939=A.I.R. 1923 Lah. 301.

——S. 92—Consideration — Registered deed of relinquishment—Contemporaneous oral agreement for payment of a certain sum—Evidence of such agreement is admissible.

The plaintiff by registered deed relinquished certain portion of the land leased and agreed to pay a reduced rent for the remaining land. The plaintiff alleged that at that time there was an oral agreement between him and the land-lord that the latter would pay Rs. 200 for the recovery of which the suit was brought,

Held, that the question of existence or otherwise of the consideration can always be inquired into irrespective of what is entered in the deed. An agreement to pay as a condition precedent to the enforcement of a deed of relinquishment can also be proved under S. 92, proviso (3) and matters not referred to in the registered document but about which there was contemporaneous oral agreement could be admitted: 63 Ind. Cas. 861=44 All. 53=19 A.L. J. 816=A.I.R. 1922 All. 165.

——S. 92—Consideration—Failure of — Admissibility of evidence.

In a redemption suit defendant should be allowed to bring evidence to show that the mortgage was fictitious. 7 O.L. J. 389=58 Ind. Cas. 115.

——S. 92—Consideration—Evidence that consideration was advanced by persons other than payee, whether admissible.

Evidence to show that consideration for a pro-note was advanced by some persons other than the payee is inadmissible under S. 92 of Evidence Act. (1919) 3 U.B.R. 200=56 Ind. Cas. 259.

——S. 92 — Consideration — Non-payment—Oral evidence.

In the case of a deed of sale vendors may prove that no consideration was actually paid and oral evidence is admissible to prove the fact, though contrary to the recitals in the deed. 55 Ind. Cas. 53 (N.).

——S. 92—Consideration.

It is competent to the real purchaser under a sale-deed to prove the payment of the purchase-money by parol, even though it was expressed otherwise in the kobala. 52 Ind. Cas. 902 (Cal.).

——S. 92 — Consideration — Promissory note— Recital as to consideration—Proof of payment of a different kind, whether admissible.

Under S. 92 the parties to an instrument can show that the special consideration mentioned in the document did not really pass between them. 32 A. 113; 11 Ind. Cas. 398 (P.C.) 24 Ind. Cas. 661 Foll. (1916) M.W.N. 474=31 M.L. J. 96=3 L. W. 589=35 Ind. Cas. 301.

——S. 92 — Consideration — Endorsement on promissory note — Presumption — Oral evidence, whether admissible to prove contract between parties.

As between an endorser and an endorsee of a promissory note the endorsement is presumed to be for the consideration recited, but that presumption will not make it 'a contract in writing' within S. 92, so as to exclude oral evidence to prove what the consideration for the endorsement really was.. 32 Ind. Cas. 233 (Mad.).

——S. 92, proviso (4) — Consideration—Portion not paid—Letter undertaking to give credit for interest —Admissibility.

At the time of execution of an usufructuary mortgage-deed, a portion of the consideration was unpaid and the mortgagee passed an unregistered letter undertaking to give credit for interest on the sum if unpaid within ten days. **Held,** in a suit for redemption that the letter being unregistered was not admissible in evidence as it modified the terms of the mortgage deed; but that a separate suit might lie for the amoun due under the letter. 2 L.W. 224=28 Ind. Cas. 1861

——S. 92 — Consideration—Recitals—Sale-deed—Variation of.

A vendor is not estopped from showing that the consideration stated to have been received in the deed was not actually received. 25 Ind. Cas. 27 (All.).

——S. 92 (1)—Consideration—Illegality of consideration—Failure—Oral evidence.

Where it can be shown that the consideration for a debt was losses in gambling, oral evidence could be let in to prove this fact as it amounts to a want or failure of consideration within S. 92 (1). 35 All. 558 =11 A.L. J. 854=21 Ind. Cas. 878.

——S. 92, provisos (2) and (3)—Consideration for sale—Variation of.

Where a sale-deed stated Rs. 35,000 as consideration, evidence of an oral contract fixing the consideration at Rs. 35,000 and the discharge of a mortgage for Rs. 1,000 is not admissible under proviso 2 or 3 of S. 92 of the Evidence Act. (1913) M.W.N. 850=14 M.L.T. 385=21 Ind. Cas. 463.

——S. 92—Consideration—Term of the contract—Variance of.

If a sale-deed recites as consideration a cash price of Rs. 35,000, evidence of an oral agreement that the consideration was really Rs: 36,000 cannot be let in, as the amount of sale price is a term of the contract and evidence cannot be admitted to vary it. 38 Mad. 514=(1913) M.W.N. 847=14 M.L.T. 382=25 M.L. J. 602=21 Ind. Cas. 458.

——S. 92—Consideration—Oral evidence to vary recitals.

Oral evidence is admissible to prove that a higher price was paid for a sale than is evidenced by a sale deed itself. (1912) 1 U.B.R. 125=15 Ind. Cas. 919.

——S. 92 — Consideration — Sale-deed—Evidence that no consideration was intended to pass.

Evidence is admissible to show that consideration for a deed of sale was not intended to pass and that it

was a deed of gift. 33 All. 340=15 C.W.N. 521=8 A.L. J. 373=13 C.L. J. 510=13 Bom. L.R. 391=10 M.L.T. 23=(1911) 2 M.W.N. 370=21 M.L. J. 1126 11 Ind. Cas. 398 (P.C.).

——S. 92, proviso (1)—Consideration—vendee's right to prove consideration was less than shown in deed.

If one party proves that the consideration shown in the sale deed did not pass, the case is within proviso 1 of the section; the other party can give oral evidence to prove the real consideration. 11 Ind. Cas. 398; 33 A. 340 (P.C.) Foll. 36 All. 537=12 A.L. J. 969=24 Ind. Cas. 661.

——S. 92—Consideration—proof of.

The section does not prevent one of the parties to the contract from showing, either that there was no consideration or that it was different from that stated in the document. 10 C.L. J. 27=2 Ind. Cas. 953.

——S. 92—Consideration, proof in variance— Whether evidence could be offered to prove actual transaction.

Evidence is admissible to show that consideration mentioned in a deed as having been paid never passed and also to show that the consideration specified in the deed was satisfied in a different way from that mentioned in the document itself. I.L.R. 18 A. 168; 22A. 370 P. C. ref. to. Where therefore a deed recited that a payment of Rs. 1,000 was made in cash—**Held,** that it could be shown that the payment was not made in cash but in some other way. (1907) A.W.N. 181=4 A.L. J. 441.

——S. 92—Consideration.

But evidence is admissible to prove any controversy as to the payment of consideration money. (1905) 27 A. 612=1905 A.W.N. 129=2 A.L. J. 360.

——S. 92—Consideration—Recital as to —Oral evidence to contradict—Rebuttal by oral evidence—One consideration recited, another proved.

Where one of the parties to a deed is under any of the provisions of S. 92 of the Evidence Act permitted to go into oral evidence, it is open to the other party also to rebut that evidence by oral evidence. Where a deed recited the payment of a certain consideration and the plaintiff denied the passing of any consideration and adduced oral evidence in support of his contention; it is open to the defendants to go into oral evidence to show that there was some consideration for the deed, though not the same as that recited in the deed. (1900) 5 C.W.N. 158.

——S. 92—Recitals—Consideration not paid,

Though the sale-deed records that consideration has been received, the vendor may prove that it is not actually paid or that the one paid was different from that recorded in the sale-deed. 6 Ind. Cas. 477 (Cal.).

——S. 92—Recitals—Consideration.

Consideration when not recited in the document may be proved and a different consideration may be proved from that stated in the document. 23 M. 94 doubted. 7 M.L.T. 81=11 Cr.L. J. 213=5 Ind. Cas. 754.

5. Decree.

——S. 92—Decree if covered by.

A decree does not come within the purview of S. 92 of the Evidence Act. That section really refers to a contract, grant or other disposition of property entered into by agreement between parties to it. It cannot refer to a decree which is imposed on one of the parties by **force majeure**. I.L.R. 58 Mad. 994, Rel. on. 1950 A.W.R. 351=A.I.R. 1950 A. 437=1950 A.L. J. 261.

——S. 92—Decree—Variation of by parties— Oral evidence, admissibility of, to prove variation.

Section 92, Evi. Act, does not apply to decrees because the section contemplates only those documents which have been voluntarily executed by one person in favour of another. Decrees contain orders imposed by a superior authority on the will of the parties and they cannot, therefore, be classified as documents **inter partes**. Consequently, oral evidence to prove that the decree had been varied by the parties and a settlement had been made is admissible. A.I.R. 1943 Pesh. 29=207 Ind. Cas. 342.

——S. 92 — Decree — Decree based on award ambiguous—Examination of arbitrator—Court directing execution—Legality of.

Section 92, Evi. Act, does not govern decrees and hence where a decree based on an award is ambiguous in its terms, it is open to the Court to examine the arbitrator and on the basis of his statement, direct execution to proceed. A.I.R. 1937 Lah. 168=165 Ind. Cas. 429.

——S. 92—Decree.

Decree—Judgment-debtor agreeing to do something in future—Decree-holder agreeing to accept contract in place of decree—Decree is extinguished—Agreement need not be in writing. A.I.R. 1936 Pat. 619=15 Pat. 390=18 P.L.T. 110=2 Cut. L. T. 40=165 Ind. Cas. 940.

——S. 92—Decree, terms of — Whether can be modified by agreement between parties.

A decree or its terms cannot be varied or modified except by the Court; it is a matter of procedure and not of rules of evidence. The parties cannot, by their agreement alone vary or modify the terms of the decree, whether the agreement be oral or written. A.I.R. 1935 Mad. 860=1935 M.W.N. 906=42 M L.W. 365=69 M. L. J. 451=58 Mad. 994=158 Ind. Cas. 187 (F.B.).

——S. 92—Decree of Court.

Oral evidence is not admissible to prove an agreement prior or subsequent to a decree contradicting or varying the terms of the decree. 1930 M.W.N. 240=125 Ind. Cas. 543=A.I.R. 1930 Mad. 673.

——S. 92—Decree.

Oral evidence to prove a subsequent adjustment under which part of a decree was paid and the rest agreed not to be executed against the judgment debtors is not inadmissible by reason of S. 92. 113 Ind. Cas. 760=A.I.R. 1929 All. 79.

——S. 92—Decrees.

Where a judgment-debtor sues for damages for the loss of his land owing to the execution of a money-decree being allowed to proceed after a compromise between the decree-holder and himself, the alleged oral adjustment of the decree, though not certified, is not inadmissible under S. 92. There is nothing whatever to prevent the parties from entering into an oral agreement for the settlement of decrees for money. 114 Ind. Cas. 682=6 Rang. 573=A.I.R. 1928 Rang. 316.

——S. 92—Decree.

Oral agreement not to proceed against a certain defendant beyond a certain limit modifies the decree by restricting that defendant's liability in a manner for which the decree does not provide and as an oral agreement it offends against the terms of S. 92, Indian Evidence Act. A.I.R. 1922 All. 7 and S. A. 52 of 1920 **Foll.**; 105 Ind. Cas. 248=50 Mad. 897=26 M.L.W. 386=1927 M.W.N. 630=A.I.R. 1927 Mad. 911=53 M.L.J. 533.

——S. 92—Decree—Section 92 does not apply to decrees of Courts.

Sections 91 and 92 refer only to what are known as "dispositive documents," and the words "or any matter required by law to be reduced to the form of a document" must be read in that sense. A.I.R. 1922 All. 13, **Dissented from.** Hence a decree does not come within the purview of S. 92. 91 Ind. Cas. 705=A.I.R. 1926 Cal. 643.

——S. 92—Decree—Oral contract in substitution of a decree is not admissible.

Per **Walsh, J.**—Under S. 92 of the Evidence Act evidence of the alleged oral agreement substituting a new executory contract for the original decree is inadmissible. 64 Ind. Cas. 990=44 All. 258=20 A.L.J. 65=A.I.R. 1922 All. 13.

——S. 92—Decree.

Section 92 of the Evidence Act does not bar the oral evidence to prove an agreement by way of adjustment of a decree as the R. 2 of O. 21, C.P. Code, contemplates the taking of evidence to prove the adjustment. 60 Ind. Cas. 316=16 N.L.R. 204.

——S. 92, proviso (4) — Decree of Court—Agreement to rescind or modify.

Evidence is never admissible to prove the existence of a distinct subsequent oral agreement to rescind or modify the decree of a Civil Court. 6 N.L.R. 123=8 Ind. Cas. 279.

6. Discharge.

——S. 92—Scope of—Plea of discharge not hit though an agreement to give a discharge in future may be.

Though an agreement to give a discharge in future may, if it is oral, be hit by the section, there is nothing in the section to preclude evidence being let in, in proof of an oral agreement which is otherwise valid and enforceable and in pursuance of which an amount somewhat less than the amount due under the mortgagee in full discharge of the mortgage. 62 L.W. 221=1949 M.W.N. 136=A.I.R. 1949 Mad. 852=(1949) 1 M.L.J. 295.

——S. 92—Discharge.

Section 92 (4) does not touch any act of a creditor which extinguishes a debt by taking a smaller sum of money. Where the act of the creditor does not extinguish the debt but gives only better terms than before which have yet to be worked out, the principle does not help the debtor and S. 92 (4) prevents the admission of such an agreement. And what S. 63, Contract Act, permits is not an agreement to remit but an actual remission. But where there is no question of any writing being admissible or inadmissible with reference to the provisions of Registration Act, if the writing itself does not purport to extinguish the mortgage bond, it would be admissible in evidence and a plea of discharge based on the fact that the sum shown in the endorsement was taken in full discharge and the discharge was given to the obligers orally would stand on a different footing from the admission of a writing evidencing the payment. 30 M.L.W. 293=A.I.R. 1929 Mad. 764.

——S. 92—Discharge—Suit or mortgage—Mortgagor alleging compromise and payment in pursuance, evidence of discharge inadmissible.

Plaintiff brought a suit on a registered mortgage passed by defendant. The defendant contended that there was a compromise in the month of January, 1923, between the plaintiff and defendant by which it was agreed that on the defendant paying Rs. 1,500 more to the plaintiff the entire claim for interest due till the end of January, 1923, would be discharged and the balance of interest would be remitted; that accordingly on 1st February, 1923, the defendant paid Rs. 1,500 to the plaintiff in full satisfaction of the claim for interest up to the end of January, 1923.

Held, that the alleged discharge was based entirely upon the alleged oral agreement, and unless the oral agreement is proved the discharge could not be established and the evidence of the oral adjustment being inadmissible under S. 92 (4), the alleged discharge was also inadmissible. 115 Ind. Cas. 382=30 Bom. L.R. 1455=A.I.R. 1928 Bom. 522.

——S. 92—Discharge—Oral evidence to prove satisfaction of claim is admissible.

While no oral evidence can be given to contradict or modify the original contract, there is nothing to prevent oral evidence being adduced under prov. 4, S. 92 in order to prove satisfaction of the claim. 110 Ind. Cas. 612=6 Rang. 191=A.I.R. 1928 Rang. 144.

——S. 92—Discharge.

In a mortgage suit it is open to the mortgagor to prove that the mortgage has been satisfied not merely by payment in full of the amount due thereon but by part payment and remission of the balance. 98 Ind. Cas. 860=44 C. L. J. 269=A.I.R. 1927 Cal. 27.

——S. 92—Discharge.

Although an endorsement on a mortgage deed in extinguishment of the mortgage, if unregistered, is inadmissible in evidence, other evidence as to the redemption of the mortgaged property or payment of the full amount of the mortgage money can be given. 91 P. L. R. 1904, **Foll.** 100 Ind. Cas. 129=A.I.R. 1927 Lah. 237.

——S. 92—Discharge.

An oral agreement to receive a lesser amount than is actually due on a mortgage in full discharge of it, as also its actuai discharge, cannot be proved under S. 92 (4) of the Evidence Act and S. 17 (b) of the Registration Act. 42 Mad. 41 (F.B.); 27 Ind. Cas. 269; 34 M.L.J. 79 and 44 Bom. 55, **Foll.** 100 Ind. Cas. 54=A.I.R. 1927 Mad. 1111=52 M.L.J. 224.

——S. 92—Discharge—Extinguishment of liability created by registered document can be proved.

It is a well established rule that a subsequent oral agreement, varying the terms of a registered lease, or suggesting that the rent payable was really less than what was stated in the registered **kabuliyat** or lease, cannot be proved. But a liability created by a registered instrument may be proved to have been extinguished by letting in admissible evidence (including oral evidence) of payment of that liability or by letting in admissible evidence of any other transaction which operates as a mode of payment. 37 Mad. 423, **Foll.** 94 Ind. Cas. 169=24 A. L. J. 548=A.I.R. 1926 All. 445.

——S. 92—Discharge.

The evidence to prove a discharge of the debt but not to vary or add to the terms of the bond is not excluded by S. 92. A. I. R. 1926 Cal. 170, **Foll.** 96 Ind. Cas. 11=30 C.W.N. 710=44 C. L. J. 449=A.I.R. 1926 Cal. 906.

——S. 92—Discharge—Registration Act, S. 17.

Oral evidence may be admitted to prove that a mortgage bond has been discharged partly by payment and partly by release of the debt and there is nothing in S. 92 of the Evidence Act to prevent such evidence being admitted. 91 Ind. Cas. 757=42 C.L.J. 582=30 C.W.N 271=A.I.R. 1926 Cal. 170.

——S. 92—Discharge.

Where in a suit on a pro-note in answer to the demand the defendant pleads that he has already discharged the note according to the method agreed upon between the plaintiff and himself, there can be no bar under S. 92 to prevent proof of that agreement as it is a method of payment or discharge. 92 Ind. Cas. 393=A.I.R. 1926 Mad. 537.

——S. 92—Discharge.

An oral agreement of satisfaction or discharge of a mortgage debt can be proved by oral evidence. 9 All. 392; 4 C.W.N. 304; 16 C.W.N. 137 and 11 C. L. J. 39, Foll. 90 Ind. Cas. 450=A.I.R. 1926 Nag. 220.

——S. 92—Discharge—Discharge of debts can be proved, though it conflicts with statements of fact made in a deed.

Where the mortgagors are setting up an agreement between them and the mortgagee to the effect that the latter had agreed to allow them credit for certain items, they are not in any way contradicting, varying, adding to, or subtracting from, the terms of the registered deed of mortgage. They are merely showing an agreement relating to the payment and the consequent discharge in part of the mortgage debt. Even a statement of fact made in a written instrument could be contradicted, as the prohibition relates only to the varying, adding to subtracting from, or contradicting the terms of a contract in writing. 14 C.L. J. 507, Foll, 95 Ind. Cas. 1019=1 Luck. 160=13 O.L. J. 95=3 O.W.N. 248=A.I.R. 1926 Oudh 273.

——S. 92—Discharge—Mortgage—Oral sale for what purposes admissible.

Per Phillips, J. (Spencer, J. dissenting.) An oral sale following a mortgage is not an agreement modifying or rescinding the mortgage but is one discharging the mortgage and although it does not effect a legal transfer of the property, yet there is nothing in S. 92, Evidence Act to exclude evidence of the transaction as showing discharge of mortgage debt and as showing the nature of possession by the mortgagee thereafter as owner. 14 C.L.J. 507; 30 M. 231; 26 M. 195; 27 M. 368 Foll. 37 M. 423 Dist. 31 Ind. Cas. 678 (Mad.).

——S. 92—Discharge—Oral—Remission—Registered lease.

An intimation from the land-lord that the reduction hitherto allowed would cease after the date of the letter, discharges the tenant from paying the contract rate for a particular period. No consideration is necessary for this remission and does not contravene S. 92. (1916) M.W.N. 149=32 Ind. Cas. 703.

——S. 92—Discharge of mortgage—Invalid oral sale.

Oral evidence is admissible to prove discharge of a mortgage by payment of money or by receipt of profits, but not to prove a discharge by an invalid oral sale of the equity of redemption in a portion of the mortgage property in discharge of the mortgage debt. 37 Mad. 423=23 M.L.J. 339=12 M.L.T. 425=(1912) M.W.N. 854=15 Ind. Cas. 343.

——S. 92—Discharge—Variation of terms—Subsequent oral agreement—Usufructuary mortgage.

An agreement between a mortgagor and the usufructuary mortgagee that a property not mortgaged shall be given possession to the mortgagee and that the profits should be applied towards the principal, is admissible in evidence. 18 Ind. Cas. 324 (All.).

——S. 92, proviso 4—Discharge—Registered bond—Agreement to take less in satisfactson.

A creditor can sue on his original registered bond which cannot be varied by an oral agreement to take part satisfaction, for until it is made and the creditor remits the balance, the original contract remains intact. 18 Ind. Cas. 847 (Cal.).

——S. 92—Discharge—Oral evidence that payment made in mode different from that mentioned in document, if admissible.

The only thing laid down by S. 92 is that the terms of the contract may not be varied or subtracted from or contradicted and not that no statement of facts in a written statement may be contradicted. 22 C. 370, 9 A. 392, Rel. Therefore oral

evidence to prove that certain sums payable as profits to a mortgagor have been paid not in cash as required by the document but in another mode is admissible. 16 C.W.N. 137=14 C. L. J. 507=11 Ind. Cas. 713.

——S. 92—Discharge — Provision for endorsement—Evidence 'aliunde'.

Though there is a covenant is a bond that all payments are to be endorsed on the back of the deed and that no payment not so entered is to be recognized, the debtor is entitled to credit for payments actually made if otherwise proved. 3 Ind. Cas. 291 (Cal.).

——S. 92—Discharge—Mode of oral evidence.

An agreement by which the mortgagee was to continue possession for 7 years and to get the profits for his dues could be proved by oral evidence as the effect of the agreement was not to vary or add to the terms of the document but only to provide a mode of discharge. 11 C.L.J. 39=2 Ind. Cas. 13.

——S. 92—Discharge—Adjustment of decree—C. P. Code, O. 21, R. 2.

S. 92 of the Evidence Act does not exclude oral evidence to prove the adjustment of a decree under O. 21, R. 2 of the C. P. Code. 9 N.L.R. 123 overruled. 16 N.L.R. 204=60 Ind. Cas. 316.

——S. 92, proviso 4—Discharge—Agreement for maintenance—Subsequent modification of contract — Oral evidence — Enjoyment of lands for past maintenance—Plea of discharge proof of.

Plaintiff sued for arrears of maintenance due to her under a registered deed executed by the defendant in her favour. The defendant pleaded a subsequent oral agreement (settlement) between himself and the plaintiff by which he had placed her in enjoyment of certain lands in lieu of her claim under the deed. Held, that the settlement pleaded was an agreement to rescind or modify the original agreement within the meaning of the 4th proviso to S. 92 of the Evidence Act, and, as such, inadmissible in evidence, and that plaintiff was entitled to future maintenance at the originally stipulated rate. Held, also, that it was open to the defendant to plead discharge of the obligation to pay past maintenance by reason of plaintiff's enjoyment of the lands in pursuance of the agreement to so discharge his liability even though the agreement itself could not be proved otherwise. 17 M.L.J. 30=30 M. 231.

——S. 92—Discharge — Mortgage—Subsequent oral agreement to be put in possession in lieu of interest.

An oral arrangement between the parties to a simple mortgage by which the mortgagee is put in possession in order that he may enjoy the profits apply them towards the satisfaction of interest due, is perfectly legal inasmuch as such an arrangement does not vary, contradict or add to the terms of the original deed but only provides for the satisfaction of one of its conditions. 3 O.L.J. 244=19 O.C. 166=34 Ind. Cas. 745.

7. Document requiring registration,

——S. 92, proviso 4—Document requiring registration.

Where in a suit to enforce a mortgage, one of the defendants who had purchased a portion of the property pleaded that in pursuance of an agreement by the mortgagee to release the portion purchased by him, he had paid a portion of the amount of the mortgage and produced an unregistered receipt, which contained a recital of such release:

Held, that there was nothing in law to prevent an oral release as between the mortgagee and an intending purchaser being proved, and the defendant was entitled to prove such release notwithstanding the fact that the receipt was unregistesed and inadmissble in evidence. A. I. R. 1935 Mad. 113 (114)=40 M.L.W. 942=7 R.M. 369=68 M.L.J. 91=58 Mad. 371=153 Ind. Cas. 668.

——S. 92—Document requiring registration—Burden of proof—Title of plaintiff based on gift—Defendant contesting.

Where the plaintiff sets up a certain title and a person interested in the property contests it on the ground of its invalidity, the plaintiff is bound to prove his claim. When the title on which the plaintiff wishes to rely constitutes a gift, it requires compulsory registration and, if unregistered, it is not admissible in evidence and it is not open to the plaintiff to prove secondary evidence in support of his claim. A.I.R. 1933 Pesh. 67=146 Ind. Cas. 363.

——S. 92—Document requiring registration — Document of agreement not incorporated in registered instrument—Admissibility.

Where there was a gift of immovable property by a registered deed and a written agreement of the same date but not registered, to the effect that the donees were to have no right in the properties gifted to them, till the death of the donor:

Held, that since the document of agreement was not incorporated in the identure itself, which was a registered instrument it would be contrary to the provisions of S. 92, Evidence Act, to read the terms of this agreement as being incorporated in the indenture in asmuch as it would contradict or vary terms of the indenture to do so. The agreement should not be read as part of the transaction evidenced by the indenture thereby converting the character of the latter from that of a gift to that of a will. A.I.R. 1933 Rang. 418 (2)=149 Ind. Cas. 1113.

——S. 92—Document requiring registration.

Agreement to give wife house to dwell in return for consent to husband to marry again—Wife taking possession of house—Husband becoming insolvant:

Held, that agreement was for valuable consideration and was valid. Even if the writing required to be registered, the arrangement was one which need not have been reduced to writing, and could be proved by oral evidence by the first wife. A.I.R. 1932 Bom. 602=34 Bom. L.R. 1317=140 Ind. Cas. 745.

——S. 92, proviso 4—Registration Act, S. 17—Agreement varying terms of tenancy permanently—Registration.

An agreement permanently varying the terms of a tenancy to the benefit of the tenant is really a new lease on more favourable terms, and requires registration. The mere fact that it is a fresh lease does not make it the less a lease. A.I.R. 1931 Mad. 751 =135 Ind. Cas. 345.

——S. 92—Documents requiring registration.

When an "award" is found in reality a partition deed and hence inadmissible in evidence for want of registration, no secondary evidence can be admitted to prove the partition: 10 P. R. 1917, Foll. 113 Ind.Cas. 87=10 L.L.J. 169.

——S. 92—Document requiring registration.

So a deed of gift of immovable property cannot be received in evidence if unregistered nor can the terms of the instrument be proved by oral evidence: 59 Pun. R. 1914, Foll. 94 Ind. Cas. 7=8 L.L.J. 156=27 P.L.R. 256=A.I.R. 1926 Lah. 372.

——S. 92—Document requiring registration.

Where the rate of interest payable on a mortgage for an amount exeeding Rs. 100 is modified by an agreement, the agreement is compulsorily registrable and oral evidence to prove its terms is not admissible under S. 92, proviso (4) of the Evidence Act. 93 Ind. Cas. 95=A.I.R. 1926 Nag. 321.

——S. 92—Document requiring registration—Registered mortgage rescinded only by registered document.

In the mortgage there was a forfeiture clause to the effect that the mortgagor was to be debarred from redeeming the property after the expiration of two years from the date of the mortgage. A year afterwards the mortgagor said, that he, by a pyat paing, made over the land to the defendants who promised to allow redemption at any time.

Held, the subsequent oral agreement could not be proved. It amounts to an agreement to rescind the mortgage and is by law required to be in writing and registered. 74 Ind. Cas. 154=1 Bur. L.J. 193=A.I.R. 1923 Rang. 102.

——S. 92—Document requiring registration—Deed of partition if to be registered—Registration Act (III of 1877) Ss. 17 (b). (h) 49—Evidence Act (I of 1872) S. 92—Document admissibility in evidence—Specific performance of agreement to effect partial partition—Suit, maintainability of—Part performance — Joint owner making valuable improvements right of —Commissioner, if can enquire into a joint character of property.

A deed of partition, either declaring certain rights over immoveable property, or reciting the allotment of land and containing an agreement to act accordingly is compulsorily registrable. 13 M. 281. 2 Bom. L.R. 800 followed 2 B. 635 explained. A document though not admissible as creating an interest in land is receivable in evidence for a collateral purpose namely, for the

purpose of obtaining specific performance of the agreement 5 B. 153. 10 C. 315, referred to. When men agree to preserve by writing the remembrance of past events of which they wish to create a memorial either with a view to lay down a rule for their own guidance, or in order to have in the instrument a lasting proof of the truth of what is written, the truth of the written acts must be established by the acts themselves, that is by the inspection of the originals. A suit for specific performance of an agreement to effect a partial partition of joint property is not maintainable. If there is part performance by the party seeking relief, and to the knowledge of the other party, proof will be admitted of the verbal contract in cases where an action for specific performance would lie. But part performance is only an exception to the plea of the statute of frauds in an action for specific performance. An act done by a party in pursuance of the parol agreement, in order to be a part performance of it, must not only be one which could not be done with any other view or design than to perform it, but must also be such as could not be undone without causing the party unliquidated damages. Hence if it is possible to restore the parties to precisely the same position as they occupied before they entered into the parol agreement, the doctrine of part performance will not ordinarily be allowed. If one joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity will take that fact into a consideration upon a partition and in some way will make an allowance to him therefore in addition to his rateable share of the property. Swan v. Swan 8 Price 571, 22 R. R. 770 Pases v. Swan 29 L. J. ch. 159. Watson v. Gass 51 L.J. Ch. 480. Williams v. Williams 68 L. J. ch. 528 and In Re Jones, 2 ch. 491 (478) referred to. The question whether a particular property, alleged to be joint really possesses that character must be determined before the preliminary decree for partition is made. 6 C.L.J. 105 foll. (1910) 12 C.L.J. 25=15 C.W.N. 375=6 Ind. Cas. 346.

8. Evidence of conduct.

——S. 92—Evidence of conduct—Widow obtaining re-conveyance of property sold by husband —Her own assertion and conduct in connexion with transaction—Admissibility.

Section 92, applies only as between the parties to a transaction and those claiming under them respectively. Where the real question is, in what character the widow acted when she obtained a re-conveyance of the properties sold by her husband, her own assertion and conduct in connexion with the transaction is certainly evidence against the persons who claim under her and, therefore, is admissible. A.I.R. 1941 Mad. 345=1940 M.W.N. 19.

——S. 92—Evidence of conduct—Gift-deed—Construction—Conduct of parties—Relevancy.

Where the language of the deed is clear and free from ambiguity, any consideration of the conduct of the parties with a view to ascertaining the intention of the grantor or the donor is beside the point. A.I.R. 1941 Oudh 369=1941 O.W.N. 412= 1941 A.W.R. 243=193 Ind. Cas. 611.

——S. 92—Subsequent conduct—Relevancy.

So far as the interpretation of a document is concerned, the subsequent conduct of the parties to it cannot be taken into account, but the surrounding circumstances can certainly be taken into account. A.I.R. 1935 All. 729=1935 R.D. 303 (2) =1935 A.W.R. 753=156 Ind. Cas. 53.

——S. 92, proviso 1—Conduct—Fact that written instrument was not intended to be acted upon from very beginning—Proof—Direct evidence.

The circumstances enumerated in proviso 1 to S. 92, Evidence Act, e.g., fraud, etc., are illustrative and not exhaustive. The fact that an instrument, registered or unregistered, was not intended to be acted upon from the very beginning is a fact which comes within proviso 1 and can be proved either by direct oral evidence or by indirect or circumstantial evidence furnished by the conduct of the parties. (1935) 39 C.W.N. 888=164 Ind. Cas. 437.

——S. 92—Evidence of conduct.

The Courts can go behind the apparent terms of a rigistered document and hold that, what purports to be a mortgage with possession can, by the subsequent conduct and intention of the parties, be shown to be in fact not a mortgage with passession, but a contract merely hypothecating the land by way of collateral security. A.I.R. 1935 Pesh. 176.

——S. 92—Subsequent conduct.

Where the words in a deed are clear, the subsequent conduct of parties is an irrelevant consideration. A.I.R. 1934 P.C. 58=11 O.W.N. 225=39 M.L.W. 291=38 C.W.N. 325=1934 A.L.J. 295= 36 Bom. L.R. 390=66 M.L.J. 399=1934 M.W.N. 300=18 R.D. 112=61 C. 313=59 C.L.J. 257=3 A.W.R. 193=61 I.A. 35=147 Ind. Cas. 884 (P.C.).

——S. 92—Previous and subsequent conduct of parties, if relevant.

A grant is to be construed by its own terms and not by the previous or the subsequent conduct of the parties. A.I.R. 1934 Bom. 434=36 Bom. L.R. 761=154 Ind. Cas. 278.

——S. 92—Evidence of conduct.

Burmese Buddhist having three wives—He and his surviving wife executing a "deed of partition of inheritance"—Share transferred to children of the other wives absolutely in right, title and interest—Power of-attorney by children in favour father alone to manage property and enjoy usufruct, but with no power to deal with corpus—Children agreeing not to cancel the power during father's life-time:

Held, that the oral evidence of intention was inadmissible under the provisions of S. 92, Evidence Act and the evidence of conduct was only relevant in so far as it led to the inference of a contemporaneous oral agreement. The power-of-attorney could not be used to aid in the interpretation of the first document, the tems of which were perfectly clear and explicit, except in so far as it was evidence of the conduct of the parties leading to the inference of the existence of a separate oral agreement. On the terms of the documents themselves, it was impossible to construe them as a will. A.I.R. 1934 Rang. 129=150 Ind. Cas. 966.

——S. 92—Subsequent conduct.

Where a registered document like a mortgage sets out the terms of the contract, namely the interest, it is not proper to look at the subsequent parol conduct of the parties for the purpose of interpreting the document. A.I.R. 1933 Mad. 171 =145 Ind. Cas. 762.

——S. 92—Evidence of conduct—Document silent as to interest.

It is open to one of two joint transferees to prove what interest, if any, is taken by the other where the document does not specify the extent of the shares, and evidencc of subsequent conduct to prove this is not barred by S. 92 between the transferees inter se. 10 All. 421; A.I.R. 1927 Mad. 1102, Foll.; N. E. Ry. v. Hastings, (1900) A. C. 260, Ref. 32 M.L.W. 160=126 Ind. Cas. 492. A.I.R. 1930 Mad. 590=

——S. 92—Evidence of conduct.

The evidence of the acts and conduct of parties for the purpose of showing that the main or essential terms of a registered instrument have been varied is not admissible, for an agreement is nonetheless oral, although it is to be inferred from the conduct of the parties: 6 C.W.N. 242, Dist; 38 Cal. 892 (P.C.); 39 Cal. 284; 41 Cal. 493 (P.C.); 20 C.W.N. 347 and other cases discussed; 20 C.W.N. 347, Not appr. 116 Ind. Cas. 733=56 Cal. 201=A.I.R. 1929 Cal. 437.

——S. 92—Evidence of conduct.

Evidence of subsequent acts and conduct is admissible to prove the character of a deed: 72 P.R. 1901; 28 Cal. 256 and A.I.R. 1925 P.C. 75, Ref. 117 Ind. Cas. 907=A.I.R. 1929 Lah. 875.

——S. 92—Evidence of conduct.

The rule, that the conduct of the parties in respect to an instrument may be looked to in construing a document, is subject to this reservation that it can be admitted only after every other means to construe a deed have been exhausted. 108 Ind. Cas. 418=A.I.R. 1928 Pat. 225.

——S. 92—Evidence of conduct.

Where a gift has been effected by an instrument only the conduct of the parties can be considered for the purpose of showing that the transaction is not what it purports to be. 104 Ind. Cas. 299= 1 L.C. 97=A.I.R. 1927 Oudh 278.

——S. 92—Evidence of conduct.

A registered deed has to be cancelled by a registered deed and evidence of an oral agreement to rescind it is shut out by S. 92 (4) of the Evidence Act. So also the conduct showing that the registered transaction is at an end is equally shut out by the said section. 32 Mad. 281, Foll. 87 Ind. Cas. 29=A.I.R. 1925 Nag. 459.

——S. 92—Evidence of conduct.

Where the conditions in a grant are clear and unambiguous, evidence of the conduct of the parties leading to a different inferenee is inadmissible. 82 Ind. Cas. 204=A.I.R. 1925 Pat. 228.

——S. 92—Evidence of conduct.

Evidence of the acts and conduct of parties is not admissible to show that the document was really not what it purported to be, that is that it was not a mortgage but really a sale. 71 Ind. Cas. 1030=A.I.R. 1924 Cal. 357.

——S. 92—Evidence of conduct.

Evidence of subsequent acts and conduct is admissible to prove the character of a deed. 82 Ind. Cas. 686=2 Rang. 253=3 Bur. L. J. 85=A.I.R. 1924 Rang. 283.

——S. 92—Evidence of conduct.

The weight of authority so far as the Calcutta High Court is concerned is in favour of the admissibility of evidence of the acts and conduct of parties, and this Court has held upon the subsequent acts and conduct of the parties, that certain terms of a contract were never intended to be acted upon, i. e., from the very beginning. 77 Ind. Cas. 154=27 C.W.N. 336=A.I.R. 1923 Cal. 417.

——S. 92—Evidence of conduct.

In order to prove evidence of a contemporaneous oral agreement, oral evidence of subsequent conduct can under no circumstances be admitted. 45 Cal. 320 (P.C.), Foll. 77 Ind. Cas. 523=4 Lah. 258=5 L. L. J. 438=A. I. R. 1923 Lah. 548.

——S. 92—Evidence of conduct.

Evidence of conduct is admissible if the contract is ambiguous in its terms. But where the terms of the contract are perfectly plain, evidence of conduct is not admissible to vary the terms of the agreement between the parties. 61 Ind. Cas. 818=33 C.L.J. 332=25 C.W.N. 308=A.I.R. 1921 Cal. 212.

——Ss. 92, 94 and 95—Evidence of conduct—Intention of the parties—Subsequent conduct.

Subsequent conduct of parties is not admissible to construe a document when its terms are unambiguous. The evidence may be given to explain but not to contradict the doubtful terms of a document. A lease purported to grant a jagiri settlement requiring the lessee to bring the land under cultivation through tenants together with a certain period of remission during which no rent was to be paid, Held, evidence of subsequent conduct of the parties was admissible to make clear the intention and purpose of the tenancy and to determine the status of the tenant. 21 C.W.N. 505=39 Ind. Cas. 934.

——S. 92—Evidence of conduct—Intention of parties—Mortgage or sale.

Evidence of conduct is admissible to show that a document which is apparently a mortgage is in reality a deed of sale. 28 C. 256 Foll. 35 Ind. Cas. 102 (Cal.).

——S. 92—Evidence of conduct—If admissible—Lease—Lower rent.

Evidence that since the execution of the kabuliyat the tenant paid rent at a lower rate than that stated in the kabuliyat was admissible to show that intention of the parties was that the kabuliyat was not intended to be acted upon or that there had been a waiver of the terms of the lease. 6 C.W.N. 242 Foll. 20 C.W.N. 347=32 Ind. Cas. 251.

——S. 92—Evidence of conduct—Registered lease—Rent.

Any variation of rent reserved by a registered lease must be made by a registered instrument and oral evidence cannot be admitted to prove such variation. An agreement is none the less oral because it is to be inferred from the conduct of the parties. Where leases are not registered, oral evidence is admissible to prove any variation of the terms. 20 C.W.N. 680=32 Ind. Cas. 185.

——S. 92—Evidence of conduct—Relevancy of.

The acts and conduct of the parties can be proof either of contemporaneous oral agreement varying the terms of the contract, or of a subsequent oral agreement having the same effect. In the former case the evidence is excluded by S. 92 and in the latter case, by proviso 4 of S. 92. 22 M. 261, Foll. 24 C. 20; 28 C. 256; Expl. Per Gupta, J.:—Mere acceptance of a reduced rent though a full acquittance of rent for the particular year for which it was paid cannot operate as binding contract between the parties without proof of the agreement which formed the basis of the reduction. 12 C.L.J. 439=8 Ind. Cas. 790.

——S. 92—Evidence of conduct—Admissibility.

No oral evidence is admissible to prove a verbal surrender and abatement of rent of a holding held under a registered lease, nor is the conduct of the parties, e.g., payment of rent at a reduced rate, admissible to prove the same. 13 C.L.J. 284=8 Ind. Cas. 47.

——S. 92—Evidence of conduct.

Subsequent admission as to the true meaning of a document or the subsequent conduct of a party to it cannot be received in aid of the construction of the document. 12 C.L.J. 378=6 Ind. Cas. 467.

——S. 92—Evidence of conduct—Acceptance of less rent—Lease registered.

No oral agreement is admissible for altering rent fixed by a registered lease, though the land-lord may have accepted less rent, he can demand the rent fixed by registered lease. 2 Ind. Cas. 160 (Cal.)

——S. 92—Evidence of conduct—Lease.

A tenant cannot prove the variation of a contract when the rent payable by him is fixed by a properly executed muchilica. (1916) M.W.N. 149=32 Ind. Cas. 703.

——S. 92—Evidence of conduct—Rate of rent.

Where the agreement of parties is distinct and clear as to rate of rent the subsequent conduct of

the parties is inadmissible in evidence to show that some other rate was intended. 26 Ind. Cas. 958 (Mad.).

——S. 92—Evidence of conduct — Intention of parties—Sale and mortgage—Extrinsic evidence of acts and conduct.

Extrinsic evidence as to acts and conduct of parties to a transaction is admissible to show the real nature of a transaction (e.g., to show that a sale-deed was in reality a mortgage) not by what they intended to do, but by what they actually did, or have been doing. 25 Mad. 7 Diss. from 22 A. 149 P.C. Expl. 1 O.L.J. 714=26 Ind. Cas. 717.

——S. 92—Evidence of conduct—Document in writing—Evidence inadmissible.

Evidence of acts and conduct of parties is not admissible to contradict or vary the written terms of an agreement. 2 U.P.L.R. (Pat.) 119=56 Ind. Cas. 752.

——S. 92—Document—Evidence of subsequent conduct in variation of.

Semble:— The legal construction or legal effect of an unambiguous document like the ikrarnama could not be controlled or altered by evidence of the subsequent conduct of parties. 11 A. 55; 13 B. L.R. 235 is no authority for any contrary proposition. (1903) 5 Bom. L. R. 461=7 C. W. N. 578=30 C. 738=30 I.A. 139 (P.C.).

——S. 92—Evidence of conduct—Rate of rent—Varying rates of rent in a kabuliyat—Admissibility of evidence of acts and conduct showing that lower rent was accepted than that mentioned in a kabuliyat.

A contemporaneous oral agreement cannot be proved under S. 92 of the Evidence Act to show that the rent is less than what is stated in a registered kabuliyat. Evidence of subsequent acts and conduct showing that the rate of rent payable by a tenant is not that mentioned in the kabuliyat is not admissible under S. 92 of the Indian Evidence Act. (1901) 6 C.W.N. 60.

——S. 92—Evidence of conduct—Sale—Mortgage—Oral evidence of conduct, admissibility of—Variation of contract:—Oral evidence of intention cannot be adduced to show that what on the face of it is a sale deed was in fact only a mortgage. 27 I. A. 58; 22 A, 119. But oral evidence of conduct of the parties showing that the parties intended the transaction to be a mortgage and not a sale is admissible. 25 C. 603 foll. (1901) 5 C.W.N. 326=28 C. 289.

——S. 92—Evidence of conduct—Construction of document — Sale — Mortgage — Conduct—Admissibility of, to prove sale mortgage.

S. 92 of the Evidence Act does not exclude the evidence of acts and conduct of the parties in order to show that a conveyance is really a mortgage by way of conditional sale. The Full Bench decision in 2 C.W.N. 562, 25 C. 603 has not been in any way overruled by the decision of the Privy Council. (1900) 5 C.W.N. 351=28 C. 256.

——S. 92—Evidence of conduct—Proof that a sale is mortgage—Evidence of subsequent conduct to show collateral agreement—Inadmissible.

On 23rd September 1876 defendant wrote to plaintiff, inviting him to execute a sale-deed, and promising that he would restore the land on re-payment of money advanced by him. The plaintiff then executed a sale-deed, unconditional in its terms, and registered it. The plaintiff then sued for redemption:—Held, (1) evidence of the subsequent conduct of the parties to show that the transaction is a mortgage is inadmissible in evidence. 22 A. 149 foll. 28 C. 256; 28 C. 289 dis. from; (2) the latter is inadmissible in evidence, as it purported to create or limit an interset in the immovable property conveyed under the deed of sale. 22 M. 508, foll. 11 M.L.J. 370=25 M. 7.

9. Fraud.

——S. 92—Fraud.

Person effecting insurance on his younger brother's life — Insurance Company can, under S. 92, Evidence Act, prove that person effecting insurance was doing it for his own use and benefit and not for use and benefit of person insured. A.I.R. 1941 Lah. 33=42 P.L.R. 801=193 Ind. Cas. 155.

——S. 92—Fraud.

Person assigning his decree to another to avoid its attachment by his creditor cannot subsequently ask Court to declare that assignment was benami. A.I.R. 1940 Pat. 379=189 Ind. Cas. 423.

——S. 92—Fraud—Surety induced to sign as executant, promising not to sue him as such.

Obiter.—Where there was an expressly alleged fraud, such as that the payee induced the surety to sign as executant, or that he promised not to sue him except as such, then proviso 1 to S. 92 would come into operation. A.I.R. 1937 Rang. 82=168 Ind. Cas. 477.

——S. 92—Fraud—Whether includes fraud on registration law.

The word 'fraud' used in the proviso is wide enough to include a fraud on the registration law. Thus a party can show that an item was fictitiously put in. Scope of proviso discussed. 1930 A.L.J. 926=A.I.R. 1930 A. 786.

——S. 92—Fraud.

There is a great difference between a suit to invalidate a document on the grounds of fraud, etc., mentioned in proviso 1 and a suit for a declaration that a document is not what it purports to be according to its plain grammatical meaning. 93 Ind. Cas. 924=27 Bom. L. R. 951=49 Bom. 662=A.I.R. 1925 Bom. 501.

——S. 92—Fraud.

Where a document is attacked on the ground of fraud, oral evidence for the purpose of superseding the recitals in respect of the terms of the document is admissible under proviso (1) of S. 92. 77 Ind. Cas. 695=25 O. C. 282=A.I.R. 1923 Oudh 45.

——S. 92—Fraud.

Where appellants knew that the plaintiffs were the true owners it would be a fraud on their part to insist upon their claim to the property under the proviso (1) to S. 92. Even if S. 92 did not apply, the appellants could not maintain their claim in equity. A.I.R. 1922 Bom. 256.

——S. 92, proviso (1)—Fraud—Extrinsic evidence—Sales ex facie absolute—Alleged to be a mortgage—Evidence of matters antecedent, admissibility of—Fraud—Notice of mortgagor's title.

In a suit for possession of properties sold by appellant to the respondents by deeds purporting to be of absolute conveyance, the former tendered evidence to show that to the knowledge of the respondents they were mortgagees only, the mortgagor not being a party to the conveyances and of acts and conduct of the parties to show that they were intended to operate only as tranfers of the mortgage interest. Held, that S. 92 of the Evidence Act did not exclude evidence in relation to matters antecedent to the sales in question showing that the respondent took with notice of the mortgagor's title; and that the case must be remitted for re-trial. S. 92 does not prevent proof of a fraudulent dealing with a third person's property or proof of notice of real state of the title. 38 Cal. 892=38 I. A. 146=15 C.W.N. 058=10 M.L.T. 103=(1911) 2 M.W.N. 30=14 C.L.J. 276=13 Bom. L.R. 797=8 A.L.J. 1184=21 M.L.J. 1105=4 Bur. L.T. 273=12 Ind. Cas. 39(P.C.).

——S. 92 (1)—Fraud—Deed of sale—Oral evidence to prove a mortgage.

If the allegation is that the vendor had been induced to sign the sale-deed by fraud inducing him to believe it to be a mortgage by conditional sale, oral evidence is admissible under Evidence Act, S. 92 (1). 35 Bom. 231=13 Bom. L.R. 113=9 Ind. Cas. 941.

——S. 92—Fraud — Written document — Oral evidence for construing the document—Oral evidence permissible to show that contract was obtained fraudulently—Dekkan Agriculturists' Relief Act (XVII of 1879).

Evidence of intention cannot be given for purpose merely of construing a document. And S. 92 of the Evidence Act, subject to the proviso therein contained forbids evidence to be given of any oral agreement or statement for the purpose of contradicting, varying, adding to or subtracting from the terms of any contract grant or other disposition of property, the terms of which have been reduced to writing as mentioned in that section. While these are the restrictions on the admissibility of oral evidence referred to above, S. 92 in its first proviso recognizes that facts may be proved by oral evidence which would invalidate a document or entitle any person to any decree or order relating thereto. And where one party induces the other to contract on the faith of representations made to him any one of which is untrue, the whole contract is in a court of equity considered as having been obtained fraudulently. Per Jenkins C. J.—The frequency of the complaint that agriculturists are entrapped into the execution of documents of sale in the belief that the right to redeem still remains with them leads us to express the hope that there may be early legislation which will enable the courts, at least where an agriculturist is concerned, to investigate and determine the real nature of the transaction, unfettered by S. 92 of the Evidence Act, and to award such relief as the juistice of the case may require. (1906) 8 Bom. L.R. 553=30 B. 426.

——S. 92, proviso (1)—Fraud—Proof of—Execution of document.

It is only fraud in connection with the entering into and execution of the document that can be proved by oral evidence, not fraud subsequent to the execution thereof. 42 Ind. Cas. 113 (L.B.).

——S. 92, proviso (1)—Fraud—Third parties.

S. 92 does not prevent proof of fraudulent dealing with a third person's property or proof of notice that the property purporting to be conveyed in fact belonged to a third person. 8 Bur. L.T. 104=26 Ind. Cas. 111.

——S. 92, proviso (1) — Fraud—Sale—Mortgage—Pre-emption.

Under S. 92 (1) a pre-emptor may show that a transaction is really one of sale under cover of mortgage in order to defeat a pre-emption claim. 157 P.W.R. 1909=4 Ind. Cas. 1017.

——S. 92 (1)—Fraud—Mortgage—Sale.

No evidence is admissible to prove that a transaction which took the form of an out and out sale was in reality a mortgage but where the parties plead that the plaintiffs practised fraud upon them by pretending to accept an agreement, evidence of such fraud is admissible under S. 92, proviso 1. 3 S.L.R. 1=1 Ind. Cas. 935.

10. Gift.

——S. 92—Gift—Evidence to prove fictitious nature.

Where a husband admits that he executed a deed of gift in favonr of his wife but alleges that he had no intention of giving away the property and that, in short, he had no animus contrabendi when he executed the deed of gift, evidence to prove such a defence is admissible and does not violate the provisions of S. 92, Evidence Act. A.I.R. 1931 Oudh 177=8 O.W.N. 349=136 Ind. Cas. 642.

——S. 92—Gift.

Parties cannot be allowed to adduce evidence to prove contrary to the terms of deed of gift that the transaction was in reality a hiba-bil-iwaz. 79 Ind. Cas. 81=6 L.L.J. 221=A.I.R. 1924 Lah 562.

——S. 92—Gift.

Parol evidence is not admissible to show what was transferred under a deed of gift. 74 Ind. Cas. 295=10 O.L.J. 24=26 O.C. 329=A.I.R. 1923 Oudh 173.

11. Intention.

——S. 92—Intention.

Compromise-decree—Oral evidence to prove intention, cannot be allowed—Intention must be deduced from language used. A.I.R. 1944 Oudh 106=1943 O.W.N. 410=1943 A.W.R. 131=214 Ind. Cas. 5.

——S. 92—Intention—Lease in writing —Payment of rent—Evidence of, to show intention of parties—Admissibility.

The fact of payment of rent different from that mentioned in the kabuliat for number of years is admissible to show that the intention of the parties was that the kabuliat from the very fiist was not intended to be acted upon or that there has been a waiver by the parties. A.I.R. 1944 Pat. 35=9 Cut. L.T. 27=10 B.R. 601=213 Ind. Cas. 394.

——S. 92—Intention — Oral evidence to show nature of transaction.

Where the documents speak clearly for themselves there can be no question of considering oral evidence to show that real nature of the transaction was, whether sale or exchange. A.I.R. 1944 Pesh. 15=212 Ind. Cas. 306.

——S. 92—Intention.

Person effecting insurance must be actually dependent on or expect advantage from continued existence of person insured—Person effecting insurance on his younger brother's life—Insurance Company can, under S. 92, Evidence Act, prove that the person effecting insurance was doing it for his own use and benefit, and not for use and benefit of person insured. A.I.R. 1941 Lah. 33=42 P.L.R. 801=193 Ind. Cas. 155.

——S. 92—Intention.

Where the land certainly existed in Sub-Division where the deed was registered but the insertion of it in the mortgage-deed gave the mortgagee no security whatsoever but was included only to effect registration in that district and on evidence it was clear that it was never intended to form part of such security:

Held, there was nothing in S. 92 to render evidence of the intention of the parties inadmissible. A.I.R. 1940 Pat. 504=19 Pat. 578=187 Ind. Cas. 522.

——S. 92, Proviso 1—Intention —When inserting rate of interest in promissory note, executant omitting to write "per cent." — Oral evidence to show intention.

Where while filling in the blanks of a printed form of a promissory note, the executant inserts certain figure as rate of interest per mensem, but omits the words, " per cent," oral evidence is admissible to prove that parties intended that the rate of interest was at that figure per cent per mensem. A.I.R. 1939 All. 308=1939 A.L.J. 196=I. L. R. (1939) All. 329=1941 A.W.R. 171=184 Ind. Cas. 149.

——S. 92, Proviso 6 — Intention — Scope of — Document executed by agriculturist as sale-deed alleged to be in reality mortgage — Executant proved not an agriculturist — Evidence to prove that deed was mortgage and not sale—Admissibility.

Proviso 6 to S. 92, Evidence Act, is not intended to apply to a case where a deed is clear and unambiguous in its terms.

Where a document executed by an agriculturist is, on the face of it, a sale-deed but is alleged to be only an ostensible sale-deed being in reality a mortgage, and in a suit by the executant for the redemption of the mortgage he pleads a contemporaneous oral agreement to reconvey, but it is proved that the executant is not an agriculturist, S. 10, Dekkhan Agriculturists' Relief Act, cannot be taken advantage of, so that even assuming that the case of the executant is true, he cannot bring either direct or circumstantial evidence to show that the document was intended to operate as a mortgage and not as a sale-deed.

He can, however, show as against the persons who are neither parties to the transaction nor are representatives-in-interest of any such parties that the deed purports to be a mortgage and not a sale. A.I.R. 1939 Sind 200=I.L.R. (1939) Kar. 530=184 Ind. Cas. 677.

——Ss. 92, 94— Intention of parties — Oral evidence—Admissibility.

When the terms of the mortgage deed are clear and unambiguous and apply to existing facts and the surrounding circumstances are not such that the only possible conclusion at which the Court could arrive is that there had been an inadvertent misdescription of the property in the mortgage bond in suit and that the property which was intended to be mortgaged was something over and above what was actually described and specified in the document, the mortgagees are barred by the provisions of Ss. 92 and 94, Evidence Act, from showing that the intention of the parties to the transaction of mortgage was different from what appears from the terms of the mortgage deed itself. A.I.R. 1938 All. 364=1938 A.W.R. 304=1938 A.L.J. 477=I.L.R. (1938) All. 494=176 Ind. Cas. 81.

——S. 92—Intention.

No oral evidence relating to the intention of the parties can be referred to under the guise of surrounding circumstances. A.I.R. 1938 Bom. 125=39 Bom. L.R. 1217=173 Ind. Cas. 963.

——S. 92—Intention—Passing of title.

It is certainly true, that there is nothing in S. 92, which prevents a person from adducing evidence for the purpose of showing that the recitals were untrue. Statements of facts are different from

the nature of the contract between the parties which must be determined from a reading of the document itself. The arrangements between the parties to a sale as to when the property shall pass is strictly contractual part and is, to be determined solely from the words of the writing; and evidence is not admissible for the purpose as mentioned in S. 92 unless the terms are ambiguous, then recourse may be had to external evidence with a view to determining what the intention of the parties was. A.I.R. 1938 Pat. 505 =17 Pat. 318=20 P.L.T. 157=4 Cut.L.T. 25=178 Ind. Cas. 629.

——S. 92—Intention—External evidence as to intention of parties to deed—Admissibility.

External evidence as to the intention of the parties to a deed is not admissible. Section 92, proviso 1, Evidence Act, has no application in a case where the instrument represents what the parties intended to put down in writing, though it might not be in accordance with what they intended to do and with the legal effect that they secretly wanted to bring about but which, for some reason, they did not want to put in writing. A.I.R. 1937 Rang. 142=171 Ind. Cas. 702.

——S. 92, proviso 1—Intention—Oral evidence to show that agreement was never meant to be acted upon—Admissibility—Such document if can be sued upon.

Oral evidence to show that a document was never intended to operate according to its terms, but was brought into existence, solely for the purpose of creating evidence about the joint status of the family is admissible, apart from the proviso 1 to S. 92, Evidence Act.

Where a party to a document is told that any stipulation in the agreement would not be enforced, he cannot be held to have assented to it. Consequently, the document is not the real agreement between the parties, and the other party cannot sue upon it. A.I.R. 1936 P. C. 70=1936 A.W.R. 242=1936 O.W.N. 120 =40 C.W.N. 353=43 M.L.W. 271=1936 A.L.J. 136=38 P.L.R. 156=70 M. L.J. 232=1936 M.W.N. 310=38 Bom. L.R. 373=19 N.L.J. 104=63 C.L.J. 353=59 Mad. 446=63 I. A. 126=160 Ind. Cas. 384 (P.C.).

——S. 92—Intention.

Where a mortgage decree is executed by three persons, an agreement between the mortgagors that two of them would take the whole of the money lent by the mortgagee and would be liable in the first instance to repay it, while the third would stand merely in the position of a surety i, e., there would be no right in the two mortgagors to demand contribution from the third if they paid off the money due to the mortgagee, this agreement can vary the contract expressed in the deed of mortgage only if there is some covenant in the deed that the mortgagors would be liable to contribution as between themselves, and it is open to the third mortgagor to prove the existence of the agreement between the mortgagors, and S. 92, Evidence Act, is no bar to such a proof. If the debt is paid off by one of the two mortgagors, he is not entitled to any contribution from the third, nor can the other mortgagor who inherits the property of the mortgagor paying off the debt have any such right. A.I.R. 1936 All. 258 = 58 All. 548=1935 A.L.J. 1273=1935 A.W.R. 1343= 162 Ind. Cas. 117.

——S. 92—Intention—Deed — Construction—Intention of parties.

It is by the language alone of any written agreement that the intention of the parties thereto can be deduced. ('36) 165 Ind. Cas. 941.

——S. 92—Intention—Mortgage-deed.

A mortgagor cannot adduce evidence to show that a mortgage bond was executed only as a security for duly collecting amounts due to the mortgagee and that the stipulations in the mortgage-deed as to the time for the payment of principal and as to the payment of interest were all inserted nominally. A.I.R. 1936 Mad. 841=1936 M.W.N. 994 =71 M.L.J. 522=44 M.L.W. 629=165 Ind. Cas. 669.

——S. 92—Intention—Document purporting to create mortgage with possession—Evidence to show that intention was to create simple mortgage.

Section 92 of the Evidence Act forbids the admission or consideration of evidence as to the intention of the parties, or to contradict the express terms of the document, executed between them. When the document purports to create a mortgage with possession, no evidence can be considered to show that the intention of the parties was to effect a simple mortgage and not a mortgage with possession. ('36) 165 Ind. Cas. 510.

——S. 92—Intention—Suit for possession by redemption of mortgage—Evidence to show that there was no disposition.

There is no authority for the proposition that a defendant cannot set up the true nature of a transaction reduced to the form of a document when the plaintiff and defendant have entered into the transaction for the purpose of misleading a third party or depriving him of rights given by law.

Where in a suit for possession by redemption of a property comprised in a mortgage, the defence is that the transaction was a sham one and there was an intention that it should have no effect on the actual ownership of property:

Held, that notwithstanding S. 92, Evidence Act, evidence may be given to show that there was really never any disposition at all. A.I.R. 1933 Lah. 222=145 Ind.Cas. 689.

——S. 92—Intention.

Where words of any written instrument are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves and in such case, evidence de hors the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the

instrument is utterly inadmissible. A.I.R. 1932 P.C. 255=63 M.L.J. 418=36 M.L.W. 761=1932 A.L.J. 971=139 Ind. Cas. 891 (P.C.).

——S. 92—Intention.

The parties must be presumed to know the difference between interest on interest, and compound interest and if they deliberately choose to use one expression, they cannot be permitted to prove that they meant the other. A.I.R. 1931 Nag. 25=130 Ind. Cas. 103.

——S. 92—Intention of parties—Purchase in the name of daughter—Intention, proof of.

Declarations by the parents if contemporaneous with the purchase are admissible to prove such an intention, but declarations subsequent are to be rejected. A.I.R. 1930 Oudh 441.

——S. 92—Intention—Transaction evidenced by instrument—Evidence regarding attendant circumstances is admissible under S. 92.

When considering the nature of evidence that could be kept adduced in cases where a defendant sets up a plea that a certain instrument exhibits only a nominal transaction and at the same time admits that a definite amount was paid in respect of the same transaction evidence by the instrument, the provisions of S. 92, Evidence Act, and S. 81, Trusts Act should be kept in view. Oral evidence of intention of parties is inadmissible. But evidence under S. 92 (b) Evidence Act, regarding the attendant circumstances is admissible. A.I.R. 1924 P.C. 226 and A.I.R. 1925 P.C. 75, Foll; A.I.R. 1929 Mad. 807.

——S. 92—Intention—Deed—Construction—Sale or mortgage—Two documents executed almost simultaneously—One a deed of sale and another an agreement to re-sale—Surrounding circumstances and intention must be looked to for deciding whether they constituted a mortgage.

When the question with reference to two documents, e. g., A and B executed almost simultaneously, one purporting to be a sale and the other an agreement to re-sell, is, whether the transaction is a mortgage or whether it is merely a sale with an agreement to repurchase, the case has to be decided on the instruments and the language employed in them having regard to the surrounding circumstances. No oral evidence is admissible to prove the real meaning or intention of the parties and not even the subsequent conduct of the parties can be looked at or regarded for the purpose.

Where it was found that at the time of execution of the documents A and B the property was impending sale, that it was sold under the first document A for comparatively low price, that the vendors under A were plaintiffs and one P a prior mortgagee while the persons who were entitled to the benefit of the contract under B were only the plaintiffs, that the actual possession of the property was only with the vendors even before the execution of a muchilika by plaintiff in favour of the defendant the opposite party, that there was no evidence of any bargaining for the price of the property, there was no reliable evidence with regard to the inspection of the property or the examination of the title deeds before concluding of the transaction, that the creditor while speaking of the amount paid always used the expression "advance the amount" and it was further found that the document B namely the agreement to re-sell provided "after the expiration of the said period you will claim no right or privilege whatever to this agreement or to the properties detailed below and I shall be in undisputed possession of the said properties."

Held, that the only conclusion that would be in consonance with what may be regarded as the real intention of the parties was that the transaction was only a mortgage and that the sale was merely by way of security for the amount that was advanced. 110 Ind. Cas. 837=1928 M.W.N. 634=A.I.R. 1928 Mad. 690.

——S. 92—Intention.

Oral evidence for the purpose of ascertaining the intention of the parties is not admissible: 22 All. 149 (P.C.), Foll. 107 Ind.Cas. 201=A.I.R. 1928 Nag. 182.

——S. 92—Intention.

Where a document is not one which embodies the terms of a contract between the parties, but it is merely a written admission of a fact by the plaintiff, evidence of the real meaning of the words used in it is not excluded. 93 Ind. Cas. 193=A.I.R. 1926 Nag. 301.

——S. 92—Intention.

Though evidence to vary the terms of an agreement in writing is not admissible under S. 92, yet evidence to show that there is not an agreement at all is admissible. Therefore, it is open to the Court to examine the surrounding circumstances with a view to enable it to decide whether the parties intended to arrive at any agreement in regard to the subject-matter of the suit: A.I.R. 1925 P.C. 75, Foll. 90 Ind. Cas. 929=7 P.L.T. 145=1926 P. H. C. C. 29=A.I.R. 1926 Pat. 156.

——S. 92—Intention.

That a gift was made subject to a condition can be proved under the provisions of S. 92. 75 Ind. Cas. 166=1 Rang. 351=A.I.R. 1924 Rang. 13.

——S. 92—Intention.

The oral admission of the mortgagor cannot be utilised to contradict the terms of the mortgage document. It would be dangerous to allow outside evidence to show the intention of the writer, which is not disclosed by the authorised channel namely, the words which he himself selected. 73 Ind. Cas. 416=37 C. L. J. 52=A.I.R. 1923 Cal. 102.

——S. 92—Intention—Language showing intention of document—Different intent cannot be proved.

Where the language of the document is clear, no evidence is permissible to prove that the intention of the parties was one different from that appearing on the face of the document.

Where a trust deed to discharge debts as well as to benefit the son of the author of the trust, was sought to be proved to be one for the benefit of the creditors alone, under S. 92, proviso (1).

Held, that such proof cannot invalidate the document, and that the proviso does not apply. 70 Ind. Cas. 253=25 O. C. 291=10 O. L. J. 491=A.I.R. 1923 Oudh 80.

——S. 92—Intention.

Defendants are not precluded by the provisions of S. 92 of the Evidence Act (I of 1872) from giving parol evidence for the purpose of showing that a deed, say, of gift of one kind like **heba-bilewaz,** was in reality intended by the executant to be a deed of gift of another kind or ordinary **heba.** 70 Ind. Cas. 203=49 Cal. 161=25 C. W. N. 833=A. I. R. 1922 Cal. 258.

——Ss. 92, 93, 95, 96 and 97—Intention of parties—Extrinsic evidence.

When the language of a document is clear no evidence is admissible to explain the language; when the words are ambiguous and cannot carry any definite meaning, evidence cannot be given to remove the ambiguity or to supply defects. But where the language of a document is capable of being applied to a number of persons or things and the question in which of these persons or things is intended by the expression, evidence may be given to show what was the thing or who was the person intended. Where a Raja made a trust of his Zamindari together with the buildings thereon and the appurtenances thereto, a question arose whether properties purchased by the Raja prior to the execution of the deed were included. It was held that the subsequent conduct of the Raja was admissible to prove the intention. 40 Mad. 1016=38 Ind. Cas. 627.

——S. 92—Intention of parties—Contract in writing—Construction—Extrinsic evidence.

The rate of payment for work done under a written contract is determined by the terms of the contract. Extrinsic evidence as to the rate of payment allowed for such work to another contractor or to the same contractor, under another contract is irrelevant and inadmissible. 19 M.L.T. 103=23 C. L. J. 177=(1916) 1 M.W.N, 201=3 L.W. 297=18 Bom. L. R. 355=33 Ind. Cas. 924 (P.C.).

——S. 92 — Intention of parties — Simultaneous transactions—Mortgage.

Where the correspondence between mortgagor and mortgagee shows that the transaction was an equitable mortgage, oral evidence may be admitted to show that they intended to create equitable mortgage by the deposit of title deeds and a pro-note. 31 M. L. J. 347=(1916) 2 M. W. N. 221=4 L. W. 472=35 Ind. Cas. 864.

——S. 92—Intention of parties—Extrinsic evidence.

A mortgage-deed for an amount found due on settling accounts, recited the conditions of repayment by instalments in kind, on failure of any of which, the mortgagor was bound to return the whole with interest at once. **Held,** Per **Curiam.**—Extrinsic evidence of the parties' intention was inadmissible to construe the document. 35 Ind. Cas. 111 (Mad.).

——S. 92—Intention of parties—Will—Proof of testator's intention—Surrounding circumstances.

Oral evidence to prove the intention of the testator is clearly inadmissible but evidence as to all the surrounding circumstances of the testator and beneficiaries would be admissible. 30 Ind. Cas. 391 (Mad.).

——S. 92 — Intention of parties — Mortgage — Document found to be a mortgage but not one in terms—Parol evidence.

If a document not in terms a mortgage is found to be in reality a mortgage, oral evidence of the intention of the parties is inadmissible under S. 92. (1912) M.W.N. 164=14 Ind. Cas. 65.

——S. 92—Intention of parties—Sale-deed—Oral agreement to prove it to be a mortgage.

If the vendor had signed the deed knowing it to be a sale-deed but at the same time there was an oral agreement by the defendant that he would treat it as a mortgage evidence of such oral agreement is inadmissible under S. 92. 12 Bom. L. R. 972; 11 Bom. L. R. 1130; 22 A. 149 Foll. 35 Bom. 231=13 Bom. L. R. 113=9 Ind. Cas. 941.

——S. 92—Intention of parties—Mortgage—Sale.

A contemporaneous oral agreement cannot be proved to establish that a registered instrument of sale was intended by the parties to be a mortgage, and that the property was to be restored on repayment of the amount. But the executant can show that owing to fraud or some other reason the deed did not represent the real agreement between the parties. 34 Bom. 59=11 Bom. L. R. 1130=4 Ind. Cas. 257.

——S. 92—Intention of parties—Sale or mortgage.

Where a document is in the form of an outright sale the executant is precluded from showing that it is a mortgage, but he is entitled to show that the consideration has not been paid to him and he is entitled to retain possession until the consideration is paid. 45 Ind. Cas. 931 (L. B.).

——S. 92—Intention of parties—Sale or mortgage—Evidence as to.

Oral evidence cannot be let in to show that a document which purports to effect a sale is really mortgage unless fraud on the part of the party taking benefit under the deed is sought to be proved. 12 Bur. L. T. 98=45 Ind. Cas. 860.

——S. 92—Intention of parties — Fraud — Oral evidence to prove—Representation of intention on which the deed is silent.

Where the accused obtained as advance from the complainants representing that he had some boat loads of paddy and also executed a promissory note which however did not contain the representation of the accused, **Held,** that oral evidence was admissible to prove the fraudulent intention of the accused as that is not inconsistent with the written agreement. 4 Bur. L. T. 279=6 L. B. R. 38=13 Cr. L. J. 50=13 Ind. Cas. 386.

——S. 92—Intention of parties — Lease — Oral evidence if admissible.

Where there is a document evidencing a transaction of a lease, oral evidence in the shape of admission

relating to the transaction of the lease is not admissible. 20 C. W. N. 182=29 Ind. Cas. 502.

——S. 92 — Intention of parties — Contract — Construction of—Oral evidence to vary terms.

The rights of the parties to a contract must be determined upon the terms of the contract and oral evidence is not admissible to show that the parties intended to enter into a contract different from that in the instrument itself. 12 C. L. J. 649, Foll. 20 C.L.J. 153=19 C.W.N. 1143=25 Ind. Cas. 171.

——S. 92—Intention of parties — Mortgage or sale—Value of property—Consideration of.

The Court does not infringe S. 92 of the Evidence Act if in order to determine whether a transaction is a mortgage or sale it looks to the contrast between the value of the property and the consideration that actually passed. 17 C. W. N. 1053=18 C. L. J. 228=21 Ind. Cas. 90.

——S. 92—Intention of parties—Sale or mortgage.

Oral evidence cannot be given to show that the parties to a sale-deed intended the transaction to be only a mortgage. 15 P.W.R. 1915=121 P.L.R. 1915=26 Ind. Cas. 426.

——S. 92 — Intention — Connected documents—Single transaction.

Whether two documents executed at an interval of two days by the same parties evidence a single transaction or two separate independent transactions, should be decided only on a perusal and construction of both and by contemporaneous surrounding circumstances but no oral evidence of intention is admissible. 14 M. L. T. 579=(1914) M.W.N. 222=1 L. W. 80=22 Ind. Cas. 4.

——S. 92 — Intention of parties — Subsequent conduct.

Evidence of the conduct of the parties subsequent to the execution of the document is admissible to show what the real meaning of the contract was. 27 P. R. 1911=118 P.W.R. 1911=191 P.L.R. 1911=10 Ind. Cas. 1004.

——Ss. 92 and 99—Intention of parties—Mortgage or sale—Evidence to show the real nature of a transaction.

In a pre-emption suit based on a mortgage-deed, on the allegation that the mortgage was really a sale cloaked as mortgage in order to defeat pre-emption, the contention was that oral evidence should not have been admitted to show that the parties intended a sale and not a mortgage. **Held,** that under Ss. 92 and 99 evidence could be given by the pre-emptor to show the real nature of the transaction, he being no party to the deed. 8 Ind. Cas. 501 (Oudh).

12. Interest.

——S. 92—Interest—Promissory note — Rate of interest mentioned—Oral evidence to prove different rate is inadmissible.

Where promissory note mentions a rate of interest, oral evidence is inadmissible to prove that the rate was different from that mentioned in the document. A.I.R. 1941 Nag. 271=1941 N. L. J. 388=I. L. R. (1942) Nag. 498=196 Ind. Cas. 493.

——S. 92, proviso 2—Interest.

Agreement between parties to pay interest—**Sarkhat** as originally drawn up not containing reference to payment of interest through accidental omission—Creditor altering **sarkhat** by incorporating rate of interest, without reference to debtor:

Held, the alteration does not make the **sarkhat** void as the alteration was made to carry out the common intention of the parties. Oral evidence as to agreement to pay interest is admissible in evidence under S. 92 Proviso 2, Evidence Act. Moreover, S. 87, Negotiable Instruments Act, itself postulates the possibility of such an agreement being proved by oral evidence. A.I.R. 1939 All. 248=1939 A. L. J. 46=1939 A.W.R. 79=181 Ind. Cas. 863.

——S. 92—Interest—Agreed rate of interest stated in note—Oral agreement reducing rate—Admissibility of.

Where it is alleged that an oral agreement was made between the parties reducing the rate of interest evidence of such oral agreement is inadmissible. A.I.R. 1936 All. 157=1935 A. W. R. 1486=160 Ind. Cas. 76.

——S. 92—Interest—Mortgage deed stipulating payment of compound interest—Oral evidence to show that the stipulation was not to be enforced—Admissibility of.

Where plaintiffs sued on a mortgage bond stipulating for payment of compound interest and defendant contended that when he came to sign the bonds, he objected to the stipulation and refused to sign though subsequently he signed on promise of plaintiffs not to enforce the stipulation:

Held, that oral evidence by which the defendant attempted to subtract from the terms of the mortgage bond was inadmissible in evidence. A.I.R. 1934 Cal. 564=61 C. 344=151 Ind. Cas. 511.

——S. 92—Interest—Deed—Rate, time and mode of payment of interest—Oral agreement to alter.

The rate of interest and the time and mode of repayment of the principal are material and essential parts of a deed of mortgage. No alteration in these terms, as contained in the registered deed, can be validly made except by a registered document. Therefore, oral evidence regarding this alleged agreement should be excluded. A.I.R. 1934 Rang. 316=13 Rang. 22=154 Ind. Cas. 189.

——S. 92—Interest.

A bond declared that money was to be repaid with interest at a certain rate. A simultaneous oral contract declared that no interest was to be paid, but the creditor was to be in possession of certain piece of land and was to pay himself the interest out of the usufruct.

Held, that the two contracts were inconsistent with each other and so oral evidence was excluded. 122 Ind. Cas. 894=A.I.R. 1930 All. 440.

——S. 92—Interest.

A mortgage deed was executed on 23rd March, 1920, for a certain sum payable with interest at $1\frac{1}{4}$ per cent. per mensem on 15th April, 1921, and liable in case of default to carry interest at 2 per cent. per mensem. On 24th March, 1923, certain payment was made and it was averred after that date, the mortgagee agreed to accept interest at $1\frac{1}{2}$ per cent. in proof of which the mortgagor pleaded that the mortgagee calculated in his books interest at the rate of $1\frac{1}{2}$ per cent. per mensem.

Held, that such calculation of interest in the mortgagee's book would not bind him to accept more than $1\frac{1}{2}$ per cent. per mensem and such agreement could not be proved under proviso (4) to S. 92. 122 Ind. Cas. 436=A.I.R. 1930 Nag. 235.

——S. 92—Interest.

Where it was suggested that the creditor was in the habit of accepting 15 p. c. when a debt was repaid even though the stipulated rate was 24 p. c. and that therefore it should be held that in other cases too the intention was only to collect the lower rate.

Held, that the suggestion is manifestly untenable. The giving up a portion of interest is purely a matter of grace. It cannot be used for construing the suit arrangement as meaning 15 p. c. for that will be against S. 92, Evidence Act. 103 Ind. Cas. 394=50 Mad. 614=38 M.L.T. 323=25 M.L.W. 699=A.I.R. 1927 Mad. 620=52 M. L. J. 612.

——S. 92—Interest.

When a bond is silent about interest evidence is permissible to prove a separate agreement to pay interest but very satisfactory and strong evidence is essential in order to establish any such separate agreement. 100 Ind. Cas. 794=10 N. L. J. 43=A.I.R. 1927 Nag. 195.

——S. 92—Interest.

Section 92 prevents proof that though a bond stipulates for compound interest, yet that there was a contemporaneous oral agreement that notwithstanding the bond, compound interest should not be claimed. Nor can the fact that as a matter of fact only simple interest was realised, entitle a party to vary the written contract. 78 Ind. Cas. 742=A.I.R. 1925 Cal. 276.

——S. 92—Interest.

Evidence of subsequent oral agreement not to charge compound interest is inadmissible to vary the original contract which is a registered one. 72 Ind. Cas. 554=A.I.R. 1924 Cal. 380.

——S. 92—Interest.

If a document is formally drawn up, it would not be open to the parties to adduce evidence in proof of a contemporaneous oral agreement to pay interest; where the document itself is silent as to interest. 70 Ind. Cas. 790=A.I.R. 1923 Cal. 402.

——S. 92—Interest.

A promissory note being a formal document intended to express the whole bargain, an oral agreement for interest made "at the time of the treaty" is not only highly suspicious, but is **prima facie** inadmissible in evidence. 70 Ind. Cas. 130=49 Cal. 716=A.I.R. 1922 Cal. 513.

——S. 92—Interest—Oral agreement for different rate of interest than that in the pro-note is inadmissible — Note by 2 defendants — Liability is joint and several.

Where the plaintiffs set up an oral agreement according to which the promisor agreed to pay interest at the rate of 1 per cent. while the rate mentioned in the pro-note was 8 annas per cent.

Held, the oral agreement sought to be proved is clearly inconsistent with the terms of the document itself and is inadmissible. 68 Ind Cas. 520=9 O.L J. 273=26 O.C. 36=A.I.R. 1922 Oudh 270.

——S. 92, proviso (5)—Interest—Implied contract —Compound interest—Bankers—Overdraft.

Under a written contract between a banker and a customer, the latter was to be allowed to overdraw his current account and interest was to be charged at a certain rate per annum, and to be calculated on the daily balance due on the overdraft. The course of business adopted by the bank was that at the end of each month interest was added to the balance then due, and the total carried to the debit of the account. The effect of it was that compound interest with monthly rests was charged and such charge appeared on the face of the customer's pass books. The customer was aware of this mode of computation of interest for several years but he raised no objection thereto. **Held,** the customer had impliedly agreed to pay compound interest with monthly rests, and that S. 92 of the Evidence Act was no bar to the proof of such agreement by the banker. 44 Bom. 474=27 M.I.T. 255=12 L.W. 356=38 M. L. J. 387=(1920) M.W.N. 312=18 A.L.J. 359=22 Bom. L. R. 545=2 U.P.L.R. (P.C.) 78=47 I.A. 17=55 Ind. Cas. 522 (P.C.)

——S. 92, proviso (2)—Interest—Entry in bahi—Oral agreement to pay interest.

Evidence relating to an oral agreement entered in bahi to pay interest is admissible. 53 Ind. Cas. 137 (Cal.).

——S. 92, proviso (2) — Interest — Hatchita silent about interest—Oral evidence.

In a claim based on a hatchita or an informal memorandum of a loan, which is silent as to interest, oral evidence of the rate of interest is admissible under S. 92 (2). 36 Ind. Cas. 612 (Cal.)

——S. 92, proviso (2)—Interest—Promissory note silent as to — Contemporaneous agreement — Admissibility.

Where a promissory note is silent as to interest S. 92, proviso (2) bars the admission of any evidence to prove the contemporaneous oral agreement to pay interest. But where the defendant admits that he agreed to pay a certain rate, effect may be given to such admission. 18 C.W.N. 1260=26 Ind. Cas. 935.

——Ss. 92, proviso (6) and 93 III (b) interest—Document not mentioning rates of interest payable, per month or per year—Oral evidence.

Where a document provides for a rate of interest but does not state whether the interest at that rate is payable monthly or yearly, the intention of the parties must be gathered from the document itself. Oral evidence inadmissible for that purpose under Sections 92 and 93 of the Evidence Act. 41 Cal. 342=19 C.L. J. 66=18 C.W.N. 592=20 Ind. Cas. 443.

——S. 92, proviso (2)—Interest—Hundi—Evidence, oral.

Where a Hundi does not provide for interest, no evidence of any separate oral agreement therefor, could be adduced. 29 A. 33 P. C. Ref. to 10 Ind. Cas. 315 Foll. 9 C L.R. 301 Diss. 12 C.L.R. 163 not Foll. 268 P.L.R. 1913=226 P.W.R. 1913=20 Ind. Cas. 319.

——S. 92, proviso (2) — Interest — Negotiable Instrument.

When a suit is based on a Negotiable Instrument which is a document of a formal character, the existence of a separate oral agreement as to any matter on which the instrument is silent (rate of interest) cannot be proved as proviso 2 to S. 92 Evidence Act does not apply to the case. 165 P.L.R. 1911=52 P.R. 1911=162 P.W.R. 1911=10 Ind. Cas. 315.

——S. 92, proviso (2)—Interest—Promissory note silent—Oral agreement to pay interest—Negotiable Instrument Act, S. 80—Effect of.

When a promissory note makes no mention regarding the payment of interest oral evidence is inadmissible, to prove a contemporaneous oral agreement to pay interest. All that can be awarded to a plaintiff suing on such a promissory note is interest at 6 per cent. per annum under S. 80 of the Negotiable Instrument Act. 17 M.L.J. 286; 18 C.W.N. 1260; 1 P.L.J. 71 Foll. 53 Ind. Cas. 242 (Nag.).

——S. 92, proviso (2) — Interest—Mortgage—Subsequent agreement.

Proof of a separate arrangement regarding payment of interest contradicting the terms of a mortgage-deed which provided for no interest expressly, is forbidden. 3 O.L.J. 462=19 O. C. 328=37 Ind. Cas. 23.

——S. 92, proviso 2—Interest—Negotiable Instruments Act, S. 80—Oral evidence of contemporaneous agreement to pay interest when pro-note is silent.

Where a promissory note is silent as to interest, oral evidence is not admissible in proof of a contemporaneous agreement to pay a certain rate of interest: but in such cases interest at the rate of 6 p c., should be awarded under S. 80 of the Negotiable Instruments Act. (1904) 17 M.L.J. 296.

——S. 92, proviso (2) — Interest — Hundi silent about rate of interest — Whether oral evidence is admissible regarding interest.

No evidence is admissible under S. 92 to prove an oral contemporaneous contract as to the rate of interest where the Hundi is silent about it, 1 Pat. L.J. 71=35 Ind. Cas. 431.

13. Interpretation.

——S. 92, proviso 3—Interpretation.

The words 'any obligation' mean the whole obligation. ('34) 1934 M.W.N. 1129.

——S. 92—Interpretation — Word—"Collateral" means not inconsistent.

"Collateral" means in effect not inconsistent with the terms of the agreement in question. 100 Ind. Cas. 1029=25 A. L. J. 349=49 All. 680=A.I.R. 1927 All. 422.

——Ss. 92, proviso (6) and 96—Interpretation of documents—Description by boundary and name—Preference.

If a document directly describes two sets of circumstances but cannot apply to both, evidence may be given to show to which set it is intended to apply. A description in a conveyance, lease or other document by boundaries overrides its description by name or out-turn. 10 Bur. L.T. 245=(1916) 2 U.B.R. 110=36 Ind. Cas. 7.

14. Lease.

——S. 92—Lease—Deed purporting to be lease executed by occupancy tenant and registered under S. 48 H, Bengal Tenancy Act — Land-lord, if precluded from showing real character of transaction.

Where a tenant of an occupancy holding executes a lease by means of **patta** which is registered under S. 48 H. Ben. Ten. Act, the land-lord is not precluded by S. 92, Evidence Act, from giving evidence to show that the real transaction is not a lease but a sale, the land-lord not being a party to the deed. A.I.R. 1934 Cal. 821=38 C.W.N. 1004=152 Ind. Cas. 933.

——S. 92—Lease—Collateral agreement giving preferential right to buy.

Under S. 92, Evidence Act, a collateral agreement to give a lessee the right to buy in preference to others would not be inadmissible in evidence. A.I.R. 1932 P.C. 231=9 O.W.N. 817=63 M.L.J. 408=36 M.L.W. 450=34 Bom. L.R. 1609=1933 A.L.J. 321=138 Ind. Cas. 774 (P.C.).

——S. 92 — Lease in one member's name — Evidence to show that lease was for family—Heritable and transferable agricultural lease—Validity.

Where a lease is taken in the name of a member of a joint family, there is nothing in law to prevent the other members of the family from showing that it was a lease taken by the entire joint family, although the name of only one of its members was entered in the document.

There is nothing in law to prevent the owner of a land from granting heritable and transferable rights in an agricultural lease upon the lessee; nor is there anything to prevent him from granting a perpetual lease to such a lessee. A. I. R. 1932 All. 112=139 Ind. Cas. 897 (2).

——S. 92—Lease.

A tenancy can be proved without proving any written lease that may exist. 59 Ind. Cas. 461 (Nag.)

——S. 92, proviso (2)—Lease—Land-lord and tenant —Rent—Oral evidence to prove reason.

In a lease the rent was stated to be a certain sum deduction being allowed on account of rent in suspense. **Held,** an oral agreement could be proved to specify the reasons for which the rent was suspended and the period during which it was suspended and that the plaintiff might establish the contingency upon which the rent was to be revived. 7 Ind. Cas. 721 (Cal.)

——S. 92, proviso (4) — Registered lease — Oral surrender—B. T. Act, S. 86.

Even when the original lease is a registered one, a raiyat can orally surrender his holding under S. 86 of the B. T. Act if it was not for a fixed period and its possession is given up. 47 Cal. 129= 54 Ind. Cas. 752.

——Ss. 92, proviso (4) and 115—Lease in writing —Oral agreement dispensing with certain conditions.

An oral agreement dispensing with certain conditions (as to the necessity for a notice of renewal) in a written lease is inadmissible. Such a statement on being assented to by the lessee, amounted tax either to modification or rescission of the contract of lease within S. 92, proviso 4. The statement did not amount to an estoppel on the part of the lessor, so as to preclude him from denying that the notice provided for by the lease had in fact been given. 46 Cal. 1079=29 C.L.J. 94=53 Ind. Cas. 684.

——S. 92—Lease—Land-lord and tenant.

Where a tenancy is brought into existence with a view to a particular purpose, subsequently the parties may alter its character and incidents by their conduct. 80 Ind. Cas. 898=A.I.R. 1925 Cal. 340.

——S. 92, proviso (3) — Lease — Condition precedent—Possession.

It is open to a Court to admit evidence that an **ijara patta** granted by a land-lord to a tenant was intended to be operative only in the event of the lesse being able to obtain possession of the lease-hold property, and possession was a condition precedent to the attaching of any obligation upon the tenant to pay rent. 29 C. L. J. 478=51 Ind. Cas. 918.

——S. 92—Lease—Commencement of tenancy— Oral agreement to lease—Proof.

S. 92, Evidence Act is no bar to evidence to show the time of commencement of the tenancy under an oral agreement to grant a lease. 22 C.W.N. 190=50 Ind. Cas. 177.

——S. 92, proviso (4)—Registered lease—Suit for rent—Subsequent correspondence varying rate of rent— Ratification—Defence.

In a suit for rent on foot of a registered lease a plaintiff cannot recover more than what was agreed to be paid under the lease as the terms of that document could not be contradicted or varied by subsequent correspondence which was not registered even though by that correspondance a binding agreement may have been made between the parties for altering the rent payable under the registered sub-lease. 41 Ind. Cas. 431. (Cal.)

——S. 92, proviso (1)—Lease—Kabuliyat—Proof of —Non-acceptance—Oral evidence.

Where a kabuliyat executed and registered by a tenant is proved by the tenant in a suit there is nothing in the Evidence Act or the Registration Act to prohibit the land-lord from showing that he never assented to or accepted the kabuliyat. 47 Ind. Cas. 1003 (Cal).

——S. 92, proviso (4)—Lease—Kabuliyat—Stipulation not to be enforced.

A kabuliyat with a stipulation which the land-lord has said is not to be enforced represents no real agreement between the parties and the tenant, cannot be deemed to have given assent to it. 20 C.W.N. 1067= 37 Ind. Cas. 126.

——S. 92, proviso (4)—Registered kabuliyat— Rent reserved—Unregistered agreement to take less—Inadmissible.

Where a registered kabuliyat (lease) fixed an annual rent of Rs. 2,800, a subsequent agreement by the land-lord to take a reduced rent of Rs. 2,000 only would be inadmissible in evidence for want of registration and unenforceable for want of consideration. The mere receipt by the land-lord of reduced rent for some years, was held to be consistent with a mere voluntary and temporary abandonment. 41 Cal. 493=40 I. A. 223= 26 M.L.J. 25=15 M.L.T. 68=19 C.L.J. 95=18 C.W.N. 66=(1914) M.W.N. 1=16 Bom. L.R. 42=21 Ind. Cas. 750 (P.C.).

[On appeal from 37 Cal. 293=4 Ind. Cas. 713.]

——S. 92—Lease—Construction of—Rent in cash and in kind—Specified fixed sum, case of non-payment of rent in kind—Intention of parties—Oral evidence if admissible—Evidence Act (i of 1862) S. 92.

Where a tenancy was reated by a lease the rent was made payable partly in kind and partly in cash, and the parties expressly provided that if the rent payable in kind was not duly delivered the tenant would be liable for a sepecified sum, oral evidence is not admissible to prove an agreement of the description which subsequently varies the rights and liabilities of the parties as explicitly set up in the instrument. 12 C.L.J. 649 ref. to. Where a contract of lease provided that Rs. 11-3 a year was to be paid by the tenant for 12 bijhas of land, 3 airs of paddy on account of another 47 bijhas of land, and Rs. 3 on account of costs and the tenant neglected to pay the fixed rent and paddy, the land-lord would be entitled to realise amicably or by action at law Rs 12 as the price of the paddy. Rs. 11-3 as the cash rent, and Rs. 3 the amount of costs; in all Rs. 26-3. **Held,** that the land-lord was entitled, upon a failure of the tenant to deliver the paddy to realise only Rs. 12 as its value and not price at the current market rate. (1910) 12 C.L.J. 649 =15 C.W.N. 249=7 Ind. Cas. 842.

——S. 92 (4)—Dharputni lease—Rent reduced by subsequent letter—Payment for 30 years—Effect of.

Where after the execution of the Dharputni lease which fixed a certain amount as rent the land-lord reduced the rent payable by the lessee by a subsequent letter and the lessee paid at the reduced rate for more than 30 years, **Held,** that the land-lord's transferee could not claim at the high rate. 13 Ind. Cas. 449 (Cal.).

——S. 92, proviso (4)—Lease—Registered kabuliyat —Modification of terms—Oral agreement.

A subsequent oral agreement by which the plaintiff would get the costs and **wasilat** and would make a deduction from the rent of the defendant corresponding to the amount received, is a different arrangement; and if the **kabuliyat** is registered the defendant cannot prove the oral agreement, under proviso (4) of S. 92. 12 C.L.J. 442=8 Ind. Cas. 792.

15. Mistake.

——S. 92—Mistake—Document silent as to interest.

Decree passed in terms of award—Subsequent objection to award and decree on ground that there was clerical mistake in award as to rate of interest—Court examining arbitrator and taking other evidence and correcting error under Civil P.C., S. 152:

Held, that S. 92 did not apply to the case and that the Court did not act illegally in the exercise of its jurisdiction. A.I.R. 1942 Oudh 426=1942 O.W.N. 429 =1942 A.W.R. 269=201 Ind. Cas. 127.

——S. 92, proviso 1, S. 94—Mistake—Property not intended to be sold was inserted in sale deed—Evidence to show what was intended to pass, admissibility.

Where the seller and the purchaser both state that by mutual mistake, property which had never been intended to be sold was inserted in the sale-deed it is open to the parties to produce evidence to show what was intended to be sold and purchased. To such a case, S. 94, Evidence Act, is inapplicable because what is sought to be rectified in such a case is not the sale-deed but the mistaken expression of the intention of the parties as embodied in the sale-deed. A.I.R. 1940 Lah. 236=42 P.L.R. 222=188 Ind. Cas. 813.

——S. 92, proviso I—Mistake—Facts which may be proved under proviso, if can be pleaded by way defence—Mistake common to all parties—Remedy—Unilateral mistake.

There is nothing in the Proviso to S. 92, Evidence Act, to suggest that the facts which may be proved under that Proviso can only be proved in support of a claim to which those facts give rise, and such facts may be pleaded in India by way of defence only.

The validity of every contract, depends on the presence of the **animus contrabendi,** the intention to contract. Where a written contract is challenged on the ground of mistake common to all parties, the remedy is rectification. All that the Court has to do in such a case is to rectify, not the contract, but the document so as to carry out the contract which the parties really entered into. Where there is a unilateral mistake, the position is different, there is, in fact, no contract. The minds of the parties were not at one; one intended one thing, and the other intended something else, and if any relief can be granted, it must be rescission. But at that point the rule of estoppel, which is part of the law of evidence steps in. Therefore, if one is dealing with a case of unilateral mistake, it is by no means every mistake of such a nature which would give rise to a claim to relief and serve as a defence under Proviso 1 to S. 92, Evidence Act. A.I.R. 1939 Bom. 151=41 Bom. L.R. 191=I.L.R. (1939) Bom. 149=181 Ind. Cas. 991.

——S. 92, Proviso 1—Mistakes contemplated by nature of.

The mistakes contemplated by Provisio 1 to S. 92 are genuine and accidental mistakes, just as the misdescription of the property. A.I.R. 1939 Pesh. 41=184 Ind. Cas. 585 (2).

——S. 92—Mistake.

Where, in a suit upon a mortgage for recovery of money, it is found that the number of a particular item of property was wrongly mentioned in the deed, even if the relief rectified is barred under Art. 96, Limitation Act, the mortgage-deed can be rectified. That the mistake was mutual can be proved by oral evidence, and when the mistake is proved, the document can be construed by the Court as if it had been rectified subject to the rights of third parties acquired in the meantime in good faith and for consideration. A.I.R. 1938 Mad. 589=47 M.L.W. 661=1938-1 M.L.J. 806=1938 M.W.N. 499=176 Ind. Cas. 875.

——S. 92, proviso I—Unilateral mistake—Evidence to prove—Admissibility—Suit on unreformed instrument without prayer for rectification.

Unilateral mistake (not amounting to fraud, legal or equitable) is not a ground for rectification, and would, therefore, if proved, not entitle the party alleging it to a decree or order rectifying or cancelling the document.

Section 92, Provisio 1, Evidence Act, does not empower a plaintiff suing on an unreformed and registered and unambiguous deed to lead evidence to show that by a mistake, a term has been omitted from the deed unless the mistake is such as would found a claim for rectification or concellation, and in such case, the evidence will be tested by the same standards and the claim will be open to the same defences as though the action claimed rectification. A.I.R. 1931 Mad. 785=34 M.L.W. 266=1931 M.W.N. 906=61 M.L.J. 437=54 Mad. 973=134 Ind. Cas. 1208.

——S. 92—Mistake.

In a suit for recovery of possession based on a document which contains a mistake, the property in suit being left out through clerical mistake, although a suit for rectification may be barred by limitation, the plaintiff is entitled to succeed and mistake can be proved under S. 92. A.I.R. 1930 All. 387=127 Ind. Cas. 577.

——S. 92—Mistake—In case of mutal mistake either party can prove mistake in written contract.

Where a mortgage deed stipulates that Re. 1 per month shall be paid interest and the mortgagee contends that the rate of interest agreed upon is Re. 1 per cent. per month, the words "per cent." having been omitted from the mortgage deed, through clerical mistake, it is a case of mutual mistake of the parties and not one of patent ambiguity as contemplated by S. 93. The case is similar to one in which a description of property intended to be conveyed in a particular deed has been wrongly entered. Therefore the combined effect of S. 92 (1), Evidence Act, and S. 31, Specific Relief Act, is to entitle either party to the contract to protect his rights by proving the mistake in the written contract: 7 O.W.N. 14=A.I.R. 1930 Oudh 95.

——S. 92—Mistake—Surety bond.

The wording of the surety bond did not support a person's contention that he did not sign a bond for payment of the amount but for appearance and payment of the amount only on failure to produce the person. The evidence showed that though the bond was read out to the person, he was told that he was surety for the appearance. The person had offered himself to be a surety by an application in which he stated that as the judgment-debtor would be produced he placed the properties mentioned therein as security. The order for the release of the judgment-debtor was vague,

Held, that though ordinarily the wording of the bond could not be allowed to be contradicted there was ample ground for holding that the bond happened to be executed under a mistake as to its real purport. A.I.R. 1929 Rang. 262.

——S. 92—Mistake.

Where the intention of the parties was to sell survey No. 181 but by mistake survey No. 161 was put in the sale-deed instead of No. 181,

Held, that extrinsic evidence was admissible as to circumstances which would show that survey No. 181 was intended to be sold and not survey No. 161. 104 Ind. Cas. 736=10 N.L. J. 201=A.I.R. 1928 Nag. 4.

——S. 92—Mistake in written contract can be proved by either party—Suit for rectification of contract is not a necessary preliminary.

When parties have come to a contract but have failed to express themselves correctly, if a mistake is a real one and mutual, and can be established by satisfactory proofs, a Court of equity will reform written instrument so as to make it conformable to the precise intent of the parties.

The combined effect of S. 92, Cl. (a), Prov. (1) and of S. 31, Specific Relief Act is to entitle either party to a contract, whether plaintiff of defendant, to protect his right by proving a mistake in contract, for example, mistake in the description of the property sold by giving wrong survey number to same: 39 Mad. 792, **Rel on.**

What in such cases is rectified is not the agreement but the mistaken expression of it: 28 Bom. 420 and A.I.R. 1922 All. 42, **Ref.**

In such a case a party is entitled to succeed upon a construction of a conveyance itself without the necessity of having to take proceedings, by way of a separate suit for rectification of the deed, as a Court is competent to give effect to what was indisputably the real agreement between the parties without driving the plaintiff to a separate suit for rectification: 2 C.W.N. 260 and A.I.R. 1923 Cal. 53, **Foll.** 104 Ind. Cas. 736=10 N.L. J. 201=A.I.R. 1928 Nag. 4.

——S. 92—Mistake—Sale-deed—Certain property sold omitted in sale-deed by mutual mistake—Rectification not sought within limitation—Oral evidence can be admitted to prove sale.

Though a remedy by a way of rectification of an instrument by a suit is open to a party, when through fraud or mutual mistake of the parties an instrument in writing does not truly express their intention; this does not mean that if, notwithstanding the mutual mistake, the property actually intended to be transferred has passed to the possession of the vendee, the vendee's title to the property can be challenged simply because the insutrument has not been rectified within three years from the date of the discovery of the mistake by the vendee. It will always be open to the vendee, if his title is challenged by the vendor, to show that there was a mistake in the instrument and that, as a matter of fact, the property in his possession was intended to be transferred to him. In fact the vendee is entitled to lead oral evidence to show the mistake in the instrument. The mere failure of the vendee, to have the instrument rectified within three years from the date of the discovery of the mistake, cannot have the effect of extinguishing his title to the property intended to be conveyed to him, though not properly described in the sale-deed: 100 Ind. Cas. 568= A.I.R. 1927 All. 355.

——S. 92—Mistake—Specific Relief Act, S. 31— Mis-statement in pro-note as to rate of interest owing to mutual mistake can be rectified.

The Court can correct the terms of a document if it is proved to the satisfaction of the Court that any of such terms are inaccurate owing to a mutual mistake. It can also correct a mis-statement in a promissory note if in fact a term had been placed in the note without really representing the true bargain between the parties. 104 Ind. Cas. 559=31 C.W.N. 747=A.I.R. 1927 Cal. 605.

——S. 92 — Mistake — Sale-deed with condition of re-purchase executed but consideration of re-purchase not entered—Evidence to prove consideration is allowed.

A deed of sale duly executed and registered contained an agreement for re-purchase but the space intended to insert the amount of re-purchase money was left blank. The executant brought a suit for specific performance and rectification of the deed, or in the alternative for its cancellation,

Held, that the omission to enter the price was either due to the fraud of the purchaser or to a mutual mistake; that under S. 92 (1), oral evidence was admissible as to the amount agreed upon on the ground of fraud or mistake and that the document could be rectified by the Courts under S. 31, Specific Relief Act so as to bring it into accord with the real intention of the parties. 80 Ind. Cas. 759= 2 Rang. 113=3 Bur. L. J. 44=A.I.R. 1924 Rang. 235.

——S. 92—Mistake.

A mortgage-deed was renewed and in the renewed deed a part of the mortgaged property was mis-described,

Held, that under S, 92, proviso (1) of Evidence Act it was open for the plaintiff to prove this mistake and the evidence which they produce to prove that fact was admissible. 64 Ind. Cas. 961=44 All. 246= 20 A.L. J. 53=A.I.R. 1922 All. 42.

——S. 92—Mistake.

Oral evidence of the negotiations antecedent to the execution of the instrument, which shows that what was intended to be offered and accepted was

different from what was by mistake actually described in the instrument can be given: 22 All. 149 (P. C.) and 5 Bom. L.R. 853, Foll. 66 Ind. Cas. 345=34 C.L.J. 256=26 C.W.N. 36=A.I.R. 1921 Cal. 730.

——S. 92, Proviso (1) —Mistake—Mutual—Registered deed—Admissibility.

Proviso (1) to S. 92, Evidence Act, admits parol evidence of mutual mistake in a registered mortgage-deed. 3 L.W. 551=31 Ind. Cas. 671.

——Ss. 92, proviso (1) and 94—Mistake in description—Evidence to prove what was actually sold—Rectification under S. 31, Sp. Relief Act.

Under S. 92, proviso (1) any fact may be proved either by the plaintiff or by the defendant which would entile him to a decree on the ground of mistake of fact or law. Where there is a mis-description of the property sold the vendee can claim a rectification of the sale-deed under S. 31, Sp. Relief Act. The combined effect of S. 92, proviso (1) of the Evidence Act and S. 31, Sp. Relief. Act, is that the defendant can resist a suit for possession on the ground that what was sold to him was different from what the sale-deed contained. The fact that he is a defendant does not disable him from setting up a plea which could have availed him as plaintiff. 39 Mad. 792=29 M.L.J. 229=(1915) M.W.N. 448=18 M.L.T. 75=29 Ind. Cas. 588.

——S. 92, proviso (1) —Mistake—Vested interest —Oral evidence—Admissibility.

To apply S. 92, proviso (1) it must be proved either that the legal requisite of a valid agreement did not exist or that there was no free consent or that the document does not express what was intended to be embodied in it. The proviso does not apply where the document represents what the parties intended to put into writing though it might not be in accordance with what they intended to do. A party cannot be permitted to show that an estate given under a document immediately to the grantee should vest in him only at a future time. A vendor cannot be allowed to show that the sale-deed created rights different from what it purports to create. A donor cannot be allowed to prove that the gift was intended to operate as a will. 38 Mad. 226=(1913) M.W.N. 650=25 M.L.J. 290=20 Ind. Cas. 924.

——S. 92, proviso (1)—Mistake as to date—If assignee of mortgage bond can show that the date is a mis-description.

The assignee of a mortgage-deed can show that the date mentioned in the asssignment bond is a mis-description if there is a mistake as to the date. 9 Ind. Cas. 729 Foll. 13 Ind. Cas. 313 (Mad.).

16. Mortgage.

——S. 92—Mortgage—Stipulation that parties would only rely on evidence of payment endorsed on back of deed.

Even where the mortgage-deed contains a stipulation that the only evidence which the parties would rely upon in support of any payments made in satisfaction of the mortgage-debts would be payments endorsed on the mortgage-deed itself, it is open to the mortgagor to rely on evidence other than the endorsements on the mortgage bond, such as, a separate receipt signed by the mortgagee or his agent. A.I.R. 1941 Pat. 246=192 Ind. Cas. 861.

——S. 92—Mortgage.

Under S. 92, the terms of unregistered mortgage-deed cannot be proved by any other evidence than the deed itself. ('38) 1938 N.L.J. 123.

——S. 92, Proviso 2—Principle of applicability—Mortgage—Subsequent oral agreement—Evidence—Admissibility.

The principle determining the question as to the applicability of the proviso 2 to S. 92, Evidence Act, is that if a separate oral agreement sought to be established is on a distinct and collateral matter, although it might have been a part of the same transaction, the agreement would be one which would come within proviso 2, if the original instrument is silent on the point which is the subject-matter of the agreement.

Where, in an oral agreement, the mortgagee agreed to accept lands mortgaged to him in full satisfaction of the mortgage debt and also some other sums due, and such agreement dealing with the mode of payment was not mentioned in the mortgage deed:

Held, that the oral agreement was admissible under S. 92, proviso 2, as it was a distinct and collateral matter dealing with the mode of payment not mentioned in the mortgage-deed. A.I.R. 1937 Cal. 619=41 C.W.N. 1053=I.L.R. (1937) 2 Cal. 752 =174 Ind. Cas. 108.

——S. 92—Registered mortgage-deed — Oral agreement—Evidence—Admissibility.

Oral evidence to prove that the mortgage amount was settled at a sum lesser than the actual amount due and that the mortgagee had agreed to accept in full discharge of the claim under the mortgage-deed a certain portion of the mortgaged property, is admissible. Proof of such an agreement is not precluded by S. 92, Evidence Act. A.I.R. 1937 Mad. 261=71 M.L.J. 850=44 M.L.W. 944=168 Ind. Cas. 699.

——S. 92—Mortgage—All mortgagors having joint liability—Mortgage security indivisible—Agreement by which one mortgagor had only a separate liability—Whether one varying terms of original—Admissibility.

Where an agreement of mortgage was one by which all the mortgagors had a joint liability and the mortgage security was indivisible, any agreement by which one mortgagor had only a separate liability and the mortgage security was made divisible, must be one to vary or contradict the terms of the original agreement and hence inadmissible in evidence. A.I.R. 1935 Rang. 197=157 Ind. Cas. 126.

——S. 92—Mortgage—Settlement between mortgagor and mortgagee, if admissible to prove the amount due.

There is nothing in law to prevent the parties from coming to settlement for the purposes of determining the amount of sale-consideration, as to the amount of money which would be due to the mortgagee under the mortgage deed when accounts are taken on an agreed basis and the settlement is admissible to prove the amount due on the mortgage, in a suit for sale by the mortgagee. A.I.R. 1934 Oudh 115=11 O.W.N. 254=151 Ind. Cas. 531.

——S. 92—Mortgage-deed—Unregistered kistbundi providing manner of payment of amount due—Admissibility.

When a mortgage bond is silent as to how the money due on it is to be paid, and the mortgagee executes to kistbundi which merely provides that mortgagor is to pay the amount then found due in certain instalments spread over a certain number of years with a proviso that in default of any kist, the entire amount under the mortgage bond would become due, the kistbundi does not alter or vary the terms of the mortgage bond and it is admissible in evidence even though it is not registered. A.I.R. 1932 Cal. 136=35 C.W.N. 861=135 Ind. Cas. 871.

——S. 92—Mortgage.

Parties to a registered deed are precluded by the provisions of S. 92 from giving evidence that the property comprised in the deed is different from that which on the face of the deed appears to have been mortgaged. 90 Ind. Cas. 841=7 P.L.T. 293.

——S. 92—Mortgage—Scope.

When there is a subsequent oral agreement between a mortgagor and the mortgagee relating only to the mode of payment of the mortgage money, evidence with respect to such oral agreement is admissible: 9 All. 392; 11 C.L.J. 39; 25 C.L.J. 560 and A.I.R. 1928 Mad. 233, Foll. But where such oral agreement purports to change the character of the mortgage also, the evidence is inadmissible. 110 Ind. Cas. 261 (Lah).

——S. 92—Transfer of Property Act, S. 59—Mortgage—Mortgage-deed unregistered—Mortgage is invalid but recitals in the deed are admissible to show nature of mortgagee's possession.

Even though a mortgage not effected by a registered deed as required by S. 59 is invalid, the recitals in the unregistered mortgage-deed are admissible in evidence for the purpose of explaining the nature and character of the possession of the mortgagees over the mortgaged property. 100 Ind. Cas. 346=A.I.R. 1927 All. 311.

——S. 92—Mortgage.

In a mortgage suit for sale the defendant pleaded that plaintiff mortgagee had subsequently orally agreed to accept in full satisfaction of the mortgage debt a conveyance of six shops valued at Rs. 95,000 and Rs. 7,000 in cash. On the date when the oral agreement was made a sum of Rs. 1,12,000 was due on the mortgage.

Held, that the oral agreement amounted to a modification of the original contract and was inadmissible under S. 92 (4); 42 Mad. 41, Foll. 119 Ind. Cas. 107=1929 A.L.J. 924=A.I.R. 1929 All. 615.

——S. 92—Mortgage.

Where the mortgage-deed provided that interest should be paid at one per cent, per mensem compoundable yearly and the defendant alleged in a suit on the mortgage that the contract between the parties was that only simple interest should be paid,

Held, that the evidence in support of the alleged oral agreement was inadmissible under Ss. 91 and 92 of the Evidence Act. 119 Ind. Cas. 92=27 A.L.J. 806.

——S. 92—Mortgage.

Evidence of a subsequent oral agreement purporting to vary the original registered mortgage-deed would be inadmissible under proviso 4 to S. 92. 89 Ind. Cas. 875=3 Rang. 243=A.I.R. 1925 Rang. 322.

——S. 92—Mortgage—Plaintiff mortgaging land with possession but without registered deed—Oral evidence to prove mortgage is not allowed but he may sue on title for possession on condition of returning consideration money.

Where a plaintiff alleges that possession of immovable property has been given to the defendant as security for a loan of Rs. 100 or upwards, but without any registered instrument, no oral evidence is admissible to prove the transaction. There is a marked distinction in these cases between those relating to an inchoate mortgage and an inchoate sale. In the latter it is open to the party in possession of land who has bought without obtaining a registered deed of conveyance to sue for specific performance of a contract to sell. But there is no right to sue for specific performance possessed by a mortgagor who has given his land in mortgage without securing his right of redemption by a registered deed of mortgage. 8 B.L.R. 334 (F.B.) and 2 K. 285 (F.B.), Expl. In such a case it is however, open to the plaintiffs to bring a suit based solely on their title. If the defendant admits their title and if he fails to prove the contract to sell which he alleges, the plaintiff would be entitled to a decree. That decree must be made conditional on repaying the money advanced not with the intention of granting practically a decree for redemption but by ordering repayment on equitable grounds. The reason why different principles apply to the admissibility of evidence to prove a contract to mortgage and a contract to sell is that in the latter the defendant is entitled to claim specific performance and in the former case he is not. 94 Ind. Cas. 567=4 Bur. L.J. 118=4 Rang. 1 =A.I.R. 1925 Rang. 291 (F.B.).

——S 92—Mortgage.

Where a mortgage-deed provides for redemption within 2 years of the date of the mortgage, a party to the deed cannot be permitted to prove a verbal promise to allow redemption at any time. 76 Ind. Cas. 624=2 Bur. L. J. 119=A.I.R. 1923 Rang. 232.

——S. 92—Mortgage.

Mortgage deeds invalid for want of registration or by reason of defective registration are admissible in evidence to prove a personal covenant to pay. 66 Ind. Cas. 589=11 L.B.R. 148=A.I.R. 1921 L.B. 34.

——Ss. 92, proviso (4) and 58—Mortgage—Oral agreement to take less than what is due—Proof of admission in pleadings.

A subsequent agreement by the mortgagee to take less than is due under a registered mortgage is an agreement modifying the terms of written contract and if it has to be proved, oral evidence is inadmissible under proviso (4) to S. 92 of the Evidence Act. Where however such an oral agreement is admitted in the pleadings of the other party, proof of the agreement is dispensed with by S. 58 of the Evidence Act. 42 Mad. 41=35 M.L J. 555=8 L.W. 522=24 M.L.T. 400=(1918) M.W.N. 719=48 Ind. Cas. 158.

——S. 92, proviso (4)—Registered usufructuary mortgage-deed—Subsequent unregistered written agreement varying the mode in which rents and profits are to be applied by mortgagee.

Where there is an express and unambiguous stipulation in a registered mortgage-deed that the profits of the mortgaged property should belong to the mortgagee in lieu of interest, it cannot be varied or contradicted by reference to priliminary negotiations or previous conversations or by evidence of a subsequent unregistered document. Effect must be given to the document as it stands and it is not open to the Court to treat it as merely usufructuary in form but creating a charge in fact. 35 All. 48=40 I.A. 31=17 C.W.N. 233=13 M.L.T. 182=(1913) M.W.N. 131=17 C.L.J. 312=15 Bom. L.R. 432=25 M.L.J. 91=17 Ind. Cas. 737 (P.C.).

——S. 92, proviso (4)—Mortgage — Oral evidence showing payment of a lesser sum in full satisfaction.

Oral evidence is inadmissible under S. 92, proviso 4 of the Evidence Act to prove the defendant's case that the plaintiff agreed to receive a lesser sum in full satisfaction of the much greater amount which was due on the mortgages. 44 Bom. 55=22 Bom.L.R. 39=54 Ind. Cas. 689; also 42 Mad. 41=35 M.L.J. 555=48 Ind. Cas. 158. (F.B.).

——S. 92, proviso (4)—Mortgage—Oral agreement to forego interest—No discharge—Contract Act, S. 63.

An oral agreement between a mortgagor and a mortgagee whereby the latter agreed to forego interest for three years in consideration of the payment of principal sum in a lump within a certain date is inadmissible in evidence. There being no payment of the principal money, S. 63 of the Contract Act did not apply. 43 Ind. Cas. 913. (L.B.).

——S. 92, proviso (2)—Mortgage—Default in payment—Agreement to take possession.

S. 92 is no bar to the proof of an agreement between the mortgagor and mortgagee that on the default of the mortgagor to pay the mortgage money on the due date the mortgagee was to take possession of the mortgaged property. 25 C.L.J. 560=40 Ind. Cas. 371.

——S. 92, proviso (4)—Registered mortgage—Agreement to take lesser sum—Inadmissible.

S. 92 (4) precludes evidence of an oral agreement to rescind a registered Contract. 32 M. 281; 9 Ind. Cas. 340; Ref. 23 M. 92; 23 B. 348; 30 M. 231, Dist. An agreement whereby a lesser amount was agreed to be taken or a different period was fixed in respect of a registered mortgage would be a variation of the terms and would fall within S. 92. A mortgage registered, cannot be cancelled or rescinded either orally or by an unregistered endorsement on the mortgage-deed reciting that the bond was cancelled and returned as the amount due was paid. 37 C. 589; 19 M. 288; Ref. 27 Ind. Cas. 269. (Mad.).

——S. 92, provisos (2) and (4)—Mortgage by conditional sale—Conversion into usufructuary mortgage—Admissibility of oral evidence.

Where evidence was adduced to prove that a mortgage by conditional sale was by agreement turned into an usufructuary mortgage, Held, that the alleged agreement was not in the nature of one contemplated by proviso 2 to S. 92 and hence evidence of such an agreement was inadmissible and also that as the mortgage was registered, no such agreement could be proved except by means of a registered instrument under proviso 4. 14 O.C. 321=13 Ind. Cas. 813.

——S. 92, proviso (4)—Mortgage—Rescission—Parol evidence.

Parol evidence of an agreement between the parties to a mortgage-deed to consider the mortgage as at an end is not admissible under S. 92 (4). 32 Mad. 281=5 M.L.T. 84=19 M.L.J. 280=2 Ind. Cas. 612.

——S. 92, proviso (4)—Unregistered agreement—Mortgage.

A, B, mortgaged certain property to the plaintiffs. C the third co-sharer died and his widow mortgaged her one-third share except a certain village to the plaintiffs. It was alleged by C's heirs that there was an arrangement agreed upon afterwards by which the mortgagee was to take the profits of the village B and utilize them to repayments. Held, that the agreement was admissible in evidence and that the S. 92 (4) of the Evidence Act did not apply. 10 Ind. Cas. 196 (Oudh).

——S. 92—Mortgage deed—Variation of terms—Mode of payment.

After the execution of a mortgage deed, the parties thereto arranged that the mortgagee would be placed in possession and authorised to receive the profits in satisfaction of his dues under the mortgage:

Held,—This was not an agreement contradicting, varying, adding to, or subtracting from, the terms of the original contract but merely providing means for the satisfaction of the bond, and could be proved by oral evidence. S. 92 of the Evidence Act did not apply. (1897) 9 A. 392, (1885) 11 C. 486 and (1895) 18 A. 168 Foll. (1909) 11 C.L.J. 39=2 Ind. Cas. 13.

17. Negotiations.

——S. 92 — Negotiations — Correspondence before the completion of mortgage—Admissibility to vary the terms.

Letters between the parties written several months before the completion of the mortgage are inadmissible in evidence to contradict, vary, or add to the terms of the mortgage-deed. They only constitute evidence of negotiations. A.I.R 1933 Lah. 1024=149 Ind. Cas. 1124.

——S. 92—Negotiations.

The true construction of a document cannot be varied by extraneous evidence as to the negotiations which led up to the contract. 41 Cal. 493 (P.C.), Foll. 107 Ind. Cas. 201=A.I.R. 1928 Nag. 182.

——S. 92—Negotiations—Oral evidence regarding what took place at the time of the deed is not admissible.

Where the question was whether two documents constituted a completed contract or not.

Held, oral evidence to show what actually took place on the occasion when the parties entered into the agreement relied upon by the plaintiff is irrelevant and in admissible. 71 Ind. Cas. 763 =17 M.L.W. 572=50 I.A. 25=37 C.L.J. 440=32 M.L.T. 175=25 Bom. L.R. 531=47 Bom. 335=28 C.W.N. 73=4 L.R.P.C. 84=.A.I.R 1923 P.C. 47= 44 M.L.J. 608 (P.C.).

——S. 92—Negotiations—Lease deed defective —Prior correspondence is admissible.

Where the lease is defective in not giving sufficient description of the property to identify it, the parties have to fall back on extraneous evidence. The Courts can take into consideration correspondence which passed between the parties prior to the lease. 69 Ind. Cas. 647=20 A.L.J. 907=A.I.R. 1923 All. 53.

——S. 92—Negotiations—Draft deed prepared before execution of document—Admissibility of.

Drafts prepared long before executing documents are inadmissible to construe documets which are not ambiguous. 25 M.L.J. 637=31 Ind. Cas 543.

——S. 92—Negotiations—Evidence of—Written contract.

Evidence of prior negotiations is not admissible to vary the terms of a lease-deed in writing or to show that a smaller area alone was leased. 41 Cal. 493=40 I.A. 223=18 C.W.N. 66=(1914) M.W.N. 1=15 M.L.T. 68=19 C.L.J. 95=26 M.L J. 25=16 Bom. L.R. 42= 21 Ind. Cas. 750 (P.C.).

——S. 92—Negotiations—Lease—Boundaries and area—Statement of—Evidence of prior negotiations to show extent leased.

The construction of a registered kabuliyat as regards the land included in the lease could not be varied by evidence of the negotiations which led to the contract or by extrinsic evidence that the area within the boundaries specified in the **kabuliyat** was different. 41 Cal. 493=40 I. A. 223=26 M.L. J. 25=15 M.L.T. 68=19 C.L.J. 95=18 C.W.N. 66=(1914) M.W.N. 1=16 Bom. L. R. 42=21 Ind. Cas. 750 (P.C.).

——S. 92—Negotiations — Express agreement—Terms not to be varied by evidence of preliminary negotiations.

Where there is an express and unambiguous stipulation in a mortgage-deed that the profits of the mortgaged property should belong to the mortgagee in lieu of interest, it cannot be varied or contradicted by reference to preliminary negotiations or previous conversations. Effect must be given to the document as it stands and it is not open to the Court to treat it as merely usufructuary in form but creating a charge in fact. 35 All. 48=40 I.A. 31=17 C. W. N. 233=13 M.L.T. 182=(1913) M.W.N. 131=17 C.L J. 312=15 Bom. L R. 432=25 M. L. J. 91=17 Ind. Cas. 737 (P. C.).

18. Oral agreement.

——S 92, proviso (3)—Oral agreement suspending implementing of agreement to sell—Admissibility.

The defendant executed an **Isar chitti** in the plaintiff's favour acknowledging receipt of a certain amount and promising to get a registered sale-deed executed when the balance is paid. In a suit by the plaintiff for specific performance the defendant pleaded that there was an oral agreement under which the plaintiff should execute a deed of reconveyance before the execution of the sale-deed by him.

Held, that the oral agreement was not one to defeat a deed of sale or to vary the terms thereof but was clearly a condition precedent to the implementing of the terms contained in the **Isar chitti** and was therefore admissible under provsso (3) of S. 92 of the Evidence Act. I. L. R. (1948) Nag. 900=A. I. R. 1949 Nag. 15=1948 N.L.J. 328.

——S. 92, proviso 2—Oral agreement—Agreement for reconveyance of property sold—Oral evidence of—Admissibility—Considerations.

Where a sale of land is in truth a mortgage, the vendor cannot claim specific performance of an oral agreement to reconvey, for in that case the oral agreement would obviously contradict the terms of the deed and evidence of such agreement cannot be let in. But where there is an outright sale on oral agreement that upon the happening of a certain event it was to be followed by a reconveyance of what has been sold the oral agreement cannot be held to contradict, vary, add to or subtract from the terms of the sale-deed. To add a stipulation which is quite unconnected with the terms of sale is not an addition of the kind struck at by S. 92 of the Evidence Act. Accordingly, oral evidence is admissible to prove such agreement though it may be contemporaneous with the original sale. 50 Bom. 566 (F. B.) and the view of Maung Ba in 1927. 1927 Rang. 314, approved. 75 I.A. 282=I.L.R. (1949) Mad. 487=51 Bom. L.R. 932=A.I.R. 1949 P.C. 32= 62 L.W. 14=1948 A. L. J. 479=(1949) 1 M. L. J. 97 (P.C.).

——S. 92—Oral agreement to set-off rent due by mortgagee against interest due by mortgagor—If can be proved.

Where the mortgagee under a simple mortgage happens also to be a tenant of the mortgagor, and the former sets up an oral agreement between him and his mortgagor that the rent due by him for the land is to be set off against the interest due to him from the mortgagor, there is no bar to the proof of such an agreement. I.L.R. (1946) All. 357=225 Ind. Cas. 482=1946 A.W.R. (H. C) 50=1946 A.L.W. 5=1946 O.W.N. (H.C.) 5=A.I.R. 1946 All. 283.

——S. 92, proviso (4)—Oral agreement—Distinct subsequent oral agreement—Contract appointing plaintiffs as sole agents for sale of defendants' goods on commission basis—Contract providing for reduction of rate of commission by mutual consent—Rate reduced by oral agreement—Agreement held was not distinct subsequent oral agreement modifying terms of contract.

Where a contract by which the plaintiffs were appointed sole agents of the defendants for the sale of their goods on commission basis, itself provided that the parties would be at liberty to reduce the rate of commission by mutual consent and the rate of commission was subsequently reduced by an oral agreement:

Held that the oral agreement to reduce the commission was not a distinct subsequent oral agreement modifying the terms of the contract but was a compliance of the terms of the contract and, therefore, it could be proved by oral evidence and not only by a registered document. 224 Ind. Cas. 273=1946 A.W.R. (H.C.) 619=A.I.R. 1946 All. 489.

——S. 92—Oral agreement — Fraudulent transaction between parties — Party defrauded can go outside the document to prove fraud.

Evidence of an oral agreement is admissible for the purpose of proving the fraudulent character of the

transaction between the parties. Evidence of fraud can be offered by a person who himself may be a victim of fraud. Hence, in a case where a deed of surrender is obtained fraudulently from a person, the person defrauded can go outside the document to prove the alleged fraud. A.I.R. 1945 Pat. 311=24 Pat. 230.

——**S. 92, proviso 4—Oral agreement — Original** contract to pay rent in kind—Subsequent oral agreement to pay it in cash, if can be proved to vary original contract.

It is open to the defendants under proviso 4 to S. 92 Evidence Act, to show that the contract evidenced by a **pattah** had been varied by a subsequent oral agreement. Since a contract of this kind is not required by law to be in writing, and a contract of the year 1830 (1237 B.S.) would not, in any event, have been registered, as the Registration Act was not passed until the year 1864 and since the defendants have consistenty maintained that there was an oral agreement that rent was to be payable in cash only, it must be inferred that the rent was payable in cash only. A.I.R. 1943 Cal. 565=76 C.L.J. 251=209 Ind. Cas. 232.

——**S. 92, proviso 3—Oral agreement that amount** under pro-note is payable only after accounts and if something over that amount is found due—Admissibility.

Section 92, Proviso 3 does not permit the terms of a written contract to be varied by a contemporaneous oral agreement. A contemporaneous oral agreement that a sum advanced and acknowledged in a pro-note is payable only after accounts have been taken and it is found that something over and above the sum mentioned in the pro-note is due from the promisor, is an attempt to alter the express terms of the written contract embodied in pro-note and is not admissible under S. 92. A.I.R. 1943 Sind 67=I.L.R. (1942) Kar. 516= 208 Ind. Cas. 51.

——**S. 92—Oral agreement.**

Oral agreements must be proved by clearest and most satisfactory evidence of credible witnesses. ('41) 43 P.L.R. 97.

——**S. 92—Oral agreement modifying registered contract of lease is inadmissible.**

Subsequent oral agreement modifying a previous contract of a month to month lease which is registered, is not admissible in evidence. A.I.R. 1939 Pat. 428= 6 B.R. 148=185 Ind. Cas. 284.

——**S. 92—Oral agreement.**

The parties to a conveyance would not be prevented from proving the existence of a separate oral agreement to the effect that the vendee would proceed no further in the prosecution of his claim for certain money debts not specified in the deed. A.I.R. 1939 Pat. 411=5 B.R. 537=18 Pat. 318=21 P.L.T. 138=181 Ind. Cas. 184.

——**S. 92—Oral agreement—Usufructuary mortgage—Oral agreement—Evidence—Admissibility.**

Plaintiffs had a holding which they granted by way of usufructuary mortgage to the defendant. Under the registered **ijara,** the defendant - **ijaradar** was liable for rent. The **ijara** was of the year 1928. The plaintiffs brought an action stating that they had been sued by the landlords for the years 1929 and 1930 and sought to recover the rent they were made liable to pay for the defendant. The defendant alleged that by an oral agreement made subsequent to the **ijara** transaction, the plaintiff had agreed to pay rent for those years and in consideration of that, he had agreed to pay the arrears which were due from the plaintiff:

Held, that the oral agreement alleged came under the first sub-clause of S. 92, Evidence Act, as it varied the terms by reason of the fact that, whereas under the written agreement the defendant was liable, under the oral agreement, the plaintiffs were liable. The oral agreement was, therefore, inadmissible. A.I.R. 1939 Pat. 142=5 B.R. 202=179 Ind. Cas. 172.

——**S. 92 — Oral agreement — Oral agreement paying amount of consideration stated in sale-deed — Admissibility — Collateral distinct oral agreement on which deed is silent—Evidence as to, if admissible.**

Evidence to vary the amount of consideration mentioned in a registered sale-deed is inadmissible, and if such a course was permissible, the protection afforded by S. 92, Evidence Act would be completely nullified.

But evidence may be given of a distinct and separate oral agreement upon a matter on which a written contract is silent, and a party is entitled to enforce the same. Whether the oral agreement precedes or be contemporaneous with the agreement, is of no consequence, provided it be on a distinct collateral matter. ('37) 169 Ind. Cas. 1002=41 C.W.N. 734=65 C.L.J. 225.

——**S. 92, proviso 3 — Oral agreement pleaded directly contrary to contract—Admissibility.**

If the oral agreement pleaded is directly contradictory to the terms of the contract itself which has been reduced to writing and does not form a condition precedent to the attaching of any obligation under the contract, it is not admissible in evidence. Consequently, where the contract is to execute a deed of release "whenever desired by you" and not "whenever desired by you after the mortgage has been discharged," the executant cannot subsequently set up an oral agreement that the release deed was to be given only when the entire mortgage-debt was discharged as it does not come within proviso 3 to S. 92, Evidence Act, and hence not admissible in evidence. A.I.R. 1937 Mad. 124=71 M.L.J. 599= 1936 M.W.N. 1238=44 M.L.W. 749=169 Ind. Cas. 12.

——**S. 92, proviso 2—Oral agreement—Document not requiring great formality silent on particular matter—Oral evidence of separate oral agreement.**

In considering whether or not proviso 2 to S. 92, Evidence Act, applies the Court shall have regard to the degree of formality of the document. Where the document is a mere contract, it does not require any great formality, and, in fact, the document cannot be considered as a particularly formal document at all and therefore under proviso 2 of S. 92, Evidence Act, oral evidence is admissible to prove the existence of any separate oral agreement as to any matter on which the document is silent and which is not inconsistent. A.I.R. 1936 All. 717=1936 A.W.R. 1216=165 Ind. Cas. 473.

——**S. 92, proviso 4—Oral agreement operating to discharge or satisfy the mortgage—Admissibility.**

Section 92 proviso 4 of Evidence Act does not preclude the admissibility of oral evidence to prove a transaction or contract which satisfies or discharges the obligation created by a registered mortgage deed.

Where, in a suit on a mortgage, the defendants pleaded that it was arranged between the mortgagee and themselves that the former should enjoy one of the mortgaged properties for a period of five years in satisfaction of the mortgage debt and that the mortgagee was accordingly let into possession of the said item and the mortgage had accordingly been discharged:

Held, that the agreement pleaded was admissible in evidence, as it operated to discharge the mortgage. A.I.R. 1936 Mad. 380=1936 M. W. N. 205=162 Ind. Cas. 53 (2).

——S. 92—Pre-decree oral agreement not to execute decree—Whether can be pleaded in bar of execution.

The rule enacted by S. 92 of the Evidence Act is a rule excluding evidence of oral agreement varying the terms of certain documents, and it implies that but for such exclusion, the agreement could in law vary the terms. Section 92 cannot be construed so as to include, decrees within its purview. An agreement not to execute a decree does not vary its terms and where the agreement pleaded is not one to which all the parties to the decree but only some of them are parties, S. 92 does not apply.

An oral agreement subsequent to the filing of the suit and prior to the passing of the decree can be pleaded in execution, and the executing court can determine whether the agreement is true but this covers only agreements which relate to execution and not to agreements which attack the decree itself. A.I.R. 1935 Mad. 860=42 M L.W. 365=1935 M.W.N. 906=69 M.L.J. 451=58 Mad. 994=158 Ind. Cas. 187 (F.B).

——S. 92—Oral agreement.

Section 92, bars oral evidence to prove an agreement to take less than what is due under a promissory note. The criterion does not lie in whether the subsequent agreement is by law required to be in writing, but it lies in whether the original contract, grant or disposition of property, the terms of which the subsequent oral agreement is meant to rescind or modify is by law required to be in writing. A.I.R. 1935 Rang. 188=156 Ind. Cas. 743.

——S. 92, proviso 3—Oral agreement.

Oral agreement must be a condition precedent to the attaching of any obligation under the instrument. ('34) 1934 M.W.N. 1129.

——S. 92—Oral agreement.

Consideration for sale deed, certain amount and oral promise to do something:

Held, oral agreement on which claim was based could not be proved under S. 92. ('34) 1934 M. W. N. 480.

——S. 92, proviso 4—Promissory note—Oral agreement to pay in form of transfer of land instead of money—Proof—Oral evidence.

Where certain documents state that principal and interest on a certain sum of money, mentioned in the documents will be paid when required, an agreement that payment shall be made in the form of a transfer of land, is on the face of it, an agreement modifying the terms of the original contract. The agreement can only be considered as an agreement modifying the terms of the contract contained in the documents sued upon, and S. 92 proviso 4, Evidence Act debars proof of such agreement by oral evidence. A.I.R. 1934 Rang. 228=151 Ind. Cas. 398.

——S. 92—Oral agreement.

An oral agreement between parties to a decree varying the terms of the decree can be proved and the proof there of is not barred by S. 92 of the Evidence Act. A.I.R. 1933 Lah 806=14 Lah. 668=34 P. L. R. 887=145 Ind. Cas. 924.

——S. 92—Oral agreement.

Where, in a C.I.F. contract, the evidence showed that the parties had agreed that the respondent firm should release the goods at the Indian Post and bring them up to Delhi, and that the goods themselves should be tendered in Delhi where payment was to be demanded, and the sellers had duly tendered the goods:

Held, that under proviso 4 to S. 92 of the Evidence Act, such an oral agreement as was set up in this case was not prohibited. A.I.R. 1933 Lah. 453=34 P L R. 266=142 Ind. Cas. 413.

——S. 92, proviso 4—Deed of sale—Oral agreement that deed should not take effect unless agreement for re-purchase was executed.

An oral agreement that a registered deed of sale should be null and void and of no effect until an agreement of re-purchase had been executed by the vendee cannot be proved under the provisions of S. 92, proviso (4) of the Evidence Act. A.I.R. 1933 Rang. 310=148 Ind. Cas. 195.

——S. 92—Contemporaneous oral agreement—Admissibility.

A party to a mortgage-deed cannot be allowed to prove that although, according to the terms of the registered mortgage-deed, the whole of the mortgage-money was payable on demand with interest, there was a contemporaneous oral agreement between the parties that the amount would not be payable on demand, but shall be accepted in instalments. A.I.R. 1932 All. 375=1932 A.L J. 414=141 Ind. Cas. 114 (2).

——S. 92, Proviso 2—Oral evidence—Gift deed— Oral agreement on point on which deed is silent—Admissibility.

It is allowable under S. 92, Evidence Act, 1872, to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone.

Where **A** and his brothers enjoyed a property by turns, and **A,** while he was enjoying it, gifted away his share to one of his brothers who passed a deed of settlement agreeing to pay Rs. 12 per month for life to **A**, and **A** instituted a suit against his brother's widow to recover from her the profits of the last year of his term alleging that at the time of passing the gift deed, he had agreed with his brother to receive profits till expiry of his term:

Held, that this alleged oral agreement referred to something on which the deed of gift was silent and was not inconsistent with its terms and consequently, the oral evidence was admissible in evidence. ('32) 34 Bom. L. R. 971=139 Ind. Cas. 221.

——S. 92, proviso 3—Oral agreement—"Any obligation," meaning of—Written contract—Parties whether can show that they never came to an agreement—Oral agreement qualifying terms of compromise decree.

The words "any obligation" under the third proviso to S. 92, Evidence Act, mean any obligation whatever under the contract and not some particular obligation which the contract may contain.

Under S. 92, Evidence Act the parties to a contract may not vary a written statement but they may show that they never came to an agreement at all and that the signed paper was never intended to be a record of the terms of the agreement, or that a written contract which has no date was not intended to operate from its delivery, but from a future uncertain period, or the parties never intended the signed paper to be an agreement until a condition precedent was fulfilled.

Where two of three judgment debtor, parties to a compromise decree set up, on execution application being filed, an oral agreement with the decree-holder that they were to be treated as sureties for the third judgment-debtor:

Held, that the separate oral agreement was not admissible under S. 92, Evidence Act. A.I.R. 1932 Cal. 328=59 Cal. 106=143 Ind. Cas. 159.

——**S. 92—Oral agreement.**

Where there has been an oral agreement before the execution of a sale deed, such agreement must be deemed to have merged in the sale-deed and other evidence of such oral agreement cannot be received under S. 92. A.I.R. 1932 Lah. 276=33 P.L.R. 227=137 Ind. Cas. 41.

——**S. 92—Oral agreement.**

The discharge of a mortgage debt by payment and receipt of a smaller amount than was due can be proved as a fact if it is separable from any oral agreement to vary the terms of the mortgage contract and can be proved without evidence of such an agreement. A.I.R. 1932 Mad 141=34 M.L.W. 921=136 Ind. Cas. 317.

——**S. 92, proviso 3—Oral agreement—'Condition** precedent', meaning of—Written agreement for maintenance—Contemporaneous oral stipulation for chastity—Admissibility.

A condition precedent within the meaning of proviso (3) to S. 92, Evi. Act, is a condition without the fulfilment of which there is in effect no written agreement at all and no contractual obligation of any description.

In a suit brought by the plaintiff to recover maintenance due under an annuity bond executed by the defendants, the latter sought to prove a contemporaneous oral agreement that the plaintiff should continue chaste in order to entitle her to maintenance:

Held, that the bond having been acted upon for sometime, the oral agreement could not be said to be a condition precedent to the operation of the written agreement within the meaning of the proviso and so was not admissible in evidence. A.I.R. 1931 Bom. 297=33 Bom. L.R. 490=132 Ind, Cas' 444.

——**S. 92—Contract Act, S. 63—Oral agreement**—Mortgage deed—Stipulation for higher rate of interest on default—Subsequent oral agreement waiving default rate—Admissibility—Actual acceptance of original rate after default—Waiver—Discharge of liability.

Section 92, Evi. Act, does not prevent proof of actual waiver of past breaches whether or not this is in pursuance of a promise to waive or not. A promise of grace to waive future breaches may be proved but is of no value unless performance has been actually waived. A binding agreement to waive future performance cannot be proved.

A mortgage-deed provided for interest at 7 percent. per annum on the principal amount. It further provided that the mortgagor should pay interest at 9 per cent. per annum in case he committed default either in the regular amount of interest or in the repayment of the principal amount at the end of two years. The mortgagor committed default and the question as to the interest payable was raised in a proceeding for apportionment of the compensation amount for the land which was acquired under the Land Acquisition Act. The mortgagor pleaded a subsequent oral agreement where by the mortgagee agreed to waive the default rate of interest both for the past and for the future. He also alleged that payments had been made in pursuance of this agreement at the original rate and that the entire claim for interest had thus been discharged:

Held, that the arrangement pleaded was one contemplated by S. 63 of the Contract Act and was admissibie as evidence of actual remission and full satisfaction, though not as evidenee of a binding agreement by the mortgagee to waive his right. A.I.R. 1931 Mad. 636=33 M.L.W. 517=54 Mad. 889=61 M.L. J. 556=132 Ind. Cas. 293.

——**S. 92—Oral agreement varying terms of decree.**

An oral agreement between the parties to a decree varying the terms of the decree can be proved; the proof of such an agreement is not barred by S. 92, Evidence Act. A.I.R. 1931 Sind 42=25 S.L.R. 279=131 Ind. Cas. 710.

——**S. 92—Oral agreement—Suit based on oral promise made at the time of execution of acknowledgment—Such oral agreement can be proved.**

Acknowledgment is not a document contemplated in S. 92. Where a suit is brought alleging that money was advanced on a promissory note and liability was acknowledged, but where the plaintiff rests his claim not on the acknowledgment, or on the pro-note, but on oral promise made at the time of the execution of the acknowledgment, S. 92 does not preclude the proof of such oral agreement, for a contract of loan is not a matter which is required by law to be in writing. An agreement to pay the amount found due on a particular day which is acknowledged in writing, need not be in writing. 127 Ind. Cas. 894=26 N.L.R. 320=A.I.R. 1930 Nag. 298.

——**S. 92—Oral agreement.**

Evidence regarding a subsequent oral agreement is excluded not only in cases in which the original contract is required by law to be in writing but also in cases where the original contract has been registered, 110 Ind. Cas. 261 (Lah.).

——**S. 92—Oral agreement.**

A vendee from the mortgagor of a part of the mortgaged property can enter into an oral agreement with the mortgagee for the redemption of that part only and proof of such an oral agreement by which money is paid, and that part is redeemed is not precluded by S. 92, prov. 4. 27 Mad. 368, **Rel. on.** 112 Ind. Cas. 559=1928 M W.N. 537=A.I.R. 1928 Mad. 1050.

——**S. 92—Oral agreement.**

Oral arrangement providing for repayment of the mortgage debt from the usufruct of the land does not amount to a lease, nor does it constitute a usufructuary mortgage, but only a means of discharging the debt by putting the simple mortgagee in possession of the property and such oral arrangement can be proved. 9 All. 392 and 11 C.L. J. 39, Foll. 107 Ind. Cas. 417=A.I.R. 1928 Mad. 233=53 M.L. J. 863.

——**S. 92—Oral agreement.**

An oral agreement by which a certain sum, due under a sale-deed was not to be payable until the vendee got possession of the whole land cannot be proved undcr S. 92. 94 Ind Cas. 302=1926 M.W.N. 209=A.I.R. 1926 Mad. 495.

——**S. 92—Oral agreement — Contemporaneous oral agreement attaching condition precedent —Evidence is admissible.**

The true construction to be placed upon S. 92, proviso (3) is that the provisions there of are inapplicable in a case in which any obligation under the written contract has attached, and that if the effect of the alleged contemporaneous oral agreement is merely to suspend the performance of the obligations contained in the written contract, evidence of such oral agreement cannot be admitted. On the other hand, it is permissible to adduce evidence of a contemporaneous oral agreement under which the parties to the written contract agree that until the happening of a certain event no obligation whatever

under the written agreement should attach, or, in other words, that until the condition precedent has been fulfilled, the written agreement should be and remain inoperative and of no effect. 90 Ind. Cas. 59=52 Cal. 677=A.I.R. 1925 Cal. 1007.

——S. 92—Oral agreement.

Where the deed between the parties is a informal document, evidence as regards the special agreement alleged by one of the parties is allowable under S. 92, proviso (2). 86 Ind. Cas. 436=A.I.R. 1925 Mad. 1029.

——S. 92—Oral agreement.

Where a deed of lease does not mention the place fixed for payment of rent, it is open to the plaintiff lessee to show that it was subsequently agreed between the parties that rent was to be paid at a particular place. 89 Ind. Cas. 273=8 N.L. J. 81=23 N.L.R. 26=A.I.R. 1925 Nag. 281.

——S. 92—Oral agreement.

Under S. 92, proviso (2) the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. This priviso applies where the document is of an informal character. 83 Ind. Cas. 309=7 N.L. J. 25.

——S. 92—Pro-note—Oral agreement prior to pro-note but written down subsequently that amount was not payable till a certain event—Evidence of agreement admissible.

Respondent sued appellants on a promissory note. Appellants admitted execution of the note but pleaded **inter alia** that under an oral agreement prior to pro-note which was embodied in a written instrument after the pro-note the amount was not payable until the accounts of a certain partnership had been settled.

Held, that the finding that the written instrument was signed some days after the promissory note did not warrant the exclusion of evidence of the oral agreement which was alleged to have been made some time before the written instrument came into existence. 88 Ind. Cas. 336=4 Bur. L.J. 38=A.I.R. 1925 Rang. 256.

——S. 92—Oral agreement.

A entered into an agreement with **P** for the supply of timber. **A** agreed to advance Rs. 5,000 to **P** "on such securities as thought suitable". **P** offered his brother **H** as surety and he was accepted. Rs. 2,500 was advanced to **P** who signed a promissory-note for the amount, **H** also signed this note. Some ten days later, a further Rs. 2,500 was paid to **H** on behalf of **P** who was away in the jungle. **H** alone signed a promissiory-note for this sum. The contract with **P** was in writing but the evidence as to the part of **H** in the transaction was purely oral.

Held, that oral evidence was rightly admitted under proviso 3 to S. 92 of the Evidence Act for the purpose of showing that **H's** liability on the second pro-note which was solely signed by him, arose only on **P's** failure to pay the amount. 10 L.B.R. 366 and 19 Mad. 368, **Foll.** 84 Ind. Cas. 1012=2 Rang. 482=A.I.R. 1925 Rang. 83.

——S. 92—Oral agreement—Agreement complete in itself—Oral evidence is not allowed to supplement it.

A contract for sale of land was entered into on 15th January, 1920, by means of a writing appearing in the books of one Chanbasappa. It was signed by both parties and witnessed. The defendant said that the agreement appearing in the book did not contain the whole of the agreement arrived at between the parties but there was an oral agreement that if anybody else per chance offered more than Rs. 500 to the first defendant above the agreed amount before the expiry of the period in the agreement, the agreement with the plaintiff was to be treated as null and void.

Held, that the evidence about the oral agreement is not admissible.

It may very well be that a writing may be an imperfect agreement of which a Court cannot decree specific performance, but if on the face of it contains all the terms which would entitle it to be considered as a perfect agreement which could be enforced, then undoubtedly no parol evidence could be adduced so as to alter or add to its terms unless they came within one of the provisos of S. 92. 76 Ind. Cas. 215=A.I.R. 1923 Bom. 236.

——S. 92—Oral agreement.

Defendant leased his absolute occupancy field to the plaintiff for a term of seven years without land-lord's consent: the land-lord brought a suit against them to cancel the lease. As the plaintiff and defendant, were bound to fail as against the land-lord, the lease was given up and in its place, the defendant the tenant, executed in favour of the plaintiff, his sub-tenant, a series of six bonds, undertaking in lieu of the lease to pay off the lease money by giving an instalment of 12 khandis of wheat every year. The defendant pleaded that the real arrangement between the parties was that in order to pay off the lease money the defendant should cultivate his own tenancy land but should give half the produce every year to the plaintiff who had been his sub-tenant, and that the plaintiff should pay him half the rent every year. It was alleged that in order that the land-lord should not be aware of this arrangment, the bonds were executed in the form in which they stand. The bonds are described in the defendant's pleadings as "security" for the real oral agreement.

Held, that the agreement "was not a condition precedent" for thr enforcement of the bonds nor can the bonds be regarded as "security" for the carrying out of the oral agreement, and that the attempt to show that the agreement was not what it purported to be but something different is directly against the provisions of S. 92 and is not covered by proviso (3). 71 Ind. Cas. 477=6 N.L.J. 21=A.I.R. 1923 Nag. 135.

——S. 92—Written agreement incomplete—Supplementary oral agreement can be proved.

Where the plaintiff's evidence proved that the written agreement about supply of consignments by defendant was incomplete and that there was a supplementary oral agreement,

Held, it would not be inconsistent with the terms of the document that there should have been an agreement that the consignments should be sent when the plaintiff ordered or requested that they should be sent. 70 Ind. Cas. 844=A.I.R. 1923 Nag. 46.

——S. 92—Oral agreement.

It is not to be thought that it is intended by the proviso (3) to permit the terms of a written contract to be varied by a contemporaneous oral agreement. Having regard to the illustrations (**b**) and (**j**) the proper meaning of proviso (3) is that a contemporaneous oral agreement, to the effect that a written contract was to be of no force or effect at all and that it was to impose no obligation at all until the happening of a certain event, may be proved. 66 Ind. Cas. 131=44 All. 421=20 A.L.J. 247=A.I.R. 1922 All. 262.

——S. 92—Evidence of oral agreement explaining document is admissible.

The interlineated words and figures in an **ikrarnama** were written after it had been signed by the defendant. The plaintiff's allegation was that there was an agreement made before the execution of the **ikrarnama** which justified the additions to the document which do not alter it in the least but merely explain it.

Held, that the plaintiff would be entitled to produce oral evidence of the oral agreement. 12 C.P.L.R. 33; 6 N.L.R. 1, **Foll**; 44 Cal. 154, **Foll**. 68 Ind. Cas. 263 =A.I.R. 1922 Nag. 191.

——S. 92—Oral agreement—Substituted oral agreement—Party setting up must prove that the other party had the understanding that both parties were proceeding on a new agreement.

When parties, who have bound themselves by a written agreement, depart from what has been so agreed on in writing and adopt some other line of conduct, it is incumbent on the party endeavouring to enforce a substituted verbal agreement, to show, not merely what he understood to be the new terms on which the parties were proceeding but also that the other party had the same understanding that both parties were proceeding on a new agreement, the terms of which they both understood. 64 Ind. Cas. 785=33 C.L.J. 577=A.I.R. 1921 Cal. 852.

——S. 92—Oral agreement.

Absolute promise to pay on demand—Contemporaneous agreement to excuse promisor from liability if certain event happened—Oral evidence to prove such agreement is not admissible. 68 Ind. Cas. 758=1921 M.W.N. 636=A.I.R. 1921 Mad. 474=41 M.L.J. 541.

——S. 92—Oral agreement—Oral agreement about payment, modifying written agreement—Payment accordingly—Oral agreement or payment can be proved but not such agreement as to future payments.

Where an oral agreement is made, which in respect of the manner of payment rescinds or modifies a contract, grant or disposition of property required by law to be in writing or actually written and registered, and any payment is made in accordance with that oral agreement, whether in complete or partial satisfaction of the contract, S. 92 does not exclude evidence of that payment or of the oral agreement that explains it. It does exclude evidence of the agreement in respect of future payments not in accordance with the terms of the instrument. 59 Ind. Cas. 249=17 N.L.R. 111= A.I.R. 1921 Nag. 51.

——S. 92, proviso (2)—Arbitration—Oral agreement—Decision of majority is to be binding—Proof of.

An agreement in writing to refer certain disputes to the arbitrators was made and the award of the arbitrators was stated to be binding on the parties to the reference. **Held**, that evidence of an oral agreement to the effect that the parties agreed to be bound by the decision of a majority of the arbitrators was inadmissible under S. 92, proviso (2) of the Evidence Act. 5 O.L.J. 471=47 Ind. Cas. 960.

——S. 92, proviso (4)—Subsequent oral agreement—Mortgage—Release of—Mortgagor from liability.

A subsequent verbal agreement entered into by the mortgagee and mortgagors, the mortgagee agreeing to hold each of the mortgagors liable only for his proportionate share of the mortgage debt contrary to the joint and several liability contracted under the registered mortgage bond is inadmissible in evidence. The agreement would be admissible only if it is evidenced by another registered instrument. 44 Cal. 162=25 C.L.J. 24=21 C.W.N. 740=34 Ind. Cas. 609.

——S. 92, proviso (3)—Oral agreement—Condition precedent to the taking effect of a contract in writing—If admissible.

Oral evidence is admissible to prove an oral arrangement that a document should take effect only on certain condition happening. 9 M.L.T. 450=11 Ind. Cas. 384.

——S. 92, proviso (4)—Parol agreement—Assignment of mortgage.

A oral agreement between a mortgagee and the assignee of his interest whereby the latter was to pay the consideration for the sale to a third person to the credit of the mortgagee is an attempted rescission of a contract required by law to be in writing by a subsequent oral agreement which is forbidden by S. 92, proviso (1) and is inadmissible in evidence; nor can a suit be based on it. 30 M. 231; 32 M. 281 Foll. 9 M.L.T. 326=9 Ind. Cas. 340.

——S. 92—Contemporaneous oral agreement and conduct of parties.

Per **Curiam**.—The act and conduct of the parties can only be proof either (1) of a contemporaneous oral agreement varying the terms of the registered contract or (2) of a subsequent oral agreement having the same effect. In the former case the evidence is excluded by S. 92 of the Evidence Act and in the latter case by proviso 4 to S. 92. 24 C. 20; 25 C 603; 28 C. 259 appl; 22 M. 261 foll. 12 C.L.J. 439=8 Ind. Cas. 790.

——S. 92 (4)—Oral agreement—Satisfaction of mortgage.

Oral evidence of an agreement that a simple mortgagee under a registered mortgage deed was to take possession and to collect rents and pay the profits towards reduction of the principal is admissible. 10 Ind. Cas. 196 (Oudh).

——S. 92—Oral agreement modifying terms of mortgage:—

A registered instrument of mortgage takes effect against any oral agreement relating to the hypothecated property and no parol agreement which purports to modify the terms of the contract of mortgage by deducting the amounts recoverable thereunder by taking away the right of sale and by providing for the payment of the reduced debt by a sale of other property, can be proved, in view of the provisions of S. 92, Evidence Act. 3 A.L.J. 274=1906 A.W.N. 117=28 A. 508.

——S. 92—Written document—Contemporaneous oral agreement—Equitable principles.

Where a written document is alleged to be governed by a contemporaneous oral agreement, or statement of intention, which must be inferred from the surrounding circumstances, the court must be guided by S. 92 of the Evidence Act, and the court cannot have recourse to those equitable principles which enable the Court of Chancery to give relief in those cases of which 2 De. G. & J. 98 and 4 De. G. & J. 16 are examples. 7 Bom. L.R. 669=30 B. 119.

——S. 92, (4)—Oral agreement—Usufructuary mortgage—Discharge by mortgagee of part—Oral agreement between mortgagee and some representatives of mortgagor—Proof—Rescission of contract.

An oral agreement by which a usufructuary mortgagee stipulated for the discharge of a portion of the mortgaged properties by receiving a proportionate part of the mortgage debt from one of the representatives of the mortgagor can be proved provided such agreement is between the mortgagee and one of the representatives (but not all) of the mortgagor. S. 92, Proviso 4, concluding part, has no application

to such a case. Per Boddam J.—The exception at the end of proviso 4 to S. 92 of the Evidence Act applies to executory as well as to executed agreements. No contract can be rescinded or modified except by the consent of all the parties to it or their representatives. Some of the parties to a written contract may agree orally, that some one or more of the parties there to may be discharged from it, and the provision to S. 92 with the exception does not apply to such a case and there is no other provision of law preventing proof of such an oral agreement from being given. 14 M. L. J. 218=27 M. 368.

——S. 92, (4) — Oral agreement — Registered Kabuliyat — Oral agreement is admissible to prove modification:—

A subsequent oral agreement by which the plaintiff would get the money for costs and would make a deduction from the rent corresponding to the amount received is not admissible in evidence under proviso (4) of S. 92 of the Evidence Act to prove modification of terms of a registered Kabuliyat. 12 C. L. J. 442= 8 Ind. Cas. 792.

——S. 92 — Grant, nature of, admissibility of evidence as to oral assurances by grantors:—

Evidence as to oral assurances given by the grantors at the time of the grant is inadmissible to show the perpetual nature of a grant. 22 A. 149; L. R. 27 I. A. 58 foll. 30 C. 883.

——S. 92 (4)—Oral agreement — Remission of rent—Subsequent oral agreement to remit rent—Rent reserved in registered lease — Agreement, legality—Contract Act, S. 63.

A subsequent oral agreement to remit rent reserved in a registered lease is valid though no oral evidence of it is admissible; and a discharge given for a larger amount by acceptance of a smaller amount will take effect as much under S. 63 of the Contract Act. (1902) 26 M. 195.

——S. 92 (4)—Evidence of subsequent oral agreement varying the rate of rent in a kabuliyat—Admissibility of:—

Evidence of a subsequent oral agreement varying the rate of rent payable as mentioned in a **kabuliyat** is excluded by S. 92. 22 M. 26 foll. (1901) 6 C. W. N. 60.

19. Oral evidence.

——S. 92—Oral evidence — Contract — Written contract—Interpretation of—Oral evidence.

There was a written agreement between **A** and **B** by which they confirmed "the negotiations already in force since sometime between them for the excavation of stone and construction thereof by means of machineries" and agreed "not to undertake, directly or indirectly, the one to the exclusion of the other, **works of a similar nature.**" The question was whether a certain contract undertaken by **A** to the exclusion of **B** subsequently was a work of a similar nature within the meaning of the agreement between them. For this the lower court resorted to oral evidence as to what formed the subject-matter of the negotiations which preceded the written agreement;

Held, that there was no ambiguity as to the meaning of the "words of a similar nature." They clearly referred to works "for the excavation of stone and construction there of by means of machineries" such works being similar to the works which were the subject of the negotiations and there was no justification for excluding such works on the ground that the means of carrying out the works, though it was machinery, was machinery which was not discussed during the negotiations. Therefore, resort to oral evidence was not justified. A. I. R. 1946 P. C. 50=12 B. R. 334=59 L. W. 248=1946 M. W. N. 340=222 Ind. Cas. 534 (P. C.).

——S. 92—Oral evidence—Nature of transaction—Oral evidence.

Where the documents speak clearly for themselves, there can be no question of considering oral evidence to show what real nature of the transaction was, whether sale or exchange. A.I.R. 1944 Pesh. 15=1944 Pesh. L.J. 15=212 Ind. Cas. 306.

——S. 92—Oral evidence.

Evidence of a strong kind is required to displace a written document executed in solemn form and duly registered. It cannot be displaced by mere oral evidence. A.I.R. 1940 Nag. 70=1939 N.L.J. 573=I.L.R. (1941) Nag. 669=188 Ind. Cas. 181.

——S. 92, Proviso 3—Oral evidence—Suit on hand-note—Defence that amount was earnest money paid by plaintiff who had agreed to purchase certain property and it was forfeited as sale had fallen through by plaintiff's default —Oral evidence—Admissibility.

The proper meaning of proviso 3 to S. 92, Evi. Act, is that the contemporaneous oral agreement to be admissible must be to the effect that a written contract was to be of no force at all and was to constitute no obligation until the happening of a certain event. In a suit on a promissory note, it is open to the defendant to prove that the promissory note was not the substantive liability such as it would be if given for a loan or for the payment of the price of goods sold and delivered but was a collateral undertaking or recognition of liability arising out of another contract altogether, and this, not only under proviso 3 to S. 92 of the Evi. Act, but also under S. 46 of the Negotiable Instruments Act.

In a suit on a hand-note, the defence taken by the defendant was that he had executed the hand-note as an agent on behalf of one from whom the plaintiff had agreed to buy certain properties, that the plaintiff had paid the amount mentioned in the hand-note as earnest money for his purchase, that the sale had fallen through on account of the plaintiff's default and that the earnest money was, therefore, forfeited, while the hand-note was only a "nominal" document executed by the defendant in proof of plaintiff's payment:

Held, that the defendant was entitled to adduce oral evidence in support of his substantial plea. A.I.R 1939 Pat. 495=5 B.R. 548=20 P.L.T. 514= 181 Ind. Cas. 280.

——S. 92—Applicability—A contracting with B, alleged agent of C—Suit on contract against C —Oral evidence—Admissibility.

Section 92, Evi. Act, contemplates a case only as between the parties to the suit.

Where in a suit filed by **A** against **C**, on a contract entered into by **A** with **B**, **A** alleges **B** to be acting as agent of **C**, and adduces oral evidence in support of his allegation, the evidence is admissible and S. 92 does not apply. A.I.R. 1939 Rang. 139= 1939 Rang. L.R. 622=181 Ind. Cas. 846.

——S. 92—Oral evidence to show that written contract is not binding—Admissibility.

Where the purpose of adducing oral evidence is not merely to prove a contemporaneous oral agreement whereby the operation of the written contract

is to be suspended until the happening of a particular event but is to show that the written contract is not binding at all, that there is no agreement, oral evidence is not admissible, A.I.R 1939 Sind 299=I.L.R. (1939) Kar. 523=184 Ind. Cas. 867.

——S. 92—Oral evidence to show that document executed was never intended to operate as agreement—Admissibility.

Section 92, Evi. Act, only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. So also, S. 91, only excludes oral evidence as to the terms of a written contract. Oral evidence is admissible, therefore, to show that a document executed by a person was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence about some other matter. Even if there were no provisos to Ss. 91 and 92, there is nothing in either section to exclude oral evidence in such a case to show that there was no agreement between the parties and, therefore, no contract. A.I.R. 1938 All. 132=1937 A.L.J. 1352=1938 A.W.R. 8=173 Ind. Cas. 941.

——S. 92—Oral evidence — Kabuliyat taking settlement of two hals of land on certain rent per hal admitted—No finding that kabuliyat was not intended to be acted upon—Oral evidence to show that one hal was rent-free—Admissibility.

Where a kabuliyat taking settlement of two hals of land on certain rent per each hal is admitted and it is not found that the agreemeut was not intended to be agreed upon, no oral evidence can be admitted to show that the tenant was to enjoy one of the two hals rent-free.

Oral evidence may, however, he admitted to show that there was no agreement between the parties and hence no contract. A.I.R. 1938 Cal. 356=I.L.R. (1938) 1 Cal. 48=176 Ind. Cas. 972.

——S. 92—Oral evidence.

In a suit for dower, the plaintiff relied on a kabinnama mentioning the dower amount but the defendant urged that the writing was a sham one and that the amount mentioned therein being nominal, no effect should be given to it:

Held, Per Aga Haider, J.—Oral evidence to prove the plea was not admissible as S. 92, Evi. Act, operated as a bar.

Per Tek Chand, J.—Section 92, operates as a bar only when oral evidence is sought to be led to vary or modify the terms of an agreement but oral evidence is admissible to prove that the agreement in writing was not an agreement at all but was only a sham and was not intended to be operative. A.I.R. 1936 Lah. 183=38 P.L.R. 337=161 Ind. Cas. 300.

——S. 92—Oral evidence.

A document tendered in evidence read:—"Rs. 6,901 on account of 100 bags sugar will be paid at D to one G by a 'rashid' or cheque of Karachi after one month on January 22, 1925." The plaintiff alleged that Rs. 6,901 was a cash loan; that hundis were drawn for that amount at Karachi and honoured at Karachi and according to custom prevailing at D, the consideration was shown as sugar sold. The document, after its receipt in British India, was adjudicated by collector of Karachi who treated the document as bond and levied duty on it:

Held, that the document on the face of it was not a pro-note and could not be treated as such or excluded from consideration on the ground of its being inadmissible in evidence for want of stamp.

Held, also that oral evidence could be given to show that the real consideration for the document was cash and not delivery of sugar, A.I.R. 1935 Sind 48=28 S.L.R. 266=153 Ind. Cas. 635.

——S. 92—Oral evidence to disprove the note of the Judge about presentation of petition.

Oral evidence can be given by the petitioner suing in forma pauperis to prove that he was personally present when the petition was presented by his Counsel or that he himself presented the petition and the note contrary to that by the Judge is wrong. A.I.R. 1934 Lah. 452 (1)=36 P.L.R. 100=151 Ind. Cas. 370 (1).

——S. 92—Oral evidence.

Where in a suit for recovery of rent for five years alleged to be due from the defendant under a registered lease, the execution of the registered lease was admitted by the defendant who alleged that he had never taken possession and that there was rescission of lease, and the plaintiff objected to the admission of oral evidence by the defendant to prove the rescission of the lease:

Held, that the view that the oral evidence was admissible was erroneous. A.I.R. 1933 Lah. 278=145 Ind. Cas. 176.

——S. 92—Oral evidence—Written agreement—Evidence to prove it to be a sham transaction.

Under S. 92, Evi. Act, oral evidence is admissible to prove that an agreement in writing was really no agreement at all but was only a sham as it was not intended to be operative. Hence, it is open to a Hindu widow to prove that an agreement which purported to provide for her maintenance was not meant to be acted upon but its execution was brought about only to secure an acknowledgment from her that her deceased husband was an undivided member of a joint Hindu family, by inserting such a clause as a preamble to what was alleged to be a deed of maintenance. A.I.R. 1933 Mad. 48=63 M.L.J. 707=36 M.L.W. 817=141 Ind. Cas. 456.

——Ss. 92, proviso 1, 91—Oral evidence—Contract in writing—All terms not reduced to writing—Oral evidence of other terms—Admissibility of—Unilateral mistake caused by innocent mis-representation—Effect.

A mistake induced by an innocent misrepresentation of the opposite party is sufficient to bring a case within S. 92, proviso 1.

The plaintiffs agreed to sell to the defendants a certain quantity of silver. The note in the plaintiff's books ran in these terms, "sold silver bars sixty to D, G (defendants) deliverable on May 30, by the hand of D (broker)." The note was signed by the defendants' broker on the misrepresentation of the plaintiffs that it contained all the terms of the contract and the defendants' broker did not know the language in which the note was written. In a suit for damages for breach of contract:

Held, (1) that inasmuch as the written contract did not contain all the terms, Ss. 91 and 92, Evi. Act, did not apply and it was open to the defendants to adduce oral evidence to prove that the

price was to include customs duties and that the plaintiffs were to obtain the drawback certificate;

(2) assuming that S. 92 applied, oral evidence was admissible under proviso 1 to S. 92, on the ground of a mistake induced by the incorrect representation of the plaintiffs.

Per Rangnekar J.—The principle of Foster v. Mackinnon (1869) 4 C. P. 704=38 L. J. C. P. 310=20 L.T. 887=17 W.R. 1105 was applicable to the case and the defendants were not bound by the contract. A.I.R. 1932 Bom. 151=34 Bom. L.R. 26=56 Bom. 180=137 Ind. Cas. 478.

——S. 92, proviso 4—Oral evidence—Registered deed of partnership for fixed term—Oral evidence to prove dissolution and payment of share.

When an oral agreement is made which in respect of the mannr of payment rescinds or modifies a contract in writing and registered and any payment is made in accordance with that oral agreement, S. 92 of the Evidence Act, does not exclude evidence of that payment or of the oral agreement that explains it. Therefore, it is open to a partner to adduce oral evidence to prove that a partnership which has been formed for a fixed period under a registered deed had, in spite of the term, been dissolved within that period and that he paid the share of the other partner. A.I.R. 1932 Nag. 42=14 N.L.J. 179=136 Ind. Cas. 874.

——S. 92 Oral evidence.

There is nothing in law to exclude oral evidence of the discharge or release of a mortgage-deed when the plea is that the payment was made partly by payment of money, and partly by release of the debt. A.I.R. 1931 Cal. 667=58 Cal. 532=133 Ind. Cas. 701.

——S. 92—Parol evidence to show that party to contract is mere agent.

Parol evidence is admissible for the purpose of showing that one of the parties to the contract had acted as agent for the plaintiffs in making the contract and that, therefore, the plaintiffs are entitled to enforce the contract on behalf of such party as against the other. A.I.R. 1931 Sind 4=25 S.L.R. 91=130 Ind. Cas. 548.

——S. 92—Oral proof.

Oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing: A.I.R. 1923 P. C. 50, Foll. 92 Ind. Cas. 948=A.I.R. 1926 Cal. 637.

——S. 92—Oral evidence.

Where all the terms of a contract have not been reduced to writing, the terms so left unwritten can be proved by oral evidence. 84 Ind. Cas. 1021 =3 Bur. L. J. 326 =2 Rang. 575=A.I.R. 1925 Rang. 128.

——S. 92—Oral evidence.

A contract of guarantee by a person signing on the back of a negotiable instrument can be established by oral evidence as the whole contract between the parties is not reduced to writing. 76 Ind. Cas. 282=A.I.R. 1925 Sind 9.

——S. 92—Substitution—Oral evidence.

Oral evidence is not admissible to show that a person who has signed a contract personally was contracting only as an agent for his principal, for the purpose of exonerating the contracting party from liability for that would be substituting a different agreement from that evidenced by the writing. Higgins v. Senior, (1841) 58 R.R. 884, Foll. 63 Ind. Cas. 482=45 Bom. 1242=23 Bom. L. R. 767=A.I.R. 1921 Bom. 81.

——S. 92—proviso (6) — Description of house and site—Oral evidence.

A sale-deed purported to convey an upstair house standing on a certain site, which was also described and conveyed. The vendor had no upstair house on that site but had one on the opposite side of the same street. Held, that parol evidence was admissible to show that the house intended to be conveyed was the latter upstair house. 22 M.L.J. 411=(1912) M.W. N. 402=15 Ind. Cas. 223.

——S. 92, (4)—Oral evidence—Agreement to lease—Oral evidence to prove items of agreement not reduced to writing.

Oral evidence is admissible to prove some items of an agreement entered into between the parties when some others have been reduced into writing in letters exchanged between the parties. There is no statute of frauds in India and there is nothing in S. 92 of the Evidence Act to exclude such evidence. (1908) 13 C.W.N. 326=4 Ind. Cas. 85.

——S. 92, proviso 1, (6) Oral evidence — 'Fraud' — Want or 'failure of consideration' —Explanation of the language used in relation to existing facts.

Oral evidence is not admissible for the purpose of ascertaining the intention of the parties in interpreting language used in a written document which is clear and unambiguous. The fraud which under proviso 1 of S. 92 may be proved must be fraud which would invalidate the document; and subsequent fraud in respect of the document, not such as to invalidate it, cannot be a ground for admitting extraneous oral evidence. The 'want or failure of consideration' contemplated by the proviso 1 to S. 92 is a complete want or failure of consideration. Proviso 6 to S. 92 does not cover facts which are intended to show that the language of the document meant the exact opposite of what it purports to mean (1906) 8 Bom. L. R. 287.

——S. 92—Oral evidence to prove that a transaction of sale was exchange—Limitation Act, Art. 97.

Plaintiff and defendants passed sale deeds of lands belonging to them on the same date. Plaintiff passed it to defendants and defendants passed theirs to plaintiff's sister, the one beirg a consideration for the other. Defendants somehow retained possession of the property which they purported to sell, and those properties were taken in execution by the defendant's creditors. The plaintiffs filed a suit to recover possession of the lands sold by them, or in the alternative for compensation for the loss sustained by them by reason of their dispossession. Held, that the two deeds professed to be deeds of conveyance, and the mere fact that they were mutual deeds of conveyance would not make the transaction an exchange. Whatever might have been the intention of the parties, having regard to S. 92 of the Evidence Act, it was impossible to treat the transaction as one for exchange. 18 M. 173 foll. Also that the plaintiff was entitled to recover

money paid upon an existing consideration which afterwards fails. (1905) 8 Bom. L.R. 283.

——S. 92—Oral evidence—Recitals—Necessity for mortgage.

In a suit for sale on the basis of a mortgage-deed which was executed in lieu of a prior mortgage-deed, not produced in the suit, oral evidence was admissible to prove the circumstances when the mortgage-deed was executed to show that the mortgage was executed for a family necessity. 10 A.L.J. 401=17 Ind. Cas. 669.

——S. 92—Oral evidence—Admissibility.

Where the terms of a bond are clear aud unambiguous, parol evidence is not admissible to show that it was an assignment of future rent. (1905) 4 C.L.J. 402.

——Ss. 92, 99—Parol evidence—Oral evidence, admissibility of—Deed of gift, true nature of—Parties—Strangers.

The rule of exclusion of oral evidence embodied in S. 92 of the Evidence Act is limited in its operation to parties to the instrument which is sought to be contradicted or varied, and to their representatives in interest. S. 99 enable strangers to an instrument to prove the real nature of the transaction by parol evidence. Where therefore, A purported to make a gift of land to his daughter B, it was open to a creditor of X, the husband of B, to prove by oral evidence that the transaction was in reality a sale to X and that the property was consequently liable to be attached and sold in execution of a decree obtained against him. (1905) 2 C.L.J. 338.

——S. 92—Oral evidence—Deposit—Oral evidence to prove agreement empowering depositee to pay off attaching creditors.

In a claim to a set off set up by the defendant-depositee in a suit to recover the deposit founded on a receipt executed by the defendant, the defendant offered to prove a separate agreement empowering him to pay off the attaching creditors out of the deposit,—Held, that the evidence was not admissible. S. 92 would not bar evidence to prove the object for which the deposit was made or to explain the meaning of the words in the receipt. (1904) 9 C.W.N, 178.

——S. 92—Oral evidence to show that an executant of note was surety—Admissibility.

Oral evidence is not admissible to show that one of the executants of a note of hand signed it only as surety and that his liability was only to the extent of standing as a surety for one month. 3 C. 174 dist. The law with regard to the admissibility of oral evidence to vary the terms of a written document is not governed by the English law of evidence but by the Evidence Act; hence, oral evidence, to be admissible, must come under one or other of the provisions of S. 92 of the Evidence Act. 4 C.W.N. 155. S.C. 27 I.A. 58 foll. (1903) 8 C.WN. 101.

——S. 92—Oral evidence—Admissibility of.

No oral evidence is admissible to prove that what purports to be a deed of sale is in reality a deed of gift. Secus:—Oral evidence to prove: (1). A Sale is a mortgage; (2) that no consideration was paid for a document while it recites it was paid is admissible. (1900) 28 C. 70.

——S. 92—Oral evidence—Admissibility—Kabuliyal—Rate of rent—Evidence to show that a lower rate has been paid since the date of kabuliyat.

Oral evidence is not admissible for the purpose of contradicting a statement made in a registered kabuliyat as to the amount of rent, but evidence is admissible to show that, as between the land-lord and the tenant, the kabuliyat was never intended to be acted upon or enforced, or that there was a waiver of some of its terms. The evidence that since the execution of the kabuliyat the tenant paid rent at a lower rate than that stated in the kabuliyat is admissible to show that the intention of the parties was that the kabuliyat from the very first was not intended to be acted upon, or that there had been a waiver by the parties. (1898) 6 C.W.N. 242.

20. Partition deed.

——S. 92—Partition deed—Document unregistered—Oral evidence of its terms, admissibility.

Mere lists of property divided, do not form an instrument of partition and so would not require registration.

In every case in which a transaction is ultimately reduced to writing, negotiations have to be carried on ahead of time and ultimately, finality is reached before the writing is commenced. Ordinarily, these negotiations are carried on orally and finality is also reached orally. But if the parties intend that the oral contract so concluded should not be binding until embodied in a document, or even at some subsequent stage agree to substitute a written instrument for the oral agreement, then the ultimate contract is deemed to be contained in that instrument alone and no oral evidence of its terms can be given thereafter. Oral evidence is certainly not admissible if the document is unambiguous but if there is any douht then it is permissible. A.I.R. 1938 Nag. 434=1938 N. L. J. 82=I. L. R. (1938) Nag. 604=178 Ind. Cas, 293.

——S. 92—Partition—Deed clear and unambiguous—Extrinsic evidence.

Where, the instrument of partition, is plain and unequivocal and where there is no ambiguity, no extrinsic evidence of subsequent or contemporaneous act can be received in construing it.

Where from the deed of partition an intention to divide is manifest, even if the subsequent conduct is susceptible of two interpretations, no Court ought to hesitate to prefer that which accords with that intention. A. I. R. 1937 Mad. 335=(1937) 1 M.L.J. 95=1937= M.W.N. 255=45 M.L.W. 114 =171 Ind. Cas. 178.

——S. 92—Partition by unregistered document—Fact of partition can be proved by oral evidence—Terms, if can be so proved.

Where a partition has been effected by a document which has not been registered, the fact of the partition can be proved by oral evidence but the terms of the partition cannot be so proved. ('35) 157 Ind. Cas. 974.

——S. 92—Partition—Unregistered document—Admissibility of oral evidence.

A partition is not required by law to be effected by a document, and, therefore, S. 91 of the Evi,

Act, would not bar oral evidence in regard to partition. A.I.R. 1933 Nag. 270=144 Ind. Cas. 312.

——S. 92—Partition-deed.

Division of status can be proved by an unregistered partition deed but status of reunion cannot be proved by unregistered deed of reunion where deed of partition is registered. A.I.R. 1919 P.C. 44, Dist.; A.I.R. 1918 P. C. 104 and A.I.R. 1917 P.C. 12, Rel. on. 117 Ind. Cas. 113=51 Mad. 977 =28 M. L. W. 919=A. I. R. 1928 Mad. 1113=55 M.L. J. 733.

——S. 92—Partition deed.

Division of status can be proved even though there is an unregistered partition deed in evidence which may be used to determine the nature of the possession held by a party. A.I.R. 1922 P.C. 266, Appl. 92 Ind. Cas. 1028=1926 M.W.N. 45=A.I.R. 1926 Mad. 402.

——S. 92—Partition deed.

An oral agreement that a partition deed was not to be treated as such, but that a fresh formal deed was to be executed and registered is admissible in evidence. 69 Ind. Cas. 562=16 M.L.W. 784= 1922 M.W.N. 833=A.I.R. 1923 Mad. 160.

——S. 92—Partition deed—"Document" means valid document—Partition-deed inadmissible for want of registration—Partition can be proved by oral evidence.

The word "document" in Ss. 91 and 92 means a valid document.

A partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved for want of stamp and registration: 41 Bom. 466, Foll.

The provisions of Chapter VI, Ss. 91 to 100, do not involve the Courts in the anomalous position of deciding that, because there is a flaw in the deed of disposition which prevents the deed being proved, they are or same time precluded from hearing the oral evidence as to the disposition. If the Courts were placed in this anomalous position the fate of a person who has obtained property under an unregistered deed of partition would be a most unhappy one, for even though the property was his property, he would be unable to prove his title against any dishonest person who chooses to challenge him. A.I.R. 1921 All. 405.

——S. 92—Partition deed—Right of access—Oral agreement.

Where there is a registered partition-deed allotting the several joint properties among the different sharer and the partition-deed, whilst it makes special provisions for giving access to other portions is silent as to the right of access of a particular house fallen to the share of a particular sharer, the latter cannot set up an oral agreement to give him the right, as the same is not admissible in evidence under S. 92 of the Evidence Act. (1905) 15 M.L.J. 255=28 M. 495.

21. Pro-note.

——S. 92 — Pro-note — Agreement postponing liability must be proved.

Per Weston J.—Under S. 92, proviso 3 an oral agreement to postpone liability under a pro-note which is unequivocal in its terms must the proved, and is not to be inferred merely from the circumstances that the parties have other delaings or from the possibility or even probability that at the time he executed the promissory note, the promissor had in mind that he was not likely to be called upon to discharge his liability until settlement of other dealings was made. A.I.R. 1943 Sind 67=I.L.R. (1942) Kar. 516=208 Ind. Cas. 51.

——S. 92—Pro-note—Debt under pro-note if can be discharged by book entries.

Payments can be made and debts discharged by book entries. Nevertheless, these entries only evidence transactions and hence the accounts must be looked at as a whole. A.I.R. 1943 Sind 67: I.L.R. (1942) Kar. 516=208 Ind. Cas. 51.

——S. 92—Negotiable Instruments Act, S. 46—Promissory note — Admissibility of oral evidence.

Where a promissory note is executed by two persons, oral evidence is admissible to prove that one of them signed the note only as a surety. A.I.R. 1942 Oudh 273=1942 A.W.R.C.C. 58=1942 A.W.R. Rev. 20=18 Luck. 81=1942 O.W.N. 63= 198 Ind. Cas. 651.

——S. 92—Promissory note—Oral agreement not to make demand until specified condition is fulfilled.

The promissory note is, by its express terms, payable on demand. that is, at once. But the agreement not to make a demand until the specified condition is fulfilled even if oral, has the intention and effect of suspending the coming into force of that obligation, which is the contract contained in the promissory note. Thus the oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of proviso 3 of S. 92, Evidence Act. A.I.R. 1938 P.C. 198=32 S.L.R. 810=(1938) 2 M.L.J. 469=48 M.L.W. 40=1938 M. W. N. 760=1938 O. W. N. 731=1938 Rang. L. R. 417=4 B. R. 719=19 P.L.T. 749=40 Bom. L.R. 1075=175 Ind. Cas. 449 (P.C.).

——S. 92—Pro-note—Pro-note as collateral security—Pro-note unstamped—Suit on original consideration.

In a suit for recovery of the price of certain bullocks, the plaintiff produced a document (hulia) and it was found to have an endorsement on the reverse as follows: "One ox, worth Rs. 179, less Rs. 8 for an ox given in exchange of Rs. 171 payable on demand at the rate of Rs. 2 per cent per month":

Held, that assuming that the endorsement on the back of the hulia amounted to a pro-note and being unstamped not admissible in evidence, the plaintiff was nevertheless entitled to recover the price of the bullocks sold by him and it was open to him to prove by evidence that the price which the purchaser agreed to pay for the bullocks was Rs. 179. (37') 1937 A. W. R. 322=1937 A. L. J. 360=170 Ind. Cas. 117.

——S. 92—Promissory note—Allegation that some executants signed as surety for others—Evidence to prove, admissibility of.

Evidence to prove that the two executants of the promissory note signed in the capacity of surety is inadmissible under S. 92, Evidence Act. Even where the contention is that one of the executants signed as a surety to the knowledge of the money-lender, such evidence is inadmissible and where in spite of such an agreement of suretyship, the executants sign the document as

co-debtors, the agreement amongst the co-debtors cannot affect the right of the promisee. A.I.R. 1937 Rang. 82=168 Ind. Cas. 477.

——S. 92—Contract Act, S. 132—Promissory note—Joint executants—Plea by one executant that he signed only as surety for the other.

Where the plaintiff sued defendants Nos. 1 and 2 on a promissory note executed to him by the two defendants and the 2nd defendant pleaded that he had executed the promissory note only as a suerty for the other to the knowledge of the plaintiff and that by reason of the plaintiff's conduct, he, being a surety, was deprived of the security against the first defendant and was there by discharged:

Held, that it was not open to the 2nd defendant to prove as between him and the plaintiff that he was only a surety and that in consequence of the plaintiff's conduct he was discharged. Equitable exceptions allowed by Courts of Chancery in England to the rule of law enacted in India under S. 92, Evidence Act, cannot be given effect to in India. A.I.R. 1935 Mad. 643=1935 M.W.N. 525=42 M.L.W. 24=156 Ind. Cas. 827.

——S. 92—Promissory note—Oral evidence to show that executant signed it as surety.

Where a person executes a promissory note in his porsonal capacity, oral evidence to show that he signed it as surety is not admissible. A.I.R. 1934 Bom. 39 =35 Bom. L. R. 1197=148 Ind. Cas. 260.

——S. 92—Oral evidence to prove that one of the executants had signed only as surety.

Where three persons executed a promissory note by which they all bound themselves equally to pay the money and in a suit on the note, one of them pleaded that he had signed only as a surety for the others and not as a principal-debtor:

Held, that evidence to prove such a plea was not admissible in view of the provisions of S. 92 Evidence Act. A.I.R. 1933 Lah. 65 =35 P.L.R. 259= 147 Ind. Cas. 785.

——S. 92—Pro-note.

Section 120 of the Negotiable Instruments Act, does not prevent the maker of the promissory note from proving that the note was executed in pursuance of an arrangement which constituted a condition precedent to the attaching of any obligation under the contract evidenced by the note. A.I.R. 1933 Lah. 456=34 P.L.R. 470=143 Ind. Cas. 348.

——S. 92, Proviso 3—Suit on promissory note —Agreement with third party — Inability to fulfill obligation — Whether condition precedent — Evidence—Admissibility.

Where in a suit on certain promissory notes, the defendant sets up on agreement binding a third party to act in a certain way after the defendant had spent the money on contemplated litigation, and that circumstances prevented the third party from fulfilling the obligation he had undertaken, and therefore, there was a condition precedent to the attaching of the obligation under the pro-notes;

Held, that on these facts, the condition was not precedent but subsequent to the obligation and that proviso 3 to S. 92, Evidence Act, would not apply and consequently the defendant was debarred from leading evidence on the point. A.I.R. 1932 Lah. 549=33 P.L.R. 712=138 Ind. Cas. 371.

——S. 92—Promissory note.

In a suit on pro-note alleged to have been executed by two defendants one of them denied the execution and receipt of consideration and averred that he had signed as an attesting witness. Oral evidence to prove that money had been borrowed by both the defendants and that defendant having "witness" before his signature, was one of the executants and not a witness was allowed.

Held, that the evidence adduced is not at variance with the terms of the contract which is not affected by the word "witness" before defendant's signature and is admissihle under S. 92. A.I.R. 1930 All. 709. =128 Ind. Cas.. 768.

——S. 92—Pro-note.

A claim based no a promissory note payable on demand cannot be resisted on the ground that the amount would be given credit to in the final settlement of accounts between the parties. 124 Ind. Cas.763=A.I.R. 1930 All. 529.

——S. 92—Pro-note—Contract with firm—Note by partner in his name—Partnership liable.

Where there is a contract with the partnership and a promissory note signed by a partner in his own name and not in the name of the partnership, as evidence of such contract, all the partners will be liable. The principle that only the maker of the promissory note can be held liable thereunder is not applicable in a case where an independent contract is alleged and therefore, the promissee can be allowed to adduce evidence as to the independent contract. 123 Ind. Cas. 358= A.I.R. 1930 Mad. 168.

——S. 92—Pro-note — Promissory note can be proved to be conditional.

In a suit on promissory note, the defendant can prove a separate oral agreement that a condition precedent to the attaching of any obligation to the contract evidenced by the promissory note was that there should not be any obligation attaching under it unless there was a final balance of account on certain transactions against the defendant which he failed to pay: A.I.R. 1927 All. 292, Foll. A.I.R. 1922 All. 213, Diss. from.

Ashworth, J.—The case is actually no exception to S. 92, Evidence Act. That section refers to documents which operate by reason merely of signature. A promissory note because it is a negotiable instrument and thus partakes of the nature of currency before it can operate must not only be signed but also delivered. 115 Ind. Cas. 771=50 All. 754=26 A.L.J. 696= A.I.R. 1928 All. 289.

——S. 92—Pro-note — Promissory note — Endorsee can prove his limited liability by oral evidence.

Lobo, A. J. C.—It is open to the endorser of a negotiable instrument to prove that the endorsee orally agreed to recover the amount of the pro-note from tne estate of the drawer only.

Rupchand Bilaram, A. J. C. —A Bill or note is required by law to be in writing and so the supervening contracts thereon such as acceptance or endorsement. It therefore follows that the contracts of the immediate parties to them are subject to the ordinary rule as to written contracts. The contract, by on endorser of a bill or note, however, stands on a different footing. It is not fully expressed in writing on the document itself,

and certain terms are said to be affixed to it either by the Law Merchant or by statute. There is, therefore more room for admission of parol evidence as to what is the contract represented by the transaction. Where the endorsement, is slient, it undoubtedly raises a prima facie presumption of law that the liabilities, inter se, of successive endorsers are that every prior endorser must indemnify a subsequent one. But this is only a presumption and not an express term of the contract reduced to writing. And, therefore, the rules as to excllusion of parol evidence crystallized in S. 92, Indian Evidence Act, do not apply. As between immediate endorsers such presumption may, in the absence of any other well-recognized rule of law or statutory provision in that behalf, be rebutted by parol evidence; 105 Ind. Cas. 747=22 S. L. R. 249 = A.I.R. 1928 Sind 50.

—S. 92—Pro-note.

It is open to the executant under proviso (3) to S. 92, Evidence Act and S. 46, Negotiable Instruments Act to prove that the promissory note is executed and delivered only as security for the payment of future instalments to a chit fund: A.I.R. 1924 Mad. 850, Foll. 107 Ind. Cas. 510 (Mad.).

——S. 92—Promissory note.

In a suit upon a pro-note, a Court should not allow evidence to show that the pro-note was not really executed in the plaintiff's favour or evidence that the note had been discharged by payment to the person really interested: 30 Mad. 88 (F. B.). Foll. 100 Ind. Cas. 703=25 A.L.J. 402=49 All. 457= A.I.R. 1927 All. 463.

——S. 92—Pro-note—Evidence to vary terms of pro-note is not permissible.

The execution of a pro-note was admitted, but the defence was that the money was advanced to defendant for the purchase of paddy in pursuance of a partership agreement and that there was really no loan at all.

Held, that such a defence was not permissible. 105 Ind. Cas. 476 = 5 Rang. 520= A.I.R. 1927 Rang. 327.

——S. 92—Pro-note.

A subsequent oral agreement varying the terms of a promissory note as regards its exigibility on demand cannot be legally proved. 90 Ind. Cas. 378=A.I.R. 1926 Nag. 194.

——S. 92—Suit on promissory note—Defendant cannot prove contemporaneous oral agreement exempting him from liability.

Where a contract is founded on consideration, and the party who received the consideration wrote down and signed the terms on which he received it, it is not open to him to raise the plea that he did not agree to those terms. Therefore if in a suit on a promissory note to pay on demand, consideration is proved, defendant cannot prove a contemporaneous oral agreement according to which he did not incur any personal liability and was not bound to pay on demand: A.I.R. 1922 All. 213; 45 Bom. 1155 and 45 Bom. 1242, Foll. 90 Ind. Cas. 982=6 Lah. 411=7 L.L.J. 453=26 P. L. R. 612=A.I.R. 1925 Lah. 576.

——S. 92—Pro-note—Agreement to postpone the obligation cannot be proved orally.

An oral agreement purporting te provide that the promise to pay on demand in a promissory note, though absolute in its terms, was not to be enforceable by suit till the happening of a particular event, i.e., that the legal obligation to perform the promise was to be postponed, is not such an agreement as falls within Prov. 3 to S. 92. A.I.R. 1924 Bom. 44 **Dissented.** 90 Ind. Cas. 1020=22 M.L.W. 445=1925 M.W. N. 601=A.I.R. 1925 Mad. 1240.

——S. 92—Pro-note—Failure of condition precedent to written agreement as fixed by oral agreement can be proved.

When it is expressly provided in a promissory note that the amount due thereunder is payable on demand with interest at a particular rate an oral agreement between the parties that the said amount was to be set off against the amount due to the executant of the promissory note on some other account is not a condition precedent to the enforcement of the liability under the pro-note and such agreement is not admissible in evidence. But an oral agreement between parties to a written contract, to the effect that the latter shall not be of any force until some condition precedent has been performed can be proved by means of oral evidence, and it can be shown that the condition has not been performed and that therefore the written agreement has not acquired any validity or force. 78 Ind. Cas. 418=18 S.L.R. 39=A.I.R. 1925 Sind. 136.

——S 92—Pro-note.

In a suit on a promissory note, it is open to the defendant to plead that the note was not executed for cash or other consideration but was executed only as a security to cover the advances to be made by the payees and that they (the defendants) are liable only for such sums as may be found due on taking accounts between the parties. 84 Ind. Cas. 146=1924 M. W. N. 529= A.I.R. 1924 Mad. 850.

——S. 92—Pro-note.

In a suit on a joint and several promissory note payable on demand executed by **A** and **B**, **A**, can give oral evidence to prove that he joined in the loan only as security for **B**. But he cannot give oral evidence to prove contemporaneous oral agreement with plaintiffs, whereby plaintiffs agreed to recover the amount under the note in the first instance from **B**. 79 Ind. Cas. 445= A.I.R. 1924 Sind. 13.

——S. 92—Pro-note.

Unconditional promise to pay—Plea of condition to pay only on settlement of accounts is not allowable. 67 Ind. Cas. 513=44 All. 521=20 A.L.J. 315=A.I.R. 1922 All. 213.

——S. 92—Pro-note—Oral evidence is admissible to prove purpose of loan.

The making of a pro-note by way of security for a sum of money advanced or given to the maker does not shut out oral evidence as to the purpose for which the money is given. Proviso 2 to S. 92 of the Evidence Act allows proof of any separate oral agreement about any matter on which a document is silent and which is not inconsistent with its terms. 64 Ind. Cas. 33=A.I.R. 1922 L.B. 10.

——S. 92—Pro-note.

In a suit on a promissory note payable on demand, it is not open to the defendant to prove a contemporaneous oral agreement by which plaintiff is not to present the promissory note for payment, although payable on demand, until he has discharged certain encumbrances on the property he has sold to a stranger: 25 Cal. 402, **Foll.** 63 Ind. Cas. 673=45 Bom. 1155=23 Bom. L.R. 488=A.I.R. 1921 Bom. 449.

——S. 92—Suit on—Pro-note given not to plaintiff but to firm having plaintiff's name and belonging to plaintiff's father — Plaintiff cannot succeed.

If the promissory notes had been executed in favour of the plaintiff, an allegation that he was not the beneficial owner of the money would not afford a defence to the suit. But where the defendants urge that the notes were given, not to the plaintiff but to a firm which happens to possess the same name as the plaintiff and is the property of his father, this raises a question, not of benami, but of identity of the person to whom the note was given, and the plaintiff cannot succeed till the matter has been determined in his favour. 62 Ind. Cas. 210=33 C. L. J. 132=A.I.R. 1921 Cal. 480.

——S. 92—Pro-note.

An oral agreement providing a different mode of satisfaction of a promissory note payable on demand is inadmissible in evidence. 63 Ind. Cas. 748=A.I.R. 1921 Lah. 74.

——S. 92, proviso (6)—Pro-note—Contract reduced to writing—Relation to existing facts—Pro-note and memorandum — Agreement not to sue till defendant succeeded in an action—Extrinsic evidence, admissibility of.

Where a contract is reduced to a document it must be construed on a consideration of the document itself, with only such extrinsic evidence as would show the relation of the written language to existing facts. 22 A. 149 (P.C.) Foll. Defendant executed a pro-note to plaintiff for amount received as expenses of an appeal to which he was a party respondent; simultaneously with the pro-note, defendant gave a note to the plaintiff stating that the pro-note was executed in consideration of plaintiff s forbearing to sue on it till the appeal was decided. It was admitted that all parties had great hopes of defendant's success in the appeal and it was understood that plaintiff was to be repaid out of the amount that defendant's oppenent had deposited in Court as security for costs of the appeal. **Held**, that construing the documents under the said circumstance, plaintiff 's liability did not depend on the result of the appeal. 36 Ind. Cas. 597 (L.B.).

——S. 92, proviso (2)—Promissory note—Contemporaneous oral agreement — Admissibility of—Onus.

Oral evidence to prove that the defendant's liability on a promissory note executed by him and payable on demand, should cease by a specified date is inadmissible under S. 92. But as the defendant's case in evidence was that the promissory note was executed jointly by him and H as recited therein, but that it was orally agreed that the advance to the defendant on the note, was on the arrival of a specified date to be held, as an advance by plaintiff (the payee) to H of a sum of money which plaintiff had separately contracted to advance to H on that date, and that the joint promissory note should be satisfied by a fresh note given by H, evidence of the agreement was admissible under S. 92 (2) of the Evidence Act. 39 Bom. 399=17 M.L. T. 402=28 M. L. J. 589=13 A.L.J. 529=19 C.W.N. 713=21 C.L J. 507=17 Bom. L.R. 460=2 L.W. 524=(1915) M.W.N. 522=42 I. A. 103=29 Ind. Cas. 223 (P.C.).

——S. 92, proviso (2)—Promissory note — Cessation of liability on a date—Oral evidence.

Where the executant of a pro-note alleged that it was verbally agreed that his liability was to cease on a certain date, **Held**, that the oral agreement was as to a matter on which the pro-note was silent and was not inconsistent with it and therefore it was admissible in evidence under S. 92, proviso (2) of the Evidence Act. 39 Bom. 399=17 M L.T. 402=28 M.L.J. 589=13 A.L. J. 529=(1915) M.W.N. 522=42 I.A. 103=19 C.W.N. 713=21 C.L.J. 507=17 Bom. L.R. 460=2 L.W. 524=29 Ind. Cas. 223 (P.C.).

22. Sale.

——S. 92—Sale-deed—Prior agreement varying nature of consideration—Admissibility.

A Court cannot go behind a deed of sale which embodies the terms and enforce a prior agreement. The negotiations which led to the sale cannot be taken into consideration and the parties are bound by the terms of the deed of sale. It is not open to a party to a document to prove, by oral evidence, a variation in the amount of consideration for the document, though it is open to him to prove want of consideration or failure or a difference in kind of consideration. 58 M.L.J. 240, foll. 1950 N.L.J. 28=A.I.R. 1950 Nag. 44.

——S. 92—Sale.

Property purchased jointly in name of two persons—Evidence by one showing that he paid the whole consideration and that other's name was entered to enable him to present the deed for registration, is clearly inadmissible. A.I.R. 1941 Rang. 99=1940 Rang. L. R. 831=194 Ind. Cas. 313.

——S. 92—Sale.

The plaintiff, on her own behalf, and as guardian of her minor son, sold certain properties under a registered deed of sale to the defendant. On the same day, an unregistered agreement was executed by which the defendant undertook to reconvey the properties to the plaintiff. In a suit for specific performance of the agreement to reconvey:

Held, that S. 92, proviso 4 of the Evidence Act was not applicable to the case as it was not sought to use the unregistered agreement to affect the sale deed. A.I.R. 1934 Mad. 703=40 M.L.W. 646=67 M.L.J. 635=1934 M.W.N. 1122=152 Ind. Cas. 634.

——S. 92—Sale.

It is not open to a party to a registered sale deed to prove an oral agreement by evidence either oral or documentary contemporaneous with the sale deed, that in spite of a certain property, belonging to the vendor, being entered in the sale deed, title to it would not pass to the vendee: 118 Ind.Cas. 589=A.I.R. 1929 All. 578.

——S. 92—Sale.

Where the contemporaneous agreement though in writing is not registered, it is not open to the party to show that what is apparently a sale was really a mortgage: 27 Mad. 348, **Rel. on.** 109 Ind. Cas. 18=A.I.R. 1928 Mad. 459.

——S. 92—Sale—Possession as a mortgagee turned into possession as a vendee without a registered instrument—Oral evidence was admissible to prove facts referable to the contract of sale.

A brought a suit for a declaration that certain land was liable to be attached in execution of his decree against **P.** At the trial it transpired that **P** had at first mortgaged the land with possession to **N** and her husband, by a registered deed and had later sold it outright to the mortgagees by a **pyatpaing** and without any registered instrument. It was contended on behalf of **A** that no oral evidence was admissible to prove the sale.

Held, that oral evidence could be offered of facts which were referable to the contract of sale and productive of a change in the nature of possession. It is not correct to say that to apply the doctrine of part performance, possession must have been given under the

contract of sale and could be referred to no other title. 110 Ind. Cas. 616=6 Rang. 270=A.I.R. 1928 Rang.321.

——S. 92—Sale.

Where the terms of a contract are unambiguous, oral evidence of surrounding circumstances and conduct of the parties in contradiction to the terms of a written contract is not admissible.

Where the terms of the deed are clear express an outright sale, the evidence to prove that the transaction is a mortgage or that there is contemporaneous oral agreement to re-sell, is excluded by S. 92: 105 Ind. Cas. 293=5 Rang. 644=6 Bur.L.J. 195=A.I.R. 1928 Rang. 58.

——S. 92—Sale.

Evidence in any shape cannot on behalf of any party to sale-deed be admitted for showing that there was no agreement at all, or in other words, that a deed was meant to be inoperative. 100 Ind. Cas. 1029=49 All. 680=25 A.L.J. 349=A.I.R. 1927 All. 422.

——S 92—Sale—Independent subsequent contract to repurchase can be proved.

In the case of an outright sale, by registered deed, an independent contract to re-sell, either oral or by unregistered deed can be proved; but, where the contract is not an independent transaction, but forms part and parcel of the original transaction and together constitutes a mortgage, such contract cannot be proved: 105 Ind. Cas. 482=6 Bur.L.J. 210=A.I.R. 1927 Rang. 314.

——S. 92—Sale—Simple mortgagor subsequently transferring possession to mortgagee—No document—Latter asserting it to be under invalid sale can plead it as bar in redemption.

Where there is a registered simple mortgage of land a subsequent transfer of possession of the land to the mortgagee without a document by the mortgagors, and the latter assert that this was under the original mortgage whilst the former plead that it was a fresh transaction amounting to an outright, but invalid, sale to them, the mortgagee can, in a suit by the mortgagors for redemption of the mortgage, plead and prove this invalid sale in equity and as a shield. 99 Ind. Cas. 519=4 Rang. 368=5 Bur.L.J. 145=A.I.R. 1927 Rang. 33 (F.B.).

——S. 92—Sale—Sale by father as manager—Other members cannot dispute nature of transaction.

If a father as one of the joint owners sells, as representing all the other members joint with him, those other members must be treated as parties to the document. The other members of the joint family cannot dispute the transaction effected by the manager of the family on the ground that the transaction was really a different one from what it appears to be on the face of the document. 87 Ind. Cas. 804=27 Bom L.R. 241=A.I.R. 1925 Bom. 288.

——S. 92—Sale—Government lands, auction of—Claim to accretions.

Where at the time of the sale by the Government of a certain estate some portions of it were submerged under water and where in the sale notification the area of the estate was specified as certain number of bighas,

Held, that the latter fact did not preclude the purchaser or his successor-in-interest from claiming any accretion to the estate: 32 C.L.J. 402; 21 W.R. 115, **Foll.** 84 Ind. Cas. 478=29 C.W.N. 166=40 C.L.J. 322 =A.I.R. 1925 Cal. 346.

——S. 92—Sale—Encumbrance known to buyer.

The evidence to prove the knowlenge on the part of the buyer of the existence of an encumbrance not disclosed in the sale-deed by the vendor does not offend against S. 92, for such evidence does not contradict, vary, add to or subtract from its terms. 85 Ind. Cas. 999=A.I.R. 1925 Mad. 968.

——S. 92—Sale—Evidence of collateral warranty admissible.

Where the plaintiff purchaser of a motor car alleged in his plaint that there was an express warranty that the car was a new car and in perfect working order, but there was no such warranty in the written agreement.

Held, that evidence of such an express collateral warranty would be admissible under S. 92, proviso(2). 77 Ind. Cas. 150=25 Bom. L.R. 778=A.I.R. 1924 Bom. 41.

——S. 92—Sale.

An attempt to prove that a sale really took place for Rs. 2,500 when the deed says it took place for Rs. 3,000 is not allowed by S. 92 (2). 38 Mad. 514, **Foll.** 71 Ind. Cas. 768=A.I.R. 1923 All. 429.

——S. 92—Sale—Oral evidence to vary terms of the deed is not admissible.

When the document in question is in terms a sale-deed, no evidence to vary the term of the deed can be admitted unless the case can be brought within any of the provisos to S. 92 of the Indian Evidence Act. 66 Ind. Cas. 865=24 Bom.L.R. 239=A.I.R. 1922 Bom. 41.

——S. 92—Sale—Agreement to sell—Part performance of agreement—Specific performance of the rest was ordered.

Defendant agreed to sell to the plaintiff two pieces of lands and a house. The agreement was reduced to writing on a plain paper. Plaintiff was put in possession of the lands, the house was conveyed by the defendant's passing a deed of sale on stamped paper but the sale-deed was not registered nor any sale-deed of the lands was ever passed. Agreement to sell also was not brought on record. In a suit by plaintiff for specific performance of the agreement,

Held, that as the agreement had been partly performed by placing the plaintiff in possession of two pieces of lands the plaintiff was entitled to succeed inasmuch as the written agreement of sale was not on a stamped paper it was not open to the plaintiff to adduce secondary evidence of it even upon payment of penalty. 23 Mad. 49 (P. C.), **Foll.** 62 Ind. Cas. 637=45 Bom. 1170=23 Bom.L.R. 506=A.I.R. 1921 Bom. 401.

——S. 92, proviso (4)—Sale absolute—Conditional sale—Contemporaneous agreement.

Where a document purports to be an absolute sale, a contemporaneous unregistered agreement by the vendee to reconvey the property is inadmissible to prove that the deed of sale is in reality a mortgage by conditional sale. 26 M.L.T. 291=10 L.W. 1=(1919) M.W.N. 87=49 Ind. Cas. 699.

——S. 92, proviso (4)—Sale—Mortgage—Unregistered agreement to reconvey—Whether admissible.

A written agreement to reconvey immovable property not being registered though compulsorily registrable can only operate as a contract, and in the absence of fraud, cannot be admitted in evidence to prove that a sale-deed was a mortgage deed. 6 S.L.R. 245=19 Ind. Cas. 729.

——S. 92, proviso (4)—Sale — Contemporaneous oral agreement.

A sale-deed cannot be construed as or converted into a mortgage-deed but the executant may show that, owing to fraud or misrepresentation or some other reason, the deed did not represent the real agreement between the parties. A contemporaneous oral agreement cannot be proved to establish that an absolute sale was intended to be a mortgage. 34 Bom. 59= 11 Bom. L.R. 1130=4 Ind. Cas. 257.

——S. 92, proviso (6)—Sale-deed—Evidence to show that gift was intended.

Extrinsic evidence is admissible to show that a deed which is in form a deed of sale with a receipt

for the consideration was in reality intended to operate as a deed of gift. 33 All. 340=15 C.W.N. 521=8 A.L.J. 373=13 C.L.J. 510=13 Bom. L.R. 391=10 M.L.T. 23=(1911) 21 M.W.N. 370=21 M.L.J. 1126=11 Ind. Cas. 398 (P.C.).

——S. 92—Sale deed—Representation that the deed would not be enforced as a sale deed—Mortgage deed—Evidence—Contract Act, S. 17 (3)—Fraud—Proof.

In a suit for a declaration that an apparent sale deed executed by the plaintiff was a mortgage and for redemption, the lower Court, allowed the plaintiff to adduce evidence to prove that the defendant at the time of the execution of the sale deed represented to the plaintiff that the sale deed would not be enforced as such. **Held,** that no evidence of a contemporaneous agreement, or promise, or representation inconsistent with the written document could be admitted. It was contended that that the representation found proved amounted to fraud as defined in S. 17 (3) of the Indian Contract Act, 1872:—**Held,** overruling the contention, that there was no finding that the defendant at the time of making the representation had no intention, of performing it. He might have made the promise in good faith and changed his mind afterwards when he found the value of the property in dispute had increased and that it was more advantageous for him to rely upon the sale evidenced by the written document than upon the mortgage which the plaintiff alleged was the real agreement between the parties. (1910) 12 Bom. L.R. 972=8 Ind. Cas. 644=35 Bom. 93.

——S. 92—Sale-deed—Construction—Oral agreement to treat it as a mortgage—Agreement cannot be proved unless fraud, etc, is alleged.

Where the parties enter into a sale-deed, it is not competent to them to prove a contemporaneous oral agreement to recover the property sold on payment of the sum advanced, in the absence of fraud, misrepresentation, or failure of consideration, &c., rendering the sale invalid. Where one party to a contract does not agree to any of its stipulations and the other party induces him, not indeed to agree to it, but to agree to its formal insertion in the written contract by representing that the stipulation in question would be in reality treated by him as a dead letter, it cannot be enforceed because the party induced had never assented to it and its inclusion in the written contract was the result of misrepresentation. It was the result of a mis-statement of the intention of the party inducing and such a mis-statement is one of fact and an action of deceit may be founded on it. (1909) 11 Bom. L.R. 1130=34 B. 59=4 Ind. Cas. 257.

——S. 92—Sale deed or mortgage?—Nature of the transaction—Evidence.

Where the contention in a case is that there was no agreement enforceable by law to sell the property, but that there was a mortgage agreement, it should be specifically determined whether the real transaction between the parties as shown by the evidence is a mortgage or a sale. Per **Heaton J**:—"The theory that an apparent sale is a mortgage is not based on the conception of a sale accompanied by a modifying oral agreement or understanding. It rests on the supposition that the intention of the parties is simply and solely that the property shall be security for the debt and that no sale in any form is jointly contemplated. The fact that the document takes the form of a sale deed is explained by the assumption: (1) of a fraud by the creditor; or (2) of a convention which the creditor insists shall be observed and which the debtor dare not repudiate; or (3) of circumstances peculiar to an individual transaction. It may be that the debtor prepares for himself a case specially difficult of proof but that is not a reason for refusing to allow him to attempt to prove it. (1906) 8 Bom. L.R. 764.

——S. 92—Sale or mortgage?—Question whether real agreement between parties embodied in document or not.

The plaintiff sued to redeem his lands, alleging that his lands were mortgaged with the defendants under a nominal sale deed. The lower appellate court, treating the contract as embodied in the deed as one of sale, rejected the suit. **Held,** that the question involved was not whether the document was one of sale or mortgage, but whether the real agreement between the parties was embodied in the document. 17 C. 291 and 2 B. 23 ref. to. (1905) 8 Bom. L.R. 669.

——S. 92—Sale or mortgage?—Representation that a sale deed would not be enforced as a sale deed—Construction of document.

Where at the time of executing a document, a representation is made that the document, though in form a sale deed, will not be enforced as against the executant as a sale deed, and where, on the faith of that representation the executant executes the document, the sale deed cannot be upheld as a sale deed as against him. (1906) 8 Bom. L.R. 761.

23. Surrounding circumstances.

——S. 92—Surrounding circumstances—Deed—Construction—Rules as to—Extraneous evidence of surrounding circumstances, when can be construed.

It is a well-recognised rule of construction of deeds that the object of all interpretations is to discover the intention of the parties and that intention must be gathered from the written instrument itself. In other words, the court has to ascertain what the parties meant by the words they have used and to give effect to the intention which is expressed by the words used by the parties themselves. Where words of any written instrument are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument, relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves and in such case evidence **de hors** the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. In the first instance, endeavour must be made to deduce the intention from the actual words used in the instrument and it is only when the words are ambiguous and do not yield clear meaning that extraneous evidence of surrounding circumstances may be looked into. A.I.R. 1942 Nag. 115=I.L.R. (1942) Nag. 592=1942 N.L.J. 445=202 Ind. Cas. 595.

——S. 92—Reference to surrounding circumstances.

Per **Cornish J.**—If necessary for the construction of the document, the Court may look at the surrounding circumstances, "not for the purpose of altering the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee." A.I.R. 1933 Mad. 756=65 M.L.J. 458=1933 M.W.N. 1095=38 M.L.W. 481=146 Ind. Cas. 608.

——S. 92—Surrounding circumstances.

The importation of extraneous matter would be forbidden in construing a deed unless surrounding

circumstances are required to show in what manner the language of the document is related to existing facts. A.I.R. 1924 P.C. 226, Foll. A.I.R. 1930 All. 837=1930 A.L.J. 978=52 A. 748.

——S. 92 — Surrounding circumstances — Oral agreement showing nature of document is not admissible but Court can look into circumstances if document is of doubtful tenor.

Proof of an oral agreement to show the nature of a document is excluded by S. 92. Such proof cannot be admitted under proviso 6. All that Court has to do is that if the document is of doubtful tenor, it should, in construing it look into surrounding circumstances. A contemporaneous oral agreement contradicting the terms of a document cannot be admitted under the proviso: 25 Mad. 7, Foll. 31 M.L.W. 516=1930 M.W.N. 129=A.I.R. 1930 Mad. 547=128 Ind. Cas. 512.

——S. 92 — Surrounding circumstances—Evidence as to circumstances themselves is inadmissible.

In construing a document evidence so far as it relates to prove how the language of the document is related to the existing facts and surrounding circumstances is only admissible and not the circumstances themselves as elucidating the document: 119 Ind. Cas. 803=33 C.W.N. 591=A.I.R. 1929 Cal. 548.

——S. 92—Surrounding circumstances can be taken into consideration to find true meaning and effect of the transaction.

S. 92 merely prescribes rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances: A.I.R. 1925 P.C. 75, Foll. 107 Ind. Cas. 658=A.I.R. 1929 Nag. 91.

——S. 92 — Surrounding circumstances—Evidence of circumstances led only to throw light on the meaning and not to change the nature of the document.

Under proviso 6 to S. 92, evidence of circumstances surrounding a document is admissible only for the purpose of throwing light on its meaning and it would not be permissible to consider the surrounding circumstances with a view to holding that a document, which on the face of it was a sale-deed, was intended to operate as a mortgage: A.I.R. 1925 Bom. 501, Foll. 107 Ind. Cas. 201=A.I.R. 1928 Nag. 182.

——S. 92—Surrounding circumstances.

Oral evidence for the purpose of ascertaining the intention of the parties to the deeds is not admissible, being excluded by the enactment in S. 92, yet it does not enact that no statement of fact written instrument is to be contradicted by oral evidence. Extrinsic evidence of circumstances is admissible to show the relation of the written language to existing facts. 109 Ind. Cas. 189=5 Rang. 822=A.I R. 1928 Rang. 79.

——S. 92—Surrounding circumstances—Circustances surrounding a document may be proved only to make its meaning clear and not to prove it to be something else than what it purports to be.

The language of the proviso is rather vague. It is true that evidence of the circumstances, surrounding a document is admissible; but it is admissible only for the purpose of throwing light on its meaning. It would not be permissible to consider the surrounding circumstances with a view to holding that a document which on the face of it is a sale-deed was intended to operate as a mortgage. There must be some limit to the suggestion that the surrounding circumstances can always be scrutinised so as to enable the Court to alter or change the nature of the document to something different from what it appears to be. Otherwise there could be no certainty as to the proper construction to be placed on a document which to all appearance is unambiguous. 93 Ind. Cas. 924=27 Bom. L.R. 951=49 Bom. 662=A.I.R. 1925 Bom. 501.

——S. 92—Surrounding circumstances.

Surrounding circumstances such as are clearly required to show in what manner the language of the documents was related to existing facts are to be taken into consideration. 27 I.A. 58, Foll. 82 Ind. Cas. 993=47 Mad. 729=51 I.A. 305=27 Bom. L.R. 4=40 C.L.J. 481=29 C.W.N. 246=20 M.L.W. 701=1924 M.W.N. 915=23 A.L.J. 161=6 L.R.P.C. 41=26 P.L.R. 18=A.I.R. 1924 P.C. 226=47 M.L.J. 809 (P.C.).

——S. 92—Surrounding circumstances — Evidence of surrounding circumstances is not admissible to contradict terms of a document.

The surrounding circumstances referred to in the proviso are circumstances which enable the Court to ascertain and give effect to the full intention of the parties as expressed in the document itself, and evidence of surrounding circumstances is not admissible under the proviso for the purpose of contradcting the terms of the document. 1921 M.W.N. 519=A.I.R. 1921 Mad. 498.

24. Terms of contract.

——S. 92—Terms of contract—Contract in printed from between A and B—Previous correspondence between A and B stating that certain clauses in printed contract would not be applicable—Held if printed form contained whole contract evidence of correspondence was inadmissible under S. 92—Held, however, that printed form and correspondence constituted one single contract.

A, an Electric Supply Company, entered into a contract with a firm B for the supply of power. The contract was on a printed form and cl. 14 of that form provided that the consumer shall be entitled to use up to 1 per cent of the total monthly quantity of the energy supplied for industrial motive power, for purposes of lighting and ventilation and the excess over 1 per cent shall be charged at the rates for 'lighting and fans.' Before this formal printed form was signed there was a correspondence between the parties which showed that this clause was agreed to be not applicable to the contract between the parties. The question was whether the previous correspondence was admissible under S. 92, Evidence Act:

Held, that if it could be held that the whole contract was to be found in the formal printed form executed by the parties, the evidence of pervious correspondence would be inadmissible as none of the Provisos to S. 92 was applicable:

Held further that the agreement disclosed in the correspondence and the printed form constituted a single contract arrived at approximately at the same time and hence the correspondence was admissible in evidence. A.I.R. 1946 All. 406=1946 A.L.J. 122=223 Ind. Cas. 365=1946 O.W.N.H.C. 134=I.L.R. (1946) All. 231.

——S. 92, provisos 6 and 1—Terms of contract —Terms of written contract clear—Real terms from conduct of parties.

Where the terms of a mortgage-deed are perfectly clear, the necessity of deducing the real terms from the conduct of the parties and the reconstituting of the contract (the mortgage-deed) in accordance therewith does not arise. A.I.R. 1939 Pesh. 41=1939 Pesh.L.J. 51=184 Ind. Cas. 585 (2)

——S. 92, proviso 2—Terms of contract.

When a document contains only some of the terms of a tenancy, evidence of a separate oral agreement containing other terms which were not reduced to writing can be given. A.I.R. 1938 Cal. 430=177 Ind. Cas. 355.

——S. 92—Terms of contract.

When a preliminary written contract is afterwards reduced into a deed and there is any difference between them, the written contract is entirely governed by the deed. A.I.R. 1938 Mad. 81=1937 M.W.N. 1027=46 M.L.W. 797=176 Ind. Cas. 173.

——S. 92—Terms of contract—Recitals in mortgage deed—Proof to invalidate deed.

A recital in a mortgage-deed is not necessarily any evidence of the truth of the statements contained therein nor is a person debarred from proving other facts not recited in the document which would go either to validate or invalidate the document executed by the manager of a joint family when the question arises as to how far the family property is bound thereunder. A.I.R. 1937 All. 219 =1937 A.L.J. 73=1937 A.W.R. 1=168 Ind.Cas. 33.

——S. 92—Terms of contract—Wakf—Beneficiaries under, not signatories to deed—Dispute between them and wakif—No other evidence than deed can be given to prove terms.

Though the beneficiaries under a deed of wakf are not signatories to the deed, yet they are parties to it within the meaning of S. 92, Evidence Act. Consequently where there is a dispute between them and the wakif no other evidence, than the deed itself, can be given to prove its terms. A.I.R. 1936 All. 704=1936 A.L.J. 793=1936 A.W.R. 647= 165 Ind. Cas. 15.

——S. 92—Terms of contract—Evidence to prove contracts entered into on principal's behalf.

An agent can perform acts on behalf of his principal either disclosing or concealing the fact that he is an agent and there is nothing in S. 92, Evidence Act, to prevent an agent in a suit for compensation from his principal from leading evidence to prove that contracts entered into in the agent's name were entered into on the principal's behalf. A.I.R. 1933 Sind 34=26 S.L.R 85=142 Ind.Cas. 52.

——S. 92—Terms of the contract—Oral agreement varying terms—Admissibility.

Where the terms of a contract have been reduced to writing no evidence of any oral agreement or statement is admissible as between the parties to show that the document was not to take effect forthwith as mentioned in the document but after the expiry of a certain period. 1930 A.L.J. 1066= 129 Ind. Cas. 439=A.I.R. 1930 A. 824.

——S. 92—Terms of contract.

In the case of an elaborate conveyance prepared after much discussion in the offices of the solicitors for the parties, oral evidence as to the terms of the contract is inadmissible. 90 Ind. Cas. 851= 52 Cal. 914=41 C.L.J. 571=A.I.R. 1926 Cal. 385.

——S. 92—Terms of contract—Assignment of decree—Oral evidence is inadmissible to vary terms as to consideration payable but is admissible to contradict recital as to amount paid actually.

The law allows the parties to a deed to show by oral evidence that a recital of fact in a deed is not true. But a recital which is a term of the contract between the parties cannot be contradicted in that manner.

A deed of assignment of a portion of a mortgage decree recited that the consideration for the assignment was a certain amount and that out of that a certain sum was paid in advance on the day of the execution of the deed of assignment.

Held, that evidence was admissible for the purpose of showing that out of the sum stated to have been paid only a portion had been actually paid,

Held, further, that oral evidence to show that the consideration for the assignment was less than that recited in the deed, was not admissible. A.I.R. 1925 Mad. 660=48 M.L.J. 721.

——S. 92—Terms of contract—Parties need not appear on face of document—Receipt for rent.

For the purposes of S. 92 it is immaterial whether the parties to a document appear as executants on the face thereof. Where a land-lord gives a receipt of rent received from the tenant, the tenant is a party to the receipt though his name does not appear on the face of the receipt.

Recitals in receipts as to the period for which the payments were made do clearly evidence one of the terms of the contract and cannot be contradicted by oral evidence. 77 Ind. Cas. 695=25 O.C. 282=A.I.R. 1923 Oudh 45.

——S. 92—Terms of the contract—Contractor shown to be agent.

Where the question is whether a contracting party acts for himself or for his principal, it is not one relating to the terms of the contract and parol evidence is admissible under S. 92 proviso. Prima facie, a contract by a person in his own name without more is a contract by him as principal. 27 M.L.J. 501=26 Ind. Cas. 822.

25. Third parties.

See also S. 92—Applicability and scope.

——S. 92—Third parties.

S. 92, which excludes evidence of any oral agreement modifying the written contract applies only as between the parties to the instrument and their representatives-in-interest. It does not preclude a person who is not a party to the instrument, from giving evidence, challenging the nature of the transfer. A.I.R. 1930 All. 798.

——S. 92—Third parties—Scope—Objection raised by third party—Court whether go into the same.

S. 92 of the Evidence Act applies only to transactions inter partes and would not bar an enquiry at the instance of a third person whether the parties intended certain item to be transferred by the sale deed. 1930 A.L.J. 926=A.I.R. 1930 A. 786

——S. 92—Third parties.

S. 92 does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed belonged to a third person, who was not a party to the conveyance.

Where a person conveys property to another but continues in possession under an oral agreement of re-purchse such person can prove against his

vendee's purchaser that the sale by the vendee was in fraud of his agreement of re-purchase: A.I.R. 1917P.C. 207, Foll. 114 Ind. Cas. 676=6 Rang. 741=A.I.R. 1929 Rang. 86.

——S. 92—Third parties—Persons not claiming through settlor can show that waqf was illusory.

A person who does not claim through the settlor is entitled to challenge the validity of a waqf on the ground that it was merely an illusory transaction never intended to be acted upon. 31 M.L.J. 431 Foll. ; 10 C.W.N. 449, Dist. and Expl.

Purchasers of some portion of the properties alleged to be waqf at a sale for arrears of Government revenue are not persons claiming under the settlor. A.I.R. 1928 Cal. 253.

——S. 92—Third parties.

What the section says is not between the parties to the contract but between the parties to the instrument, and therefore the section is no bar to the admission of evidence to show what the true nature of the written transaction was, at the instance of a third party, and evidence as to the third party's right can not only be admissible but is most relevant. 104 Ind. Cas. 736=10 N.L.J. 201 =A.I.R. 1928 Nag. 4.

——S. 92—Third parties—Pre-emptor not debarred from showing the intention of the parties or the real nature of the transactions.

As between the parties to the instrument, oral evidence of intention is not admissible for the purpose of construing the deeds or ascertaining the intention of the parties. But in a suit for pre-emtion, a pre-emptor not being a party to the instrument cannot be debarred from adducing evidence to show the intention of the parties or the real nature of the transaction. 113 Ind. Cas. 263=5 O.W.N. 825=4 Luck. 68=A.I.R. 1928 Oudh 472.

——S. 92—Third parties—Transaction with a third party is not governed by the section

Plaintiff sold his land to **A** in satisfaction of a debt of Rs. 450. **A** was alleged to have agreed that he would at any time re-sell the land to the plaintiff at the same price. Later, **A** sold the land to the defendant who agreed with the plaintiff to be bound by the same terms as **A** and to reconvey the land to him at any time for Rs. 450. Plaintiff sued the defendants on the agreement to reconvey the land. The lower Court held that the plaintiff was barred hy S. 92 from giving evidence to prove the agreement.

Held, that if the question related to the conveyance to **A**, then evidence was not admissible under S. 92. But as the plaintiff was not a party to the sale deed executed by **A** in favour of the defendants, S. 92 did not apply and did not debar him from proving the agreement that he set up. A.I.R. 1917 P. C. 207, **Foll**. 103 Ind. Cas. 734=5 Rang. 836=A.I.R. 1928 Rang. 61.

——S. 92—Third parties.

Subsequent oral agreement between **A** and **C** varying terms of deed between **A** and **B** is provable by **C** against **A**. 96 Ind. Cas. 276 (All.).

——S. 92—Third parties—Vendee can give oral evidence in a pre-emption suit to explain the character of the sale-deed.

In a suit for pre-emption against the vendee, the vendee can adduce evidence showing that a document which on its face purported to be a deed of sale was in reality a deed of relinquishment. Section 92 excludes the admission of any oral agreement or statement as between the parties to an instrument or their representatives-in-interest, but the plaintiff in a pre-emption suit is not such a party. 79 Ind. Cas. 320=21 A. L.J. 932=5 L. R. A. Civ. 41=A.I.R. 1924 All. 229.

——S. 92—Third parties — Transaction with a third party - Evidence as to, is admissible.

Whenever evidence is tendered as to a transaction with a third party it is not governed by S. 92 or by the rule of evidence which it contains, and in such a case the ordinary rules of evidence of equity and good conscience come into play unhampered by the statutory restrictions. 77 Ind. Cas. 342=25 Bom. L. R. 818=A.I.R. 1924 Bom. 58.

——S. 92—Third parties.

Evidence is admissible to show that a sale-deed is not in fact a sale-deed but only a mortgage deed. Section 92 prohibits only parties. 44 I. A. 236, **Foll.** 79 Ind. Cas. 186=A.I.R 1923 Bom. 429.

——S 92—Third parties—Stranger to deed cannot plead condition precedent.

Per **Das, J.**—A separate oral agreement constituting a condition precedent to the attaching of any obligation under the document could be proved only by the vendor or his representative-in-interest. 27 All. 271, **Foll.** 65 Ind. Cas. 882=3 Pat. L. T. 653=A.I.R. 1922 Pat. 619.

——S. 92—Third parties—Conveyance absolute—Oral evidence to prove a transfer of mortgage was intended—Fraud.

As between the parties to an absolute convevance, S. 92 of the Evidence Act precludes the giving of oral evidence to prove that the transaction was intended to be a mortgage only. The English equity doctrine permitting evidence of acts and conduct of the parties to be given in evidence for the purpose of ascertaining the true intention of the parties is not applicable to India in the face of S. 92. 27 I. A. 58 Foll 4 B. 594; 9 C. 528; 16 M. 80; 25 C. 603; 28 C. 256; 28 C. 289; Disappr. 25 M. 7; 30 B. 119 Appr. S. 92, however, applied as between the parties only. Wherever accordingly evidence is tendered as to a transaction with a third party, it is governed not by the section but by the ordinary rules of equity and good conscience. Where therefore a person takes a sale-deed knowing that a third person to the owner of the property and the vendor is only a mortgagee and the intention of the parties is merely to transfer the mortgage, oral evidence is admissible to prove the real nature of the transaction. **Semble.**—Even if S 92 applied to the case, proviso (1), would admit the oral evidence, as it would be a fraud to insist upon a claim to property arising out of such a transaction, the claimant knowing that the true owner had never parted with it. 45 Cal. 320=15 A. L.J. 825=33 M. L.J. 648=3 Pat. L. W. 185=6 L. W. 777=22 C.W.N. 257=23 M.L.T. 36= 27 C. L. J. 175=20 Bom. L. R. 278=(1918) M.W N. 300=9 L.B R. 114=11 Bur. L. T. 21=44 I. A. 236= 42 Ind. Cas. 642 (P.C.).

——S. 92—Third parties—Applicability—Sale or mortgage—Oral evidence.

S. 92 only applies to parties to a document and their privies. In cases of transactions with third parties, the section has no application, and the ordinary rules of equity and good conscience come into play unhampered by any statutory restrictions. 42 Bom. 512=20 Bom. L. R. 684=46=Ind. Cas. 662.

——S. 92—Third parties—Evidence admissible.

The provisions of S. 92 excluding oral evidence do not apply to a case where one of the parties to the suit is not a party to the document about which oral evidence is proposed to be let in. 45 Ind. Cas. 13 (Cal.).

——S. 92—Third party—Oral evidenee—Proof of oral transaction.

Where the whole contract is not embodied in writing and when that part of the contract relates to a party not a party to the document oral evidence to prove that part of the contract is admissible. 15 C. W. N. 408=9 Ind. Cas. 161.

——S. 92—Third parties—Not affected.

The prohibition in S. 92 of the Act applies only to parties to a deed and not to outsiders. 67 P. R. 1912=126 P. L. R. 1912=255 P. W. R. 1912=13 Ind. Cas. 667.

——Ss. 92 and 99—Third parties—Sale—Evidence to show that transaction was a mortgage—Admissibility.

S. 99 of the Evidence Act is an enabling section; S. 92 is a disqualifying section. The word 'varying' in S. 99 of the Evidence Act covers the same ground as the words 'contradicting, varying, adding to or subtracting from' in S. 92 of the Act. It is competent for persons who are not parties to a document to adduce oral evidence to show that the rights of parties to it are at variance with the rights ostensibly created and declared by the instrument. 53 Ind. Cas. 243 (Mad.).

——S. 92—Third parties — Parties on the same side—Admissibility of oral evidence.

S. 92 of the Evidence Act merely prevents evidence being given to vary the terms of a document in a proceeding between the parties to the document and their representatives. Two persons who are arrayed on the same side such as joint vendees can give evidence to vary the terms of the written instrument in a contest between themselves. 54 Ind. Cas. 962 (Nag.)

——S. 92—Third parties—Real nature of transaction—Evidence of—Admissibility.

S. 92 of the Evidence Act is confined to proceedings between the parties to the deed or their respresentative in interest and has no application to claims by or against third persons. Parties to a transaction which is not really an out and out sale are not estopped in a suit for pre-emption brought by a third party from showing the real nature of transaction even when the document evidencing the transfer stands in the form of a sale-deed. 21 O.C. 165=47 Ind. Cas. 194.

——Ss. 92 and 99—Third parties—Sale or mortgage—Extrinsic evidence as to show real nature of transaction.

Extrinsic evidence is admissible to show the real nature of the transaction both as against and in favour of persons not parties to the deed. To get at the real nature of the document, the Court has to look to the surrounding circumstances and subsequent conduct of the parties in addition to the terms of the document. 21 Ind. Cas. 69 (Oudh).

——S. 92—Third parties—Sale or gift—Extrinsic evidence to show real nature of transaction.

As between persons not parties to a deed, extrinsic evidence is admissible to show that an ostensible sale is really a gift. 21 Ind. Cas. 60 (Oudh).

——Ss. 92 and 99—Third parties—Exclusion of oral evidence.

S. 92 applies only to parties to the contract and not to a third party. A pre emptor can produce oral evidence to prove that an alleged mortgage is in reality a sale. 16 O.C. 9=19 Ind. Cas. 679.

——S. 92—Third parties — Oral agreement not confirmed to in written deed of compromise.

Where an assignment is in writing, oral evidence to vary or alter its terms is admissible at the instance of third parties who impeach the transaction as fraudulent. 6 S.L.R. 107=17 Ind. Cas. 39.

26. Usage.

——S. 92—Usage.

Evidence of an usage inconsistent with the terms of the contract is inadmissible though evidence of an usage increasing liability of a broker is admissible as consistent with the contract. 81 Ind. Cas. 721=51 Cal. 588=A.I.R. 1924 Cal. 733.

——S. 92—Usage—Custom that when due date falls on a holiday contract may be performed on the next working day can be proved.

In the absence of statutory provision or trade custom or usage to that effect, the fact that the performance of a contract falls due on a holiday does not alter the rights of the parties. **Richardson v. Godard,** (1859) 23 Howard 28; 15 Bom. 338, **Foll.** Such mercantile usage, though it needs not either the antiquity, the uniformity or the notoriety of custom, must be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract. 7 M.I.A. 263 (P. C.) and **Gibson v. Small,** (1853) 4 H.L.C. 353, **Foll.** Consequently the usage of which evidence is received must not be repugnant to or inconsistent with the written contract. **Brown v. Byrne,** (1854) 3 El. and Bl. 703 and **Ross v. Shaw,** (1917) 2 Ir. Rule 367, **Foll.**

But in order that the material incidence which it is sought to annex should fall within the exception of repugnancy, the incident must be such as if expressed in the written contract, would make it insensible or inconsistent or thoroughly unreasonable. (English cases referred).

The mere fact that the usage varies the apparent contract is not of itself sufficient to exclude the evidence, for it is manifestly impossible to add any material incident to the written terms of a contract without altering its effect, more or less. The test is whether the incident, if expressed in the writen contract, would make it insensible or inconsistent or unreasonable. 26 C.W.N. 354=A.I.R. 1921 Cal. 809.

——S. 92 — Usage — Dowls expressly excluding transferability—Custom of transferability cannot be proved.

Any evidence designed to show customary incidents of tenure as attaching to the jotes must be rejected if and so far as it conflicts with what is contained in the dowls themselves.

Where the dowls contain an express statement that there is no right of sale, gift or transfer without the land-lord's consent in face of this, it is impossible to admit evidence of a custom of transferability in the jotes. 61 Ind. Cas. 503=48 Cal. 359=25 C.W.N. 13=A.I.R. 1921 Cal. 741.

——S. 92, proviso (5)—Usage—Written contract—Evidence.

The mere fact that the usage varies the apparent contract is not of itself sufficient to exclude the evidence. The test is, whether the incident if expressed in the written contract would make it insensible or inconsistent or unreasonable. 32 C.L.J. 140=58 Ind. Cas. 396.

——S. 92, proviso (5)—Usage—Interest—Pro-note—Liability.

Under S. 92 no oral evidence can be given to show that the interest mentioned in a pro-note is not payable and a custom or usage repugnant to or inconsistent with the terms of a pro-note cannot be proved. 10 Bur. L.T. 242=36 Ind. Cas. 957.

——S. 92, proviso (5)—Trade usage—Contract.

Evidence of usage of trade applicable to a contract which the parties making it knew, or may be reasonably presumed to have known is admissible for importing terms into the contract respecting which

the instrument tself is silent. 20 C. W. N. 365=35 Ind. Cas. 3.

——S. 92, proviso (5)—Trade usage—Commercial contracts—Oral evidence.

The law recognizes the fact that merchants do not write all the terms of their contract but rely upon the knowledge and good faith of one another as to matters so well known that special reference to them would be burdensome and unnecessary and that they accordingly agree on many of the terms of their contract by mere silence. What the terms are must be shown by parol evidence. 33 Ind. Cas. 838 (Cal.)

27. Variation of terms.

——S. 92, proviso 4—Variation of terms—Contemporaneous oral agreement cannot be proved.

It is open to a party to lead evidence of a variation of the written contract only if that variation was made subsequently and not at the same time as the original contract. Hence proof of any contemporaneous contract varying the terms of the original contract is barred by the provisions of S. 92, Evidence Act. A.I.R. 1943 All. 370=1943 A.L.J. 411=I.L.R. (1943) All. 752=1943 A.W.R. (H.C.) 224=210 Ind. Cas. 55.

——S. 92—Variation in terms—Lease registered—Oral agreement reducing rent—Reduced rent paid for many years—Agreement is still inadmissible.

No oral agreement is admissible to prove variation of the terms of a registered lease including a term as to the payment of rent, notwithstanding the fact that the lessee has paid and the lessor has accepted rent at a reduced rate for many years. A.I.R. 1943 Pat. 152=22 Pat. 5=206 Ind. Cas. 401.

——S. 92, proviso 4—Variation in terms—Mortgage-deed registered—Subsequent oral agreement varying terms of deed, admissibility.

It is always open to a mortgagor to prove that on a certain day, he discharged the mortgage. But when in a registered mortgage-deed, there is an express term that payment should be made in a certain way and unless endorsed on the deed, it should not be regarded as payment at all, the mortgagor will not be allowed to prove discharge of the mortgage by subsequent oral agreement which goes to vary the terms of the mortgage. A.I.R. 1940 Pat. 49=6 B.R. 422=21 P.L.T. 437=187 Ind. Cas. 63.

——S. 92, proviso 1—Variation of terms—Relationship contradictory to that expressed upon the written document, whether permissible.

Giving evidence of a relationship between the parties which was other than and contradictory to the relationship expressed upon the written promissory note is not permissible. A.I.R. 1940 Rang. 152=189 Ind. Cas. 384.

——S. 92—Variation in terms—Contract reduced to writing—Oral evidence to change terms—Illegality not pleaded—Court, if can take notice.

Section 92 does not preclude a party from showing that the writing was not really the contract between the parties but was only a fictitious or colourable device which cloaked something else. It is always permissible to look to the surrounding circumstances to see in what manner the language of a document was related to existing facts.

Per Digby J.—Though the contract is apparently valid in form or matter, extrinsic evidence is always admissible in variance of or in addition to the contract to show that the transaction is illegal and hence void even in the case of a covenant or contract under seal.

Per Stone C. J.—A Court can, and must, take notice of an illegality which emerges in the course of a case although not pleaded. But a Court should be very slow to do so and should not go out of its way to assume facts or draw inferences from facts capable of another construction to tend to the conclusion that there has been illegality of so grave a nature neither pleaded nor raised by the issues. It should be still more hesitant if the suit appears collusive. A.I.R. 1938 Nag. 335=I.L.R. (1939) Nag. 1=177 Ind. Cas. 6 (F.B.).

——S. 92—Variation in terms—Document clear—Evidence to contradict.

Where the terms of a document are clear, evidence ought not to be permitted to contradict those terms or to vary their meaning. A.I.R. 1937 Bom. 341=39 Bom. L. R. 165=170 Ind. Cas. 960.

——S. 92, Proviso 4—Variation in terms—Pron-note—Subsequent agreement rescinding or modifying its terms—Oral evidence proving agreement of discharge—Admissibility.

Since a promissory note is a document which is required to be in writing, S. 92, Evidence Act applies to it and proviso 4 shows that if any distinct subsequent oral gareement is sought to be proved, which would have the effect of rescinding or modifying any such contract, then it must be in writing; oral evidence, therefore, to prove an agreement of discharge or of the discharge of the debt evidenced by the pro-note is inadmissible under S. 92, proviso 4. A.I.R. 1937 Rang. 521=174 Ind. Cas. 964.

——S. 92, proviso 3—Variation in terms—Document in writing—Parole evidence to show condition precedent contradicting terms of document.

The condition precedent to which proviso 3 to S. 92, Evidence Act, refers is a condition. the subject-matter of which is de hors the contents of the instrument and such that if effect be given to the condition, it cannot affect the terms of the document itself. Oral evidence of a condition which directly contravenes the terms of the document cannot be adduced. A.I.R. 1936 Mad. 841=71 M.L.J. 522=1936 M.W.N. 994=44 M.L.W. 629=165 Ind. Cas. 669.

——S. 92—Variation in terms—Verbal agreement modifying terms of mortgage—Admissibility of.

Where the plaintiffs allege that the terms of the security are to be found, not in the mortgage-deed, but in that deed as modified by a verbal agreement subsequently made and the defendants admit a modification by verbal agreement but attribute to the verbal agreement an effect different from that alleged by the plaintiffs having regard to S. 59, T. P. Act, the plaintiffs cannot prove their allegations as to security at all.

Where the plaintiffs admit that the transaction was not governed by the registered mortgage-deed alone, it would be inadmissible to allow them, when they have failed to prove the transaction alleged to set up the registered mortgage-deed unmodified as being the instrument which alone governs the relations between the parties. A.I.R. 1934 P. C. 98=59 C.L.J. 277=36 Bom. L.R. 547==13 Pat. 310=61 I. A. 185=1934 A.L. J. 462=38

C.W.N. 575=1934 M.W.N. 377=66 M.L.J. 662=39 M.L.W. 482=15 P.L.T. 169=11 O.W.N. 481=3 A.W.R 595=148 Ind. Cas. 486 (P. C.).

——S. 92—Variation in terms.

Oral agreement varying the terms of the written contract is not admissible. ('34) 1934 M.W.N. 679.

——S. 92—Variation of terms.

Where the Inamdar lets his sheri lands under a rent-note, the terms of the rent-note govern the the relations between the parties—Evidence of custom at variance with the terms of the document cannot be permitted to be led by either party. A.I.R. 1932 Bom. 493=34 Bom. L.R. 959=139 Ind. Cas. 258.

——S. 92, proviso 1—Variation of terms—Consideration, whether term of contract—Evidence to contradict or vary, admissibility of.

The consideration mentioned in a document is not one of the terms of the document but is a recital of a fact which can be contradicted or varied under proviso 1 to S. 92, Evidence Act. A.I.R. 1932 Cal. 25=35 C.W.N. 279=133 Ind. Cas. 568.

——S. 92—Variation of terms—Oral agreement between mortgagors varying terms of mortgage.

When the terms of a mortgage contract have been reduced to writing, no oral agreement varying those terms can be admitted in evidence. A.I.R. 1932 Mad. 218=35 M.L.W. 145=1932 M.W.N. 168=137 Ind. Cas. 285.

——S. 92—Variation of terms—Person described as principal debtor—If can be proved to be surety.

Under S. 92, Evidence Act, the obligee of a bond cannot prove that the position of one of the persons described in the surety bond as principal debtor was that of surety for the other principal debtors. A.I.R. 1932 Nag. 62=28 N.L.R. 325=138 Ind. Cas. 879.

——S. 92—Variation of terms—Contract—Evidence of agency.

Parol evidence tendered by plaintiffs for the purpose of showing that one of the parties to the contract had acted as agents for them (plaintiffs) in making the contract, and that therefore the plaintiffs were entitled to enforce the contract on behalf of such party as against the other, is admissible. 130 Ind. Cas. 548=25 S.L.R. 91=A.I.R. 1931 Sind 4.

——S. 92—Variation of terms—By proviso 4, oral evidence, varying or modifying terms of a written contract, is entirely inadmissible.

Under proviso 4, in certain cases, a subsequent oral agreement to modify any previous contract may be proved, but this is not permitted where the law requires that the terms of the contract should be reduced into writing, as in the case of a mortgage or where the terms of the contract have been registered. By proviso 4 oral evidence is entirely inadmissible to vary or modify the terms of such a contract.

Where the defendants pleaded that some time before any payment was made, an oral agreement with the plaintiffs was reached by which they (plaintiffs) were to receive, in full satisfaction of the mortgage deed, less money than was due to them under the mortgage bond.

Held, that the oral agreement set up on behelf of the defendant is calculated to vary the terms of the written instrument by trying to establish that although the plaintiffs were entitled to something under the terms of the mortgage, they were not entitled to it by virtue of a subsequent oral agreement, and that S. 92 was a bar to the plea. A.I.R. 1930 All. 721=1930 A.L.J. 1193=127 Ind. Cas. 443. (F.B.).

——S. 92—Variation of terms—Interpretation—Oral evidence to prove satisfaction of debt by part payment and remission of reminder is admissible.

Section 63, Contract Act, has nothing to do with the interpretation of S. 92, Evidence Act. In some cases, where the pormisee exercises any of his privileges given him under S. 63, Contract Act with the consent of the promisor the act may amount to a variance, etc., of the terms of the original contract and in that case, unless the variance is made by a document in writing, evidence would not be admissible to prove the fact. For example, where the mortgagee agrees to extend the time for payment, if the promise is merely oral and if the mortgage is by a registered document, the promise cannot be proved by oral evidence. But in the case of a satisfaction of the debt or remission of a part of the debt there is no contradicting, or varying, or adding to, or subtracting from the terms of the contract, and oral evidence may be adduced to prove the payment of a part of the debt and remission of the balance. For in that case, it would not be the plea of the mortgagor that the mortgagee is not entitled to the whole of his money. On the other hand his plea would amount to this, that although the mortgagee was entitled to the whole of his money he, in consideration of prompt payment of a certain amount (and for other possible considerations) agreed to accept a part in satisfaction of the full promise. A.I.R. 1930 All. 721=1930 A.L.J. 1193=127 Ind. Cas. 443 (F. B.).

——S. 92—Variation of terms—Subsequent oral agreement modifying written contract cannot be proved by oral evidence.

A subsequent oral agreement to take less than is due under a registered mortgage-bond is an agreemet modifying the terms of a written contract, and if it has to be proved, oral evidence is inadmissible under S. 92, prov. 4. 42 Mad. 41 and 44 Bom. 55, **Foll**. 110 Ind. Cas. 424=9 Lah. 597=30 P.L.R. 46=A.I.R. 1928 Lah. 873.

——S. 92—Variation of terms—A document which cannot be said to be a varation of a mortgage bond is admissible.

A leased certain property to **B** and also executed a mortgage of the same property to him. The mortgage bond contained a covenant that unless credit entry was made therein in respect of payments of amounts which might be made on account of the bond, a statement that they had been made otherwise would not be sustainable. On the same date **B** executed a varthamanam to **A** agreeing to pay a certain sum out of rents for charity, to pay the kist, and to credit the balance of the rents towards the bond. **A** alleged that **B** failed to pay the amount for charity and assessment due in respect of the land and that by crediting the rents as provided for in the varthamanam towards the mortgage-bond, the bond was fully discharged and therefore he instituted the suit for taking accounts in respect of the lease and the mortgage bond, for the recovery of the land and some other reliefs. The Trial Court dismissed the suit, holding that the varthamanam was inadmissible in evidence,

Held, that the varthamanam was admissible in evidence as it cannot be said to be a variation of the mortgage bond.

If the parties had intended actual cash payments to be the only method of discharge, then they would not have with the provision in mind, executed on the same

date the varthamanam which provides for a different method of discharge. 107 Ind. Cas. 808=27 M.L.W. 47=A.I.R. 1928 Mad. 382.

——S. 92—Variation of terms.

Evidence of statements made at the time of execution of will cannot be admitted for the purpose of varying the terms of the will. 105 Ind. Cas. 840=A.I.R. 1928 Nag. 55.

——S. 92—Variation of terms—Two separate sale-deeds by both parties—Evidence to show the transaction to be exchange is admissible.

Extrinsic evidence is admissible for the purpose of showing that two documents, though purporting to be separate sale-deeds, are in reality part and parcel of the same transaction, which, was one of an exchange. Such evidence which shows that two documents executed and registered on the same date are part and parcel of one transaction and in fact represent only one transaction, does not amount to leading evidence so as to vary the terms of a document. 103 Ind. Cas. 399 =25 A.L.J. 723=A.I.R. 1927 All. 696.

——S. 92—Variation of terms.

Oral evidence is not admissible to show that one of the executants of a money bond signed only as surety: 8 C.W.N. 101 and 2 U.B.R. 13, **Foll.** 103 Ind. Cas. 79=5 Rang. 168=A.I.R. 1927 Rang. 199.

——S. 92—Variation of terms.

Executant cannot plead that a different rate from that contained in the deed was agreed to. 95 Ind. Cas. 1019=1 Luck. 160=13 O.L.J. 95=3 O.W.N. 248=A.I.R. 1926 Oudh 273.

——S 92—Variation of terms—Joint execution of a bill—Oral evidence that one was surety is not excluded if creditor's right to demand immediate payment for either is not affected.

Where a bill contains a joint promise by the two executants to pay to their creditors the amount of the bill jointly and severally so far as the express promise goes it may not be varied by parol evidence; but where the bill does not declare in express terms the rights of the co-obligors **inter se,** there is nothing in law to prevent one of them from proving such terms by parol evidence, provided that he does not thereby intend to affect the rights of the creditor to demand immediate payment from either or both of the co-obligors or joint promisors. 92 Ind. Cas. 667=20 S.L.R. 106=A.I.R. 1926 Sind 156.

——S. 92—Variation of terms.

Where the promisee knew that one co-executant was a surety for the other co-executant, evidence may be let in to prove that he was a surety. 82 Ind. Cas. 816=3 Bur. L.J. 112=A.I.R. 1924 Rang. 360,

——S. 92—Variation of terms.

There is no reason in S. 92 of the Act why the fact whether in case of a joint contract both or either of the workmen have actually, or constructively received all or part of the advance should not be proved, since the fact that one of two joint contracting parties actually receives the consideration does not necessarily involve that he does not receive it as regards part or whole as the agent of the other and a finding to that effect will not necessarily involve and variaion of the terms of the contract. 71 Ind. Cas. 61=16 M.L.W. 883=31 M.L.T. 475=24 Cr.L.J. 13= A.I.R. 1923 Mad. 184=44 M.L J. 53.

——S. 92—Variation of terms.

Where a bond is executed by 3 persons, one cannot show by oral evidence that he is only a guarantor for the other debtors. 70 Ind. Cas. 872=1 Bur. L.J. 157= A.I.R. 1923 Rang. 15.

——S. 92—Variation in terms.

Where the documentary evidence showed a contract between plaintiffs and defendants as between principals,

Held, the mere mention of commission in the contract as signed was not in any way inconsistent with the relation being between principal and principal and a mere statement of the defendants contradicted by the plaintiffs, that it was made a condition that there was to be no liability on their part, cannot be allowed to displace the ordinary results which contract between principals entails. 63 Ind. Cas. 521=5 Rang. 1=13 M. L. W. 537=A.I.R. 1921 P. C. 129 (P. C.).

——S. 92—Variation of terms—Hundi payable at sight—Contemporaneous oral agreement.

A contemporaneous oral agreement that the whole amount of a hundi payable at sight should not be paid but a less amount does not fall under the proveiso to S. 92 of the Evidence Act and is inadmissible in evidence. 12 S.L.R. 70=49 Ind. Cas. 193.

——S. 92—Variation of terms—Oral evidence——Admissibility to prove variation of a registered instrument optionally registrable.

A mortgage was made by plaintiff to defendant comprising 3 items of property for an advance of Rs. 99 and was registered. In pursuance of this the mortgagee took possession of the first item and another property in lieu of the second item. Plaintiff paid into Court Rs. 99 and claimed redemption of the two items alleging that by an oral agreement the second item in defendant's possession was given him in lieu of second item in the registered deed. Defendant pleaded inadmissibility of extrinsic evidence as regards item 2 and that the claim with regard to this item was barred by limitation. **Held,** (1) that the plaintiff was entitled to lead evidence to prove the two facts, viz., that the defendant's possession of the 2nd item was that of mortgagee and never adverse to him; (2) that his right to possession was terminated by payment of Rs. 99 only tendered. 39 All. 300=15 A.L. J. 257=39 Ind. Cas. 528.

——S. 92—Variation of terms—Gift—Unconditional—Evidence contrary, if admissible.

Evidence in proof of a separate agreement, which is contrary to a deed of gift, which is unconditional in its terms is barred under S. 92 of the Evidence Act. 5 Ind. Cas. 49 (All.)

——S. 92, proviso (6)—Evidence to vary terms—Conduct—Sale or mortgage—Intention of parties.

Where a document is perfectly plain no extrinsic evidence is required to show in what manner the language of the documents related to existing facts. There may be cases where such extrinsic evidence is required and it will therefore be admitted. But it can only be in such cases where the terms of the documents themselves require explanation and then evidence can be led within the restrictions laid down by proviso to S. 92 of the Evidence Act. Where a document has stood more than fifty years it is extremely undesirable to allow evidence to be led to show that the document is not what it appears to be on the face of it. 44 Bom. 710=22 Bom.L.R. 831=58 Ind. Cas. 574.

——Ss. 92 and 99—Variation of terms—Sale—Evidence to proof gift.

A party to what is on the face of it a sale-deed cannot in a suit with a person who is no party to the deed produce evidence to show that the deed was really a deed of gift. 6 O.L.J. 563=22 O.C. 222=53 Ind. Cas. 961.

——S. 92—Recitals—Oral evidence to vary or contradict.

There is nothing in S. 92 of the Evidence Act to exclude evidence of an oral agreement which con-

tradicts, varies, adds to, or subtracts form not the terms of the contract. but some recitals in the contract itself. 51 Ind. Cas. 320 (Pat).

——S. 92—Variation of terms—Instalmeut bond—Oral undertaking to waive provision for payment of whole on default—Inadmissible.

A subsequent oral undertaking on the part of the creditor to waive his right to enforce the payment of the whole amount on two successive defaults of payments of instalments is a variation of the contract and is therefore inadmissible in evidence under S. 92 of the Evidence Act. 47 Ind. Cas. 943 (Cal.)

——S. 92—Variation of terms—Promissory note—Evidence to show that executant was surety.

In a suit on a promissory note the question whether the defendant executant of the note, signed it by way of security for others cannot be tried or determined except so far as it affects the question of consideration. 47 Ind. Cas. 917 (Cal.)

——S. 92—Variation of terms—Sale—Agreement to reconvey.

Where there is an out and out sale no oral evidence of a contemporaneous oral agreement varying the terms of the sale-deed or importing an agreement to reconvey as part of the same transaction is admissible. 22 Ind. Cas. 4; 12 All. 387 (P.C.) Foll. and 22 All. 149 (P. C.) Dist. 74 P.R. 1918=163 P.W.R. 1918=47 Ind. Cas. 418.

——S. 92—Variation of terms—Gift—Conditions—Introduction of.

To introduce a condition into a document (a gift deed) that is on the face of it unconditional and absolute is to vary the terms thereof within S. 92. Oral evidence is inadmissible to prove that a gift unconditional in its terms was revocable by the donor if future services were not rendered. (1917) M.W.N. 634=42 Ind. Cas. 265.

——S. 92—Variation of terms—Evidence of motive.

Where a 'Barga Kabuliyat' containing a number of terms had as clause that on failure of crops Rs. 25 per annum is to be paid; **Held,** that under S. 92 no oral evidence was admissible to show that the clause about payment of Rs. 25 was inserted solely for purposes of registration as it was not so stated on the fact of the instrument itself. 21 C.W.N. 860=40 Ind. Cas. 833.

——S. 92—Recitals—Partition—Variation of.

In spite of the apparent tenor of a deed of partition parties may prove either that the partition, was incomplete or that certain properties were reserved for future division. 4 L. W. 329=34 Ind. Cas. 712.

——S. 92—Variation of terms—Mortgage—Splitting up of contract.

Oral evidence to prove an agreement between a mortgagor and mortgagee having the effects of splitting up the contract contained in the registered mortgage-bond is inadmissible. 44 Cal. 162=25 C.L.J. 24=21 C.W.N. 740=34 Ind. Cas. 609.

——S. 92—Variation of terms—Benamidar obligor can't be proved the real obligor or obligee.

Where there is a written contract, the obligor or the obligee might not give parol evidence to shift his liability or to seek his remedy from a third person even though the facts were within the knowledge of the parties on the ground that the obligor on record was only a benamidar. 18 Bom. L. R. 134=33 Ind. Cas. 396.

——S. 92—Variation of terms—Promissory note—Joint execution—Oral evidence to prove liability as surety.

It is not open to one of the executants of a pro-note to adduce oral evidence that he was a surety. 29 Ind. Cas. 760 (L.B.)

——S. 92—Contradiction of terms—Statement of deceased regarding revocation—Oral evidence as to—Admissibility.

Oral evidence as to statements alleged to have been made by a deceased executant as having the effect of practically cancelling a registered instrument cannot be admitted unless there are anomalous and suspicious circumstances already in existence. 1 O.L.J. 591=26 Ind. Cas. 547.

——S. 92 — Contradiction of terms — Oral agreement releasing one of the joint promissors.

Evidence is not admissible to prove a contemporaneous oral agreement between the promisee and one joint promissor that the latter is not liable under a promissory note. 38 Mad. 680=14 M.L.T. 559=(1914) M.W.N. 27=26 M.L.J. 113=22 Ind. Cas. 1.

——S. 92—Variation of terms—Negotiable instrument—Signed as principal—Liability as surety—Oral evidence.

A person signing a pro-note as principal cannot prove by oral evidence that he was only intended to be surety.

An unconditional agreement to pay cannot be varied by an oral agreement under S. 92 of I.E. Act. 1913 M. W .N. 336=24 M. L. J 91=13 M. L. T. 104=18 Ind. Cas. 696.

——S 92, provisos (3) and (4)—Variation of terms—Registered contract.

Oral evidence of modification of a registered contract by an unregistered writing is inadmissible. 21 P.L.R. 1913=17 Ind. Cas. 362.

——Ss. 92 and 115—Variation of terms—Oral evidence.

S. 92 of the Evidence Act should not be read subject to S. 115 of the Act. In a suit for possession of property on the basis of a sale-deed defendant pleaded an oral agreement whereby plaintiff had agreed to return the sale-deed to defendant and to relinquish his claim. **Held**, that evidence of the oral agreement was inadmissible under S. 92 of the Evidence Act and that, as the oral evidence itself was inadmissible, there was no question of the plaintiff being estopped from prosecuting his suit by reason of such agreement. 29 M. 336, 36 C. 920 Ref. 15 Ind. Cas. 326 (Mad.)

——S. 92—Variation of terms—Sale—Rescission—Mutual consent—Parol evidence.

Oral evidence to prove that parties to a sale-deed, duly executed and registered, subsequently rescinded it by mutual consent, is inadmissible under S. 92 of the Evidence Act. 15 Ind. Cas. 282 (Mad.)

——S. 92—Variation of terms—Registered instrument—Oral agreement—Conduct variation by.

No oral agreement is admissible to prove variation of the terms of a registered deed for instance, a term as to the payment of rent in a registered lease. An agreement is none the less oral because it is to be referred from the conduct of the parties. (1910) 12 C.L.J. 646=6 Ind. Cas. 577.

——S. 92—Variation in terms—Contemporaneous documents—Admissibility.

If a contract is based on two documents, executed contemporaneously, the defendant in a suit on one of them is entitled to show the contemporaneous execution of the other. **A** sued **B** on a pro-note payable on demand. **B** pleaded a contemporaneous agreement of its payment by instalments. **Held**, he could give

evidence of the existence of the contemporaneous agreement. 4 Bur. L.T. 136=12 Ind. Cas. 896.

——S. 92—Variation of terms—Promissory note—Summary suit—Plea of security.

In a summary suit on a pro-note under O. XXXVIII the plea that the contract sued on, was a conditional agreement cannot be allowed as the contract embodied in the note is an unconditional agreement to pay and the object of the pro-note is to show that the particular transaction represented by the note is a separate transaction and the intention is that the remedies relative thereto should be separately followed. (3 O.C. 627, Foll.) 9 Ind. Cas. 299 (Sindh.)

——S. 92—Variation of terms — Representation that a deed would not be enforceable as such inadmissible.

Evidence of a contemporaneous agreement or promise or representation between the parties inconsistent with their written document cannot be admitted. Hence, the representation by a party to a deed that the deed cannot be enforced is inadmissible. 35 Bom. 93=12 Bom. L.R. 972=8 Ind. Cas. 644.

——S. 92—Contradiction of terms.

Oral evidence is not admissible to prove anything contrary to the express provision in the document. 2 Ind. Cas. 160; 6 Ind. Cas. 577, Foll. 3 C.W.N. 151; 14 C.W.N. CXII, Diss. 15 C.W.N. 249=12 C.L.J. 649=7 Ind. Cas. 842.

——S. 92—Variation of terms—Partnership deed.

Where the deed of partnership did not show that the members of a family entered into the partnership on behalf of the family, no extraneous evidence is admissible to prove that the members of the family were acting on behalf of the family in the concern and not in their individual capacity. 87 P.L.R. 1909=4 Ind. Cas. 929.

28. Miscellaneous.

——S. 92—Miscellaneous—Objection to admissibility.

An objection that a certain document cannot be said to have been properly proved by virtue of presumption under S. 90, should be taken at the earliest time and cannot be allowed for the first time in second appeal. A.I.R. 1939 Mad. 926=50 M.L.W. 527=1939 M.W.N. 946=(1939) 2 M.L J. 593.

——S. 92—Miscellaneous.

The question whether a specification of a prior invention describes the invention claimed by the subsequent inventor is a question of construction and parol evidence is only admissible for the purpose of explaining words or symbols of art and other such like technical matters, and of informing the Court of relevant surrounding circumstances. 124 Ind. Cas. 569=31 M.L.W. 126=A.I.R. 1930 P.C. 1 (P.C.)

——S. 92—Miscellaneous.

Covenent for title under S. 55 (2), T.P. Act—Contract to the contrary — Whether can take shape of oral agreement. 124 Ind. Cas. 185=1930 A.L.J. 653=A.I.R. 1930 A. 771=52 A. 604.

——S. 92—Contract in writing—Suit on promissory note—Collateral agreement of time.

An agreement in writing postponing the time for payment is a valid and enforceable agreement and time runs from the expiry of the agreement. 39 Mad. 129=3 L. W. 38=19 M.L.T. 62=30 M.L.J. 51=(1916) M.W.N. 93=32 Ind. Cas. 869 (F.B.).

——S. 92, proviso (4) — Miscellaneous — Relinquishment—Under rayati interest.

Where an instrument regarding the creation of an under-rayati interest worth less than Rs. 100 is registered, evidence may be given of an unregistered document to show that the interest was relinquished. 57 Ind. Cas. 949 (Cal.)

——S. 92—Miscellaneous — No estoppel against statute.

Where the transaction is expressly forbidden by statute, the rule that the grantor cannot derogate from his grant does not operate, for on a point of law there can be no estoppel and there is no rule of law standing in the way of a party asking the Court to hold that a particular transaction which as a matter of fact is void should be declared to be of no effect. In such a case the Court is bound as soon as the invalidity of the transaction is pointed out to it, to set aside the transaction provided that the Court holds that the alleged invalidity really exists. 12 N.L.R. 100 and 44 Bom. 488, **Foll.** 82 Ind. Cas. 126=20 N.L.R. 162=A.I.R. 1925 Nag. 125.

——S. 93.

See also Deed — Construction.

——S. 93 — Ambiguity in number of holding — Evidence to explain.

There is nothing in S. 93, Evidence Act, which precludes evidence to be given for the purpose of explaining an ambiguity that the municipal number given in a rent receipt differing from the present number of the holding was the old number of the holding. A.I.R. 1932 Cal. 634=36 C.W.N. 583=141 Ind. Cas. 320.

——S. 93—Ambiguous expression — Evidence admissible to explain it.

The expression 'movables' does not include paddy therefore evidence is admissible to prove that it was left undivided. 4 L.W. 329=34 Ind. Cas. 712.

——S. 93—Bequest for 'Dharmarth.'

Where the trust is for 'Dharmarth' without specifying the special charity, oral evidence is inadmissible to prove that 'Dharmarth' was intended to mean only the maintenance of Langar. 63 P. W. R. 1912=106 P.L.R. 1912=78 P.R. 1912=14 Ind. Cas. 247.

——S. 93—Conflict—Conflict between recitals and diagram forming part of description of property —Rule that recitals will prevail does not apply.

Where, in a grant of land there is a repugnancy between the terms of the grant and any plan or diagram, the general rule is that the former will prevail. But where the plan of boundary is a part and parcel of the description itself the general rule ceases to apply.

Where a deed of conveyance contained an ambiguity as to the descriptinn of the property conveyed one portion of it referring to the entire house and another portion, only to a portion of the house but both read together did apply correctly either to the whole house or to a portion of it,

Held, the case is within Section 97 of the Act and extrinsic evidence is admissible for the purpose of solving the question whether by the description of the property taken as a whole the intention is to convey the house in its entirety or only a portion of it. The principle that when an instrument contains an ambiguity, evidence of user under it may be given to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument, and where the ambiguity is patent as well as where it is latent. 66 Ind. Cas. 442=8 O.L.J. 521 = A.I.R. 1922 Oudh 162.

——S 93—Conflicting statements.

Extrinic evidence is admissible for explaining apparently conflicting statements in the body of a document

and in the Schedule thereto. 61 Ind. Cas. 361=25 C.W.N. 385=1920 M.W.N. 726=A.I.R. 1921 P.C. 40 (P.C.).

——S. 93—Construction.

If the declaration of acquisition under S. 6, Land Acquisition Act had been ambiguous contemporaneous evidence and evidence of conduct would have been admissible to determine the intention as to the extent of acquisition. A.I.R. 1943 Cal. 122=I.L.R. (1942) 2 Cal. 378=206 Ind. Cas. 118.

——S. 93—Construction—Ambiguity in consent decree—Evidence to construe it.

Only under one set of circumstances can the parties be allowed to give evidence as to what the decree meant or to give evidence to assist the Court in coming to their conclusion; and that is where there is a latent ambiguity. Where the ambiguity is on the face of the document itself, evidence to enable Court to construe it, is not admissible. Consequently, where the Court has any difficulty as to what the decree means either by reason of an ambiguous sentence or an apparent contradiction arising out of that, no evidence is admissible. A.I.R. 1935 Pat. 123=1 B.R. 597=156 Ind. Cas. 302.

——S. 93—Construction—Ambiguity.

A document must be taken as a whole and if there is inconsistency between two parts of it, the case is one of ambiguity. A.I.R. 1935 All. 662=1935 A.L.J. 664=1935 A.W.R. 715=1935 R.D. 263=155 Ind. Cas. 634.

——S. 93—Construction.

Deed — Construction — Ambiguous deed may be construed in the light of parties' conduct, but unambiguous deed should not be so construed. 62 Ind. Cas. 491=33 C.L.J. 186=A.I.R. 1921 Cal. 750.

——S. 93—Defective language.

Where the language of a document is defective, oral evidence is inadmissible under S. 93 to supply such defects. 1921 M.W.N. 519=A.I.R. 1921 Mad. 498.

——S. 93—Document not ambiguous.

Evidence of the conduct of the parties is not admissible to prove the intention when the document is not ambiguous. (1911) A.C. 487 Foll. (1911) 2 M.W.N. 238=12 Ind. Cas. 146.

——S. 93—Elucidation.

Where the instrument is plain and unequivocal, evidence of conduct cannot be received for elucidating its terms: 30 Cal. 738 (P.C.), **Foll.** 112 Ind. Cas. 184=28 M.L.W. 824=A.I.R. 1928 Mad. 1064=55 M.L.J. 132.

——Ss. 93, 94, 95, 96—Hand note—Stipulation to pay interest—Interest whether monthly or annual—Extrinsic evidence to prove.

A hand note contained a stipulation to pay interest at $2\frac{1}{2}$ per cent, but did not mention whether that interest was to be calculated annually or monthly or otherwise. **Held**—That evidence was properly admitted to show that the words meant that the interest should be calculated monthly. W.R. (1864) 379 foll. (1910) 14 C.W.N. 1100=14 C.L.J. 97=7 Ind. Cas. 214.

——S. 93—Imputation—Ambiguity.

If an imputation is ambiguous in meaning, evidence is admissible to explain it. 33 Mad. 67=19 M.L.J. 714=6 M.L.T. 290=3 Ind. Cas. 955.

——S. 93—Meaning of "Sir lands".

The words "**sir** lands' are not in the least ambiguous and, therefore, fresh evidence cannot be allowed under S. 93, Evidence Act to show that **sir** lands were not meant but **sir** rights were meant. A.I.R. 1935 All. 729=1935 R.D. 303 (2)=1935 A.W.R. 753=156 Ind. Cas. 53.

——S. 93—Meaning of words.

Direct words not used in a deed—Evidence of parties, if uninterested, is the surest guide as to meaning of the phrases used. A.I.R. 1939 Lah. 433=41 P.L.R. 879=185 Ind. Cas. 65.

——S. 93—Meaning not clear.

Contract—Construction—Meaning of words in document not clear—Court may consider prior negotiations for determining meaning: 3 Bom. 186, **Foll.** 114 Ind. Cas. 626=1928 M.W.N. 763=A.I.R. 1928 Mad. 1246.

——S. 93 — Parol evidence inadmissible when document is ambiguous.

When the terms of a document are ambiguous on the face of it, parol evidence is not admissible to prove the intention of the executant. 185 P.W.R. 1915=31 Ind. Cas. 632.

——S. 93—Patent ambiguity—When other evidence is not admissible.

Where a mortgage deed was admittedly ungrammatical and could not be read literally so as to give any clear meaning and in order to arrive at the construction both the parties had to supply or remove some words from the document as it stood,

Held, there was a patent ambiguity in the deed and under S. 93 of the Evidence Act no evidence was admissible to supply the defect. 80 Ind. Cas. 944=5 L.R.A. Civ. 542=A.I.R. 1925 All. 34.

——Ss. 93 and 94—Sale—Ambiguity.

Where on a sale of land the land is described in such a way that one-half of the description would fit in one particular plot of land while the other half would apply to a different plot of land. **Held,** that evidence was admissible to show which portion or plot of land was intended to be conveyed. 130 P.L.R. 1910=8 Ind. Cas. 554.

——S. 93—Sale certificate.

Where the sale certificate is ambiguous, the Court is entitled to look into the surrounding facts and its conclusion upon those facts would be binding in second appeal. 88 Ind. Cas. 399=1924 P.H.C.C. 271=3 Pat.L.R. Civ. 107=A.I.R. 1924 Pat. 805.

——S. 93—Sale Certificate.

Evidence cannot be given to contradict the terms of a sale certificate; but evidence may be admissible to interpret its terms when they are ambiguous and stand in need of explanation. 19 O.L.J. 182=22 Ind. Cas. 280.

——S. 93 — Vakalatnama — Vakalatnama **without pleader's name but bearing his signature.**

Where a **vakalatnama** did not contain the name of the pleader after the word 'Mr.' in the printed form but bore the signature of the party as well as that of the pleader,

Held, that the ambiguity in the document was not a patent ambiguity such that S. 93 would exclude evidence to explain it, but the ambiguity may be cleared up by extrinsic evidence under S. 96 of the Act. 71 Ind. Cas. 436=19 N.L.R. 36=6 N.L.J. 100=A.I.R. 1923 Nag. 182.

——S. 94.

See also (1) S. 92, Evidence Act

(2) Deed construction.

——S. 94—Extrinsic evidence.

When documents speak clearly for themselves, there can be no question of considering oral evidence to

show what was the real nature of the transaction. A.I.R. 1944 Pesh. 15=1944 Pesh. L. J. 15=212 Ind. Cas. 306.

——**S. 94—Extraneous evidence—Deed unambiguous and clear.**

Where the terms of a document are clear and unambiguous, no oral evidence can be given to explain them. But the evidence is certainly admissible to explain in what manner the language used is related to existing facts but that is only if such relation does not appear from the document itself. A. I. R. 1936 Lah. 508=164 Ind. Cas. 463.

——**Ss. 94, 95—Extrinsic evidence.**

Where the language used in the sale-deed was plain in itself and applied accurately to existing facts no evidence could be given to show that it was not meant to apply to such facts. 150 Ind. Cas. 363= 36 P. L. R. 61.

——**S. 94—Extrinsic evidence.**

Where the language of a document is clear and applies without difficulty to the facts of the case, no extrinsic evidence can be admitted for the purpose of affecting its interpretation. 4 O. L. J. 313=40 Ind. Cas. 491.

——**S. 94—Extrinsic evidence—Admissibility of evidence—Document not solely relied on by plaintiff.**

Where the plaintiff put in a certain document which was quite clear in its terms but the plaintiff himself was no party to it and did not rely upon it exclusively for establishing his title, **Held,** that under the circumstances the plaintiff was not debarred from adducing oral evidence in support of his contention. 27 P.W.R. 1915=57 P.L.R. 1915=27 Ind. Cas. 701.

——**S. 94—Extrinsic evidence.**

Where the language used is plain and applies accurately to existing facts evidence is not admissible for showing that it was not meant to apply to those facts. Where the words used are definite and unambiguous, the Courts must not travel outside the words used to found or confirm speculations, as to the parties to the document having in fact intended other than what they have said. (1915) M.W.N. 325= 29 Ind. Cas. 201.

——**S. 94—Lease—Perpetual lease—Oral evidence.**

Extraneous evidence is admissible to show that a lease to **A** was intened to be a permanent lease to **A** and his heirs. Even in the absence of words of inheritance a lease may be a permanent lease if, from the language of the document, the object of the lease and the surrounding circumstances it appears that a permanent lease was intended. (1901) 3 Bom. L.R. 768.

——**S. 94—Ambiguity, not latent—Construction—Question of fact, when can be availed of.**

The mere fact that there is ambiguity or difficulty, not being a latent ambiguity, would not entitle the Judge to consider these questions. But, if, there is no expression in the document itself which properly construed, would entitle the Court to come to any conclusion with regard to the matter, then the questions of fact are certainly open to him to consider in coming to a conclusion with regard to the matter. A.I.R. 1936 Pat. 275=2 B.R. 495=17 P.L.T. 488=162 Ind. Cas. 797.

——**S. 94—Mis-description.**

In cases of mis-description S. 94, Evidence Act, can have no application. 104 Ind. Cas. 736=10 N.L.J. 201=A.I.R. 1928 Nag. 4.

——**S. 94—Mis-description—Extrinsic evidence.**

Oral evidence is admissible to show what properties were really intended to be mortgaged in a case of misdescription or mutual mistake. 38 All. 103=14 A.L.J. 15=32 Ind. Cas. 174.

——**S. 94—Mutual mistake.**

Where the seller and purchaser, both by mutual mistake, state that property which had never been intended to be sold, was inserted in the sale-deed, it is open to the parties to produce evidence to show what was intended to be sold and purchased. To such a case, S. 94 is inapplicable because what is sought to be rectified in such a case is not the sale-deed but the mistaken expression of the intention of the parties as embodied in the sale-deed. A.I.R. 1940 Lah. 236=42 P.L.R. 222=188 Ind. Cas. 813.

——**S. 94—Mutual mistake.**

Where the dispute is not as to existing facts but is as to what is intended by the parties to be done by them in future, S. 94 does not apply and mutual mistake of fact can be proved. 122 Ind. Cas. 493= A.I.R. 1930 Lah. 446.

——**S. 94—Scope and applicability.**

Property mortgaged specified in deed as five pies **zemindari** share in **mahal**—Property described in same manner in plaint and decrees in mortgage suit—Application for correcting description of property in plaint, decrees and deed, on ground that not five pies share but whole **zemindari** was intended to be mortgaged.

Held, that the case was governed by the rule laid down in S. 94, Evi. Act and the Court should not have allowed the evidence to be produced to prove the allegations of the mortgagee. A.I.R. 1939 All. 231=1939 A. L. J. 193=I.L.R. (1939) All. 399= 1939 A.W.R. 173=181 Ind. Cas. 153.

——**S. 94—Subsequent conduct—Relevancy, when deed is free from ambiguity.**

Although evidence as to subsequent conduct is relevant if there is a doubt as to the effect of any instrument, when instrument itself is clear and free from any ambiguity, subsequent conduct is altogether irrelevant. It is only when after other methods of interpretation have been exhausted, there remains a doubt as to the effect of instrument that it is permissible to give evidence of the acts under it as a guide to the intention of the parties. A.I..R. 1935 Nag. 35=31 Nag. L.R. 188=157 Ind. Cas. 17.

——**S. 94—Subsequent conduct.**

Where the words in a deed are clear, the subsequent conduct of parties is an irrelevant consideration. A.I.R. 1934 P. C. 58=11 O.W.N. 225=39 M.L.W. 291=38 O.W.N. 325=1934 A.L. J. 295=36 Bom. L.R. 390=66 M. L. J. 399=1934 M. W. N. 300=18 R.D. 112=61 Cal. 313=59 C.L.J. 257=3 A.W.R. 193=61 I.A. 35=147 Ind. Cas. 884 (P.C.).

——**S. 94—Antecedent communings, consideration of — Surrounding and contemporaneous circumstances, if and when can be looked into.**

When the words used in a document are plain, no extraneous considerations are permissible; neither antecedent correspondence, nor surrounding circumstances nor subsequent conduct.

When parties have entered into a formal contract that contract must be construed according to its own terms and not be explained or interpreted by the antecedent communings which led up to it. The latter could only show what parties meant to do but cannot show what they did. Though it is perfectly true that when the terms of an agreement are ambiguous, the surrounding and contemporaneous circumstances (not subsequent conduct) can be looked to, yet even in the rare cases where the rule can be applied, it has to be used with the greatest care.

One party thought there was a completed contract while the other insisted that there was not and refused to perform it. The contemporaneous circumstances were that both dealt in the same commodities and

that both were negotiating, one for the purchase, and the other for the sale, of the goods. The question arose whether the subsequent conduct of the parties could be considered for ascertaining whether there was a completed contract:

Held, that this was not one of those cases in which all the parties concerned (not merely one side), had, for years, acted along a given set of lines which could only fit one case and not the other (that is, of contract and no contract). It was only in circumstances of that kind that it was legitimate to try and correlate the meaning of the words used to existing facts, that is to say, to facts existing at the time of the dispute.

Courts have no power to decree one kind of contract when a totally different contract is set up and the plaintiff fails to establish it, nor have they power to introduce terms into a contract when those terms fly in the face of the contract pleaded. A.I.R. 1943 Nag. 81=1942 N.L. J. 481=I.L.R. (1943) Nag. 10=203 Ind. Cas. 341.

——S. 94—Extraneous evidence of surrounding circumstances, when can be considered.

The court has to ascertain what the parties meant by the words they have used and to give effect to the intention which is expressed by the words used by the parties themselves. Where words of any written instrument are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves and in such case, evidence **de hors** the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. It is only when the words are ambiguous and do not yield clear meaning that extraneous evidence of surrouuding circumstances may be looked into. Object of construction is to discover intention of parties which should be gathered from the written instrument itself. A I.R. 1942 Nag. 115=1942 N.L. J. 445=I.L.R. (1942) Nag. 592=202 Ind. Cas.595.

——S. 95

See also: (1) Deed—Construction.
(2) Evi. Act, S. 94.

——S. 95.—Security bond—Doubt as to construction of—Reference to order directing the security to be taken can be made. A.I.R. 1934 Cal. 569=61 Cal. 890=150 Ind. Cas. 985 (2).

——Ss. 95 and 92—Conflicting recitals.

In case of conflict between the recitals in the body of a document and the schedule, extrinsic parol evidence is admissible to explain the facts that led to the execution of the document in order to reconcile the different statements regarding the property covered by it. (1920) M.W.N. 726 =25 C.W.N. 385=61 Ind. Cas. 361=A.I.R. 1921 P.C. 40. (P.C.).

——S. 95—Evidence of the claim released—Document silent.

Where a release is silent as to the nature of the claim released, evidence is admissible under S. 95 to prove what the claim referred to in the release is. 34 Mad. 156=20 M.L. J. 383=(1910) M.W.N. 191=7 M.L.T. 392=6 Ind. Cas. 758.

——S. 95—Evidence to clear it admissible.

When a description is partly correct and partly incorrect and the former part is sufficient to identify the subject-matter intended while the latter does not apply to any subject, the erroneous part will be rejected on the maxim that a false description will not hurt when it can exist with the subject itself. Where the language of a will, though plain in itself, had no meaning with reference to existing facts, evidence can be let in to show how the error arose. 84 Ind. Cas. 137=A.I.R. 1923 Sind 42.

——S. 95—Latent ambiguity.

Where a mortgagee transferred the mortgaged property and there was no mention in the deed that only mortgage rights were intended, to be transferred, the mere fact that it is mentioned in the deed that the property stood in the khata of the mortgagor and that there is an idemnity clause cannot justify the contention that only mortgage rights were intended; and if the absence of any assertion in the deed of absolute ownership on the part of the vendor mortgagee makes it possible to hold that mortgagee's rights were sold, there is a latent ambiguity to remove which evidence can be given: 118 Ind. Cas. 682=A.I.R. 1929 Nag. 267.

——S. 95—Misdescription—Evidence is allowed to correct misdescription.

Where property mortgaged was wrongly written in the bond as Touzi No. 1 in place of Touzi No Y.

Held, that the plaintiff in a suit to enforce the mortgage can adduce evidence to show that there was a misdescription. 71 Ind. Cas. 589=1 Pat. L.R. 80=A.I.R. 1924 Pat. 359.

——S. 95—Mistake—Construction of order appointing receiver to sue upon an agreement—Suit agreement described wrongly—Mistake, effect of.

S. 95 has no application and cannot be invoked in the matter of construing an order of court appointing a receiver to bring a suit upon an agreement of one date, when it was found afterwards that the agreement intended to be sued upon was one of another date, the intention of the parties being immaterial to the question of title and authority of plaintiff to maintain the suit. The effect of the mistake is to make the appointment of the receiver to recover a debt due under an agreement which does not exist a nullity. 13 C.B. (N'S.) 292, 304 dist. (1903) 7 C.W.N, 651=30 C. 699.

——S. 95—Payment of interest—Evidence can be allowed to show that interest is payable monthly when document is silent.

Under the provisions of S. 95 or S. 98 evidence can be allowed to show that the rate of interest specified in certain deeds is payable monthly, when the deeds are silent, 121 Ind. Cas. 75=30 P.L.R. 741=A.I.R. 1930 Lah. 144.

——S. 95—Payment of interest.

Where a compromise decree provides for interest at 2 percent. but it is ambiguous whether it is monthly or annually, the Court may hear evidence as to the ordinary meaning of those expressions in documents of that nature. 62 Ind. Cas. 702. (Cal.).

——Ss. 95, 96, and 97—Relation to existing facts.

Extrinsic evidence is admissible to show how the language of a document is related to existing facts or to facts which existed when the document was written. 20 C.W.N. 1158=34 Ind. Cas. 450.

——Ss. 96, 97—No ambiguity—Evidence regarding intention of executant—Admissibility.

Where there is, in the document, no ambiguity of the kind provided for in Ss. 96 and 97, Evidence Act, evidence can be adduced only in respect of facts existing at the time and not directed to intentions of the executant, in relation to unexpected contingencies. A.I.R. 1936 Mad. 388=70 M.L.J

128=43 M.L.W. 742=1936 M.W.N. 600=163 Ind. Cas. 471..

——Ss. 96 and 97 — Intention—External evidence.

External evidence may be offered to prove intention or the meaning of the language used to find out whether the words used were tedious or not. 32 Mad. 384=5 M.L.T. 393=9 Cr. L.J. 456=2 Ind. Cas. 33.

——S. 96—Latent ambiguity — Extrinsic evidence is admissible.

When an instrument appears on its face to be free from ambiguity but upon the endeavour being made to apply it to the persons or things indicated it transpires that the words are equally applicable to two or more persons or to two or more things there is a latent ambiguity. In such a case extrinsic evidence has created the ambiguity and extrinsic evidence is admissible to resolve it and direct evidence of intention may be given for the purpose of ascertaining which of the several persons or things to whom the words are applicable was intended to be connoted. 72 Ind. Cas. 696 =36 C.L.J. 242=A.I.R. 1923 Cal. 32.

——S. 96—Mortgage—Provision for payment of revenue by mortgagee—Enhancement of revenue—Liability to pay—Admissibility of evidence.

Where a usufructuary mortgage merely provides for the payment of revenue by the mortgagee without indicating whether it meant the revenue as assessed at the date of the deed or as it might be reassessed from time to time, evidence may be given under S. 96 of the Evidence Act of facts to show what was meant. In the absence of a contract to the contrary, the mortgagee will pay the revenue as assessed from time to time. The parties must have forseen the enhancement of revenue within the period allowed for redemption. Evidence of this nature will, however, be outweighed by an express declaration of the parties even two years after the execution of the mortgage deed. 22 O.C. 270=54 Ind.Cas. 264.

——Ss. 96 and 95—Mortgage—Oral evidence—Mistake.

In a suit for possession on a mortgage oral evidence to prove how the description in the mortgage-deed is related to existing facts is admissible under Ss. 95 and 96, of the evidence Act. 16 O.C. 213=21 Ind. Cas. 429.

——S. 96—Vakalatnama—Vakalatnama without pleader's name but bearing his signature—Extrinsic evidence admissible.

Where a Vakalatnama did not contain the name of the pleader after the word Mr. in the printed form but bore the signature of the party as well as that of the pleader,

Held, that the ambiguity in the document was not a patent ambiguity such that S. 93 would exclude evidence to explain it, but the ambiguity may be cleared up by extrinsic evidence under S. 96 of the act. 71 Ind. Cas. 436=19 N. L. R. 36=6 N. L. J. 100=A.I.R. 1923 Nag. 182.

——S. 97.

See also S. 96 Evidence Act.

——S. 97—Description partly correct and partly incorrect—Correct description sufficient to indentify subject-matter—Land described by boundaries and area—Which prevails.

When a description in a document is partly correct and partly incorrect and the former part is sufficient to identify the subject-matter while the latter does not apply to any subject, the erroneous part will be rejected in accordance with the maxim falsa demonstratio non nocet cum de corpore constat, and extrinsic evidence to show that the intention of the parties was not in accordance with the part of the description which is correct is inadmissible. So, where there is a description of land in a document setting forth the boundaries and then specifying the quantity as so many acres, etc., the description in regard to the acreage is considered to be mere false discription if there is an error in the quantity, and the land within the boundaries passes by the document, whether it be less or more than the quantity specified. A.I.R. 1939 Rang. 396=185 Ind. Cas. 641.

——S. 97—One part of deed indicating that whole grove is sold—Another part indicating that only part is sold—Evidence—Admissibility.

Where the language of a deed, so far as the boundaries are concerned is indicative of the fact alleged by one party, namely that the whole of a grove was sold and another part of the deed, referring to the number and area, is indicative of the fact alleged by the other party, that part only of the grove was sold, under S. 97 Evi. Act, evidence is admissible to show whether it was meant that the deed should convey the whole of the grove or only part of it. A.I.R. 1935 All. 662 =1935 A.L.J. 664=1935 R.D. 263=1935 A.W.R. 715=155 Ind. Cas. 634.

——S. 97—Description of property partly applying to property claimed and partly to another—Description not applying as a whole to either—Further evidence.

If the wording of a deed of transfer is sufficiently specific to identify the property under transfer beyond reasonable doubt, no question of taking further evidence arises. Where the description cannot be made to apply to any known property in all its details, but can be made to apply either to one or other of two known properties by eliminating part of the description, then further evidence may be taken to determine which property has actually been transferred. ('35)158 Ind. Cas. 571.

——S. 97—Mortgage-deed—Boundaries and area of property totally wrong—Oral evidence to explain intention of decree.

In order to explain a decree one can look at the judgment and the pleadings of the parties. Ordinarily, these are sufficient to clarify the issue and there is no need to go further. But where the boundaries and the area are wrongly given and the matter is not in the least advanced from the position of the decree by looking at the judgment and the pleadings oral evidence can be led to explain the facts and circumstances of the case from which the Court will determine not what was actually mortgaged which led to the decree, but as to what all the misleading descriptions in the decree are the convey. A.I.R. 1934 Lah. 181=35 P.L.R. 20=147 Ind. Cas. 23.

——S. 97—Ambiguity in description of land—Evidence.

In the case of an ambiguity, in the description of land in a mortgage-deed it is open to a party to show by other evidence what land was actually covered by the deed. 43 Ind. Cas. 721 (Cal.)

——S. 97—Applicability—Conflict between recitals and diagram forming part of description of property—Rule that recitals will prevail

does not apply—Ambiguity—Evidence to solve it is admissible whether it is patent or latent.

Where, in a grant of land there is a repugnancy between the terms of the grant and any plan or diagram, the general rule is that the former will prevail. But where the plan of boundary is a part and parcel of the description itself, the general rule ceases to apply.

Where a deed of conveyance contained an ambiguity as to the description of the property conveyed one portion of it referring to the entire house and another portion, only to a portion of the house but both read together did apply correctly either to the whole house or to a portion of it,

Held, the case is within S. 97 of the Act and extrinsic evidence is admissible for the purpose of solving the question whether by the description of the property taken as a whole the intention is to convey the house in its entirety or only a portion of it. The principle that when an instrument contains an ambiguity, evidence of user under it may be given to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument, and where the ambiguity is patent as well as where it is latent. 66 Ind. Cas. 442=8 O.L.J. 521=A.I.R. 1922 Oudh 162.

——S. 98—Expert to explain meaning of document.

Generally speaking, it is not permissible to call a witness to explain to the Court what a document means, unless such a witness is an expert under the Evi. Act. It is for the Court to ascertain what the document means, though, no doubt, a witness may suggest methods by which an intelligent meaning can be given to the instrument. A.I.R. 1939 Bom. 339=I.L.R. (1939) Bom. 434=41 Bom. L.R. 548=40 Cr. L.J. 891=184 Ind. Cas. 252.

——S. 98—Direct words not used—Evidence of parties, if uninterested, whether guide to meaning of phrases used.

Where direct words are not used to convey a right and the matter is one of inference by implication from the phrases used, then the evidence of the parties, if they are not interested one way or the other in the matter, is the surest of all guides as to the meaning of the phrases used. A.I.R. 1939 Lah. 433=41 P.L.R. 879=185 Ind. Cas. 65.

——S. 98—Dispute about meaning.

Where the point in dispute, is as to the meaning of a particular word in the document oral evidence may be admitted under S. 98. 67 Ind. Cas. 90=A.I.R. 1923 Cal. 309.

——S. 98—Special usage—Oral evidence—Meaning of words used in a particular locality.

Where in a deed words in use in particular locality in a peculiar sense are employed, oral evidence is admissible under S. 98 of the Evidence Act to explain the meaning of the words in question. 63 Ind. Cas. 138=3 U.P.L.R. (All.) 199.

——S. 98—Words not ambiguous—Evidence of special usage giving them a peculiar meaning is admissible.

Various words in written documents which prima facie present no ambiguity may be interpreted by extrinsic evidence of usage; and their peculiar meaning, when found in connection with the subject-matter of the transaction, may be fixed by parol testimony.

Evidence is admissible to show that the term (San) does not signify the Bengali year which commences on the first day of Baisakh and ends on the last day of Chaitra but a different period specially applicable to jalkar tenancies. 64 Ind. Cas. 693=34 C.L.J. 160=26 C.W.N. 1022=A.I.R. 1921 Cal. 122.

——S. 99—Deed of conveyance—Conveyance—Contemporaneous oral agreement proved by person not actual party to the deed.

As between the actual parties to an outright conveyance a contemporaneous oral agreement to allow re-purchase cannot be proved, but if the party who alleges the contemporaneous oral agreement was not actually a party to the conveyance (although the conveyance was given on his behalf) he can prove that there was such an agreement. 111 Ind. Cas. 832=6 Rang. 376=A.I.R. 1928 Rang. 244.

——S. 99—Mortgage.

In a suit on a mortgage the mortgagors are estopped from disputing that they have not got the interest which they said they had and which the mortgagees bargained for. But it is open to third parties to state and prove what that interest is and to say that the mortgagors have no interests or have lesser interests than those prescribed for in the mortgage. 96 Ind. Cas. 26=23 M.L.W. 664=1926 M.W.N. 938=A.I.R. 1926 Mad. 744.

——S. 99—Mortgage—Stranger can prove subsequent oral agreement between mortgagee and himself.

Where properties were mortgaged by the defendant to the plaintiff and subsequently certain items of the mortgaged property were bought by another and there was an oral agreement between the purchaser and the plaintiff by which the plaintiff agreed to release the items sold to the purchaser,

Held, that in a suit by the plaintiff on the mortgage the purchaser would not be precluded from proving the oral agreement. 27 Mad. 368, Ref. to. 87 Ind. Cas. 246=1925 M.W.N. 214=A.I.R. 1925 Mad. 775=48 M.L.J. 280.

——S. 99—Scope of—"Varying"—Semble.

The legislature apparently use the expression "varying" as sufficient to convey all that is denoted by the other different expressions occurring in S. 92. S. 99, being merely an enabling provisions, could not be held to prohibit the reception of evidence as to a fact in issue or a relevant fact admissible independently thereof. (1903) 27 M. 329.

——S. 99—Waqf—Persons not claiming through settlor can show that waqf was illusory.

A person who does not claim through the settlor is entitled to challenge the validity of a waqf on the ground that it was merely an illusory transaction never intended to be acted upon. 31 M.L.J. 431, Foll.; 10 C.W.N. 449, Dist. and Expl.

Purchasers of some portion of the properties alleged to waqf at a sale for arrears of Government revenue are not persons claiming under the settlor. A.I.R. 1928 Cal. 253.

——S. 99—Pre-emption.

It is open to the plaintiff in a pre-emption suit to show from circumstantial or oral evidence that the real transaction was one of a sale and not a mortgage. 98 Ind. Cas. 989=A.I.R. 1927 All. 204.

——Ss. 101 to 104.

Synopsis.

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1. Admission.

——Ss. 101 to 104—Admission—Consideration.

Obiter.— Once the debtor admits that money (the consideration for the mortgage) was paid before the Sub-Registrar, the onus of proving that it was returned to the creditor is upon the persons who assert it. A.I.R. 1945 Mad. 135: (1945) 1 M.L.J. 207: 58 M.L.W. 233.

——Ss. 101 to 104—Admission by party—Burden shifts upon him to explain it away.

The law is that when there is an admission by a party, the burden of proof shifts and it is for the party making the admission to explain it away. A I R. 1940 Oudh 35: 1939 O.W.N. 1114: 15 Luck. 191: 184 Ind. Cas. 521.

——S. 103—Admission—Burden of proof.

Where a person states in a certain document, that the properties were his son's self-acquired properties, an admission by his grandsons (defendants) that the said properties are the ijmali properties of the family consisting of them and the plaintiff, shifts the burden on them of proving that the properties are the self-acquired properties of their father, on the principle, that what a man admits to be true may reasonably be presumed to be so. The admission is not conclusive and may be shown to be wrong and made under circumstances which do not make it binding on the person making the admission. 163 Ind. Cas. 663: 61 C.L.J. 551.

——Ss. 101 to 104—Admission—Guardian admitting legal necessity — Presumption—Onus of proving absence of legal necessity.

Admission made by the guardian on behalf of himself and on behalf of the minor that the sale was for legal necessity affects equally both his interests and the interests of the minor—In the absence of any proof that this admission is mala fide, it must be taken that the guardian who is a major, and was presumably well aware of the circumstances leading to the alienation, made an admission that the sale was for legal necessity, because he thought that it was for legal necessity. This admission should, in the circumstances of the case, shift the onus on to the plaintiff (minor) to prove that the sale was not for legal necessity, especially when coupled with the other circumstances of the case, namely, that the sale was by the father who was not shown to have been a debauchee or hostile to his sons. A.I.R. 1935 Lah. 489: 159 Ind. Cas. 693.

——Ss. 101 to 104—Admission—Balance struck and signed.

Where, in a suit to recover balances alleged to have been struck and signed by the defendant, the defendant pleaded that he had never borrowed money from the plaintiff nor had he signed the balances and that he was illiterate, and as lambardar was receiving land revenue from the plaintiff and had been executing receipts on that account:

Held, that initially the burden of proof was on the defendant to show that the documents signed by him were not intended to be what they expressed to be, but that under the circumstances, the plaintiff had failed to prove the execution of the balance as such. A.I.R. 1932 Lah. 602 (2): 33 P.L.R. 700: 140 Ind. Cas. 714 (1).

——— Ss. 101 to 104—Admission.

Suit on entry in account books—Defendant admitting signature but denying consideration—Plaintiff taking onus upon himself, but failing to prove consideration.

Held, though the burden of proving want of consideration was on the defendant, as the plaintiff had taken it upon himself and failed, the suit must be dismissed. A.I.R. 1932 Lah. 417: 33 P.L.R. 168: 137 Ind. Cas. 44.

———Ss. 101 to 104—Admission—Consideration.

Where a person has admitted receipt of full consideration in a sale-deed, the burden is heavily on him of proving non-receipt of consideration. A.I R. 1931 Lah. 419: 12 L. 546: 32 P.L.R. 840: 133 Ind. Cas. 628.

———S. 101—Admission—Execution—Thumb impression admitted but not the contents of the document —How the document came into existence must be proved by the other party.

Where in a suit on a hand-note the defendant, while denying that he had signed or made thumb impression upon any hand-note, admitted that he had put his thumb-impression on a blank piece of paper upon which it was intended that a kabuliyat should be written out and that that may be the thumb-impression and paper which had been utilized for the hand-note, it is clear admission that the hand-note on which the suit is brought bears the thumb-impression of the defendant and the burden of proof is on the defence to explain how the document bearing the defendant's thumb-impression came into existence. 11 Pat. L.T. 606: A.I.R. 1930 Pat. 598.

———Ss. 101 to 104—Admission—Partnership—By one partner—Onus of proving it as not binding on others.

Plaintiff sued defendants for recovery of a sum of money said to be due to him in respect of labour supplied to them. He alleged that accounts of labour supplied were settled and the sum of money was found due to him and produced a document signed by a partner in defendant's business saying the balance claimed in respect of labour was due to plaintiff.

Held, that it was an admission and it was for the defendants to prove that such an admission was obtained from them under circumstances which would prevent its being legally binding upon them. A I.R. 1925 Lah. 471, Rel. on; A.I.R. 1929 Rang. 263.

———Ss. 101 to 104—Admission — Lost bond—Execution denied—Alternative plea of payment does not amount to admission.

Where in a suit on a mortgage bond alleged to be lost the defendant denies execution, his alternative plea of payment does not amount to an admission of the mortgage sufficient to relieve the plaintiff from proving the loss of the original deed, and to entitle him to sue upon a copy of it. 11 A.L.J. 255, Foll. 97 Ind. Cas. 82: 49 All. 78: 24 A.L.J. 964: A.I.R. 1926 All. 741.

———Ss. 101 to 104—Admission — Execution — Admission by one defendant — Not conclusive against others.

Where one of the defendants admits the execution of the bond alleged to be executed by all the defendants jointly, in respect of a partnership, such an admission is not conclusive, but it amounts to presumptive proof of the allegation of the plaintiff, and, therefore, the burden should be placed on the defendants to prove the non-existence of a partnership. 93 Ind. Cas. 309: 27 P.L.R. 160: A.I.R. 1926 Lah. 299.

———Ss. 101 to 104—Admission—Execution admitted —Onus of proving at fictitious.

The execution and registration of the document being admitted if the defendant makes the allegation that the document had been executed merely for show and was purely fictitious the burden of proof rests upon him. 77 Ind. Cas. 753: 21 A.L.J. 793: 5 L.R.A. Civ. 55: A.I.R. 1924 All. 294.

———Ss. 101 to 104—Admission—Thumb-impression admitted — Knowledge of contents cannot be presumed.

When a party admits his subscription or thumb-impression borne on any documents he ought not to be presumed necessarily to have put it upon that document with full knowledge of its contents and the burden still lies on the party relying on the document to prove the execution and passing of the consideration 13 N.L R. 121; A.I.R. 1922 All. 401 (1), Foll. 78 Ind. Cas. 104: 20 N L.R. 7: A.I.R. 1924 Nag. 103.

———Ss. 101 to 104—Admission—Prior suit—Shifts burden of proof.

B sued W to recover a sum of money wrongly paid to him. W's admission in a previous suit between B and a third person that he had received the money from B was proved against him. In the present suit W pleaded that he had not received the money and that the receipt executed by him in favour of B was obtained from him under undue influence.

Held, that W's admission in the previous suit shifted the burden of proving non-receipt of the money and existence of undue influence on W. 75 Ind. Cas. 1027: A.I.R. 1924 Lah. 650.

———Ss. 101 to 104— Admission—Gift—Plea of benami onus.

Where a party had admitted the gift by A to B and the transaction is undisputed for several years even after the death of A.

Held, that the burden of proving the transaction was fictitious lies heavily on the party and is not discharged by proving that the donor managed the property especially where the donee was almost illiterate. 66 Ind. Cas. 222: 8 O.L.J. 439: A I.R. 1922 Oudh 178.

———Ss. 101 to 104—Admission—Marriage.

Where defendant stated in a criminal case that the plaintiff was his wife, in a suit by the plaintiff to declare that she was not the wife of the defendant, the burden of proving that the plaintiff was married to him is on the defendant. 81 P.L.R. 1915: 88 P.W.R. 1915: 29 Ind. Cas. 194.

2. Adoption.

———Ss. 101 to 104 — Adoption—Onus of proving legality.

It is for the party who alleges adoption to prove an adoption to be legal according to the Hindu Law. 68 Ind. Cas. 763: 47 P.L.R. 1922: A I.R. 1923 Lah. 26.

———S. 104—Adoption.

A very grave and serious onus rests upon any person who seeks to displace the natural succession of property

by the Act of an adoption. In such case, the proof requires strict and almost severe scrutiny. 31 P.L.R. 509: A.I.R. 1930 Lah. 579.

———S. 102—Adoption—Onus on person alleging.

The onus is on the person alleging an adoption to prove it by affirmative evidence. 32 All. 104: 37 I.A. 1: 14 C.W.N. 285: 11 C.L.J. 172: 7 M.L.T. 57: (1910) M.W.N. 8: 12 Bom. L.R. 244: 20 M.L.J. 182: 5 Ind. Cas. 549 (P.C.).

———Ss. 101 to 104—Hindu Law—Adoption—Defendant setting up the plea of plaintiff's adoption into another family.

Where in answer to a suit by the plaintiff to recover property as the son of his father, the plea is set up that the plaintiff has been adopted into another family, the onus of proving the adoption rests on the defendant. The onus is discharged by proving the plaintiff's own solemn statement under hand and seal that the adoption took place. The proof of the admission shifts the burden. (1906) 11 C.W.N. 321: 4 A.L.J. 102: 5 C.L.J. 115: 9 Bom L.R. 267: 2 M.L.T. 109: 17 M.L.J. 103: 29 A. 184: 34 I.A. 27 (P.C.).

———Ss 101 to 104—Adoption—Factum of Adoption long recognised.

Where an adoption has been fully recognised in the family for a long time, the burden is upon a plaintiff who impeaches the factum of adoption to show that it did not legally take place. 4 Bom L.R. 140. See also 11 Bom. L.R. 196: 9 C.L.J. 172: 31 A. 116: 19 M.L.J. 186: 13 C.W.N. 370: 36 I.A. 9 (P.C.).

———Ss. 101 to 104—Adoption—Succession certificate granted to a person on the ground that he is an adopted son—Suit to set aside adoption.

One Sardar Singh, a minor under the guardianship of his father Dip Chand, obtained a certificate authorising him to collect debts due to Gir Prasad, deceased on the basis of his being the adopted son of Gir Prasad Singh, the alleged adoption having been made by Ram Kunwar, one of the widows of Gir Prasad Singh. The two other widows of Gir Prasad Singh, who though given more than one opportunity of doing so, never appeared in the proceedings before the District Judge, sued for a declaration that the alleged adoption of Sardar Singh to Gir Prasad never, in fact, took place or if it did take place, was invalid owing to want of authority on the part of Ram Kunwar to adopt.

Held, that the burden of proof was on the plaintiffs, who disputed the fact and the validity of the adoption, to give prima facie evidence to support their statements. 1902 A.W.N. 62.

3. Adverse possession.

———S. 101—Adverse possession.

Waste and jungle land—Presumption that the taluqdar is in possession—Trespass—The burden to establish that he has prefected a title by adverse possession is on the trespasser. A.I.R. 1941 Oudh 45: 1940 O.W.N. 990: 1940 A.W.R (C.C.) 458: 16 Luck. 223: 191 Ind. Cas. 157: 1940 R.D. 484.

———Ss. 101 to 104—Adverse possession.

It is not necessary for plaintiff where title has been established, to prove his own possession within 12 years. The onus is on defendant to prove adverse possession. A.I.R 1931 Oudh 382: 8 O.W.N. 921: 15 R.D. 566: 134 Ind. Cas. 599.

———Ss. 101 to 104—Adverse possession—Suit for redemption—Mortgagee in long possession—Plea of outright sale—Onus to prove how possession passed is on plaintiff.

A person effected a simple mortgage of the land in favour of another person and his deceased wife by a registered deed. About a year later, the mortgagor was unable to pay the interest on the mortgage and possession of the land was given to the mortgagee. Mortgagors' heirs sued for redemption of the mortgage of the land which was in possession of the mortgagee for over 20 years. Mortgagee alleged that the land was made over to him outright by way of sale.

Held, that the burden of proof as to the nature of the original transaction rests on the plaintiff. If they cannot prove how possession passed, no presumption that the possession was not adverse can be drawn. A.I.R. 1925 Rang. 377 and A.I.R. 1927 Rang. 33 (F.B.), Expl. ; 5 L.B.R. 40, Doubted.

Rutledge, C.J.—In cases of long possession the onus should be on the party out of possession. In cases, however, where the possession has been less than 12 years, and where the title of the previous owner is admitted, the onus may properly be put on the person in possesson who alleged an outright sale. 107 Ind. Cas. 165: 5 Rang. 668: A.I.R. 1928 Rang. 44.

———Ss. 101 to 104—Adverse possession—Onus on him who set up.

In a case where the suit is registered on the ground of acquisition of title by prescription it is not for the plaintiff to prove his title within 12 years. It is for the defendants to prove his adverse proprietary title. 39 Mad. 670: 17 A.L.J. 84, Foll. 74 Ind. Cas. 879: A.I.R. 1923 All. 565.

———Ss. 101 to 104 — Adverse possession — Reversioner of persons previously in possession—Title presumed.

Where the plaintiff was a reversioner of the persons who were previously in possession of the property.

Held, that title was with them and it is for the defendants who seek to avoid that title on a plea of adverse possession to establish it. 77 Ind. Cas. 705: A.I.R. 1923 All. 563.

———Ss. 101 to 104—Adverse possession—Onus on him who sets up.

Where plaintiffs are in possession as having some title to the lands, in a suit by them for declaration of ownership and injunction it is for defendants to prove adverse possession for 12 years. 76 Ind. Cas. 959: A.I.R. 1923 Bom. 382.

———S. 102—Adverse possession—Title by—Onus on person setting up.

When a person sets up his rights to the property by reason of adverse possession, the onus of establishing such right is on him. 39 Mad. 617 (P.C.) Foll. and 20 All. 182, over-ruled. 41 All. 669: 17 A.L.J. 814: 52 Ind. Cas. 636.

———Ss. 101 to 104 — Adverse possession — Title admitted — Proof of possession — Onus on the trespasser.

Where the plaintiff brings a suit on the basis of his title which is admitted, it is not for him to prove

possession on his own part within twelve years, but it is for the trespasser to prove his adverse possession. 108 Ind. Cas. 109: 5 O.W.N. 121: A.I.R. 1928 Oudh 246.

———S. 102—Adverse possession—Joint Hindu family —Partition—Adverse possession.

In a suit for partition of a property which devolve upon the parties jointly, the onus is on the party alleging exclusive title to it by adverse possession to prove the allegations. 24 Ind. Cas. 633 (Oudh).

———S. 103 — Adverse possession — Mortgagor and mortgagee.

The person out of possession must prove the nature of the transaction by which the person in possession obtained that possession. This rule does not apply when the original relation of the parties is that of mortgagor and mortgagee. The party who alleges that the said relation has ceased, must prove it. 5 Bur. L.T. 161: 17 Ind. Cas. 913.

———S. 103—Adverse possession — Mortgagor and mortgagee—Burden of proof.

If after mortgaging the properties the mortgagors remained in possession at first and then made over possession to the mortgagees, who alleged that possession was made over outright and not in usufruct, the burden of proving the outright transfer is on the party asserting it. 1 L.B.R. 215, Appr. An entry in Register No. 1 showing an outright transfer for consideration, together with the fact of possession for over 13 years, is not sufficient to shift the onus, especially if there is no entry in Register IX of the corresponding year and the possession is equally consistent with the transaction being an usufructuary mortgage and an outright transfer. 3 Bur. L.T. 37: 8 Ind. Cas. 610.

———S. 103—Adverse possession—Onus.

If a plea of exclusion of the vendor is set up, onus is the defendant to prove it. 34 Mad. 402: 20 M.L.J. 323: 7 M.L.T. 155: (1910) M.W.N. 555: 5 Ind. Cas. 491.

———Ss. 101 to 104—Adverse possession—Plea of.

When the defendant to a suit for possession of land pleads adverse possession, it lies in the first instance upon the plaintiff to prove that he was in possession at some time within 12 years of the suit. 3 A.L.J. 567; 1906 A.W.N. 234: 28 A. 760.

———Ss. 101 to 104—Adverse possession.

The party claiming right by possession must prove adverse possession. 4 Bom. L.R. 355.

———Ss. 101 to 104—Adverse possession—Tenant-in-common—Ouster of.

Where a tenant in common sues for a share, and ouster for twelve years and consequent extinguishment of his right is set up in defence.

Held, that the onus of proving such ouster was on those setting it up. (1901) 24 M. 441.

4. Affirmation of fact.

———Ss. 101 to 104—Affi mation of facts—Illegality—Onus is on party who so assets.

The law presumes against an illegality, and the burden of proving that an illegality has taken place rests on the party who so asserts. A.I.R. 1946 Bom. 429: 48 Bom. L.R. 274.

———S. 102—Affirmation of fact.

Death in earthquake of two persons—There is no presumption that younger survived elder—Onus of proof is on person who asserts affirmative A.I.R. 1944 P.C. 100: 57 M.L.W 608: 1944 M.W.N. 661: (1944) 2 M.L.J. 354: 49 C.W.N. 52: 47 P L.R. 20: 1944 A.L.J. 513: 1944 Pesh. L.J P.C. 29: 71 I.A. 171: I.L.R. (1945) Kar. (P.C.) 36: 216 Ind. Cas. 262: 11 B.R. 162. (P.C.).

———Ss. 101 to 104—Affirmation of fact.

The burden of proof is on the defendant to prove that the plaintiff is an idiot. A.I.R. 1943 Bom. 272: 45 Bom. L.R. 561: 210 Ind. Cas. 49.

———Ss. 101 to 104—Affirmation of fact.

Plaintiff alleging assessment to profession tax under Madras Local Boards Act unjust and arbitrary. Burden of proof is on the Panchayat Board to show that R. 11-A, Sch. IV of the Act under which assessment was made was in substance and effect, complied with. A.I.R. 1941 Mad. 686: 54 M.L.W. 140: (1941) 1 M.L.J. 824: 1941 M W.N. 634.

———S. 102—Affirmation of fact.

The presumption in the first instance is that the executant of a document was of a sound disposing mind, and the burden of proof that he was not so is necessarily upon the party who so alleges. A.I.R. 1941 Oudh 529: 1941 O.W.N. 906: 1941 A.W.R. (C.C.) 274: 196 Ind. Cas. 787.

———Ss 101 to 104—Affimation of fact.

The burden of proving that the valuation made by the Special Land Acquisition Officer is insufficient and unfair, lies on the claimant who alleges so. A.I.R. 1938 Sind 225: 179 Ind. Cas, 359.

———Ss. 101 to 104—Affirmation of fact.

Government compulsorily acquiring buildings of appellants—Appellants claiming that compensation given was too small—It is for the appellants to show that the amounts were insufficient. A.I.R. 1936 Lah. 1010: 38 P.L.R. 1071: I.L.R. (1937) Lah. 54: 164 Ind. Cas. 408.

———Ss. 101 to 104—Affirmation of fact.

The question whether the creditor of a firm had notice of the dissolution of the firm by the retirement of one of the partners from it is one of fact, and the onus of proving the fact is on the partner who alleges that he has retired. A I R. 1935 P C. 14: 1935 M W.N. 102: 1935 O.W.N. 194: 39 C.W.N 412: 37 Bom. L.R. 387: 61 C.L.J. 212: 68 M.L.J. 206: 41 M.L W. 164: 1935 A.W.R. 105: 153 Ind. Cas. 662: 1 B.R. 252 (P.C.).

———Ss. 101 to 104—Affirmation of fact.

The burden of proof of wilful default in respect of something which the executants could have received but for their wilful default or neglect is, in the first place, always on the party who alleges the default. A.I.R. 1935 Bom. 84: 36 Bom. L.R. 1155: 155 Ind. Cas. 334.

——Ss. 101 to 104—Affirmation of fact.

The burden of proof of the fact that there has been by consent of parties, a departure from the terms of the original contract is on the person asserting it. A. I. R. 1935 Cal. 347: 60 C.L.J. 424: 62 Cal. 175: 156 Ind. Cas. 643.

——Ss. 101 to 104—Affirmation of fact—Marriage challenged on non-performance of rites, etc.—Burden of proof.

Where a marriage is challenged due to the non-performance of some religious rites and rules, the burden would lie on any party who asserts that any such rules, rites, ceremonies and customs were not observed, to prove not only the omission but also that such rules, etc., were absolutely essential and indispensable in the sense that on account of their not being duly performed, the marriage itself was void. A.I.R. 1934 All. 273: 1934 A.L.J. 1129: 3 A.W.R. 70: 56 All. 428: 153 Ind. Cas. 733.

——Ss. 101 to 104—Affirmation of fact.

Collector's award—Burden of proof lies on the objectors to show the award was erroneous—District Judge accepting objections—Appellants must prove that the decision of District Judge was wrong. A.I.R. 1934 Lah. 97: 154 Ind. Cas. 407.

——Ss. 101 to 104—Affirmation of fact.

Where, in certain land acquisition proceedings, the tenure holders contended that the zamindar had only lost his right to rent by acquisition:

Held, that burden was on the tenants to show that they had a permanent interest and that rent was mokarari. A. I.R. 1933 Cal. 21: 36 C.W.N. 866: 140 Ind. Cas. 385.

——Ss. 101 to 104—Affirmation of fact.

Under the proceedings of the Land Acquisition Act, the onus is on the party claiming to prove that the valuation is insufficient. A.I.R. 1933 Sind 124: 143 Ind. Cas. 699.

——Ss. 101 to 104—Affirmation of fact.

It is allowable under S. 92, Evidence Act, to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone, but such oral agreement must clearly be proved, and the onus lies on him who sets it up. 139 Ind. Cas. 221: 34 Bom. L.R. 971.

——Ss. 101 to 104—Affirmation of fact—Taking advantage of opponent's evidence which has been disbelieved.

A litigant cannot be allowed to avail himself in support of his case his opponent's evidence directed to a different story which has not been believed by the Court. A. I. R. 1932 P.C. 95: 63 M.L.J. 275: 36 M.L.W. 434: 136 Ind. Cas. 451 (P.C.).

——Ss. 101 to 104—Affirmation of fact.

It is for the person setting up the plea under S. 247, Contract Act, to prove the facts which bring the case within that section. A.I.R. 1932 Bom. 117: 34 Bom. L.R. 35: 137 Ind. Cas. 710.

——Ss. 101 to 104—Affirmation of facts.

It is for the claimant to show that the assessment of the Land Acquisition Officer is too low. A I.R. 1931 Lah. 36: 33 P.L.R. 1100: 135 Ind. Cas. 183.

——Ss. 101 to 104—Affirmation of fact—Absence of authority—Onus on principal.

It was for the landlord to prove that the agent acted outside the powers given to him. 64 Ind. Cas. 823 (Cal.).

——Ss. 101 to 104—Affirmation of fact—Ancestral property—Mere conjectures insufficient.

The party asserting the land to be ancestral must prove the fact, it not being possible to accept mere conjectures as substitutes for proof. P R. 42 of 1910, Foll. 75 Ind. Cas. 913: A.I.R. 1924 Lah. 677.

——Ss. 101 to 104—Affirmation of fact—Assertion of ancestral nature — Proof of —Conjecture insufficient.

In a case in which the ancestral nature of land is in dispute the party asserting that such land is ancestral is required to prove his assertion and conjectures cannot be accepted as a substitute for proofs. 64 Ind. Cas. 428: 4 L.L J. 31: A I.R. 1922 Lah. 65

——S. 102—Affirmation of fact—Ancestral property.

The onus probandi of showing that certain property is ancestral lies on the party asserting it. 12 C W N. 1049; 35 C. 1039; 18 M.L J. 379, Foll. 217 P.L.R. 1914: 127 P.W.R. 1914: 24 Ind. Cas. 678.

——Ss. 101 to 104—Affirmation of fact—Authority to receive—Payment to 3rd party—Onus on debtor.

It is elementary law that when a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid the debt to another person, it is for the debtor to prove that the other person had or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor 94 Ind. Cas. 767: 49 Mad. 435: 53 I.A. 84: 3 O.W.N. 568: 1926 M.W.N. 495: 24 M.L W. 115: 44 C.L.J. 67: 28 Bom. L.R. 1391: 31 C.W.N. 1: A.I.R. 1926 P. C. 34: 51 M.L.J. 570 (P.C.).

——Ss. 101 to 104—Affirmation of fact—Bona fides

Where a person sets up the plea that he is a bona fide transferee, he is bound to prove it. 68 Ind. Cas. 732: A.I.R. 1923 Nag. 15.

——Ss 101 to 104—Affirmation of fact—Boundary—Demarcation—Proof of.

The onus lies on the person setting up the plea to show that the land is not capable of identification especially where there is no difficulty in marking off an exact area. 4 U.P.L.R. (B.R.) 50; L. R. 3 A. 391 (Rev.).

——Ss. 101 to 104—Affirmation of fact—Broker, liability of—Want of authority.

In order to make a broker liable on the ground of want of authority, the onus is upon the plaintiff to affirmatively prove such want of authority. (1905) 10 C.W.N. 14.

——Ss 101 to 104—Affirmation of fact—Circumstances alleged — Transfers attacked — Onus on plaintiff.

In a suit attacking transfers of property the burden is on the plaintiff of establishing the attacks. 113 Ind. Cas. 479: 29 M.L.W. 579: A.I.R. 1929 P C. 296: 56 M.L.J. 172 (P.C.).

———Ss. 101 to 104—Affirmation of fact—Consent —Consent to a compromise.

The burden of proving consent to a compromise to set aside which a suit is brought lies on the defendant. 71 Ind. Cas. 632: 17 M.L W. 481: 27 C.W.N. 629: 25 Bom. L.R. 548: 37 C.L.J. 501: 1923 M.W.N. 392: 32 M.L.T. 137: A.I.R. 1923 P C. 13 (P.C).

———S. 103—Affirmation of fact—Covenant for renewal—Lease for a fixed term.

The onus of proving a right to renewal of a lease for a fixed term is on the lessee. 39 Bom. 625: 42 I.A. 229: 19 C W.N. 1087: 13 A.L.J. 953: (1915) M.W N. 563: 29 M.L J. 242: 18 M.L.T. 179: 2 L W. 731: 17 Bom. L.R. 730: 23 C.L.J. 1: 30 Ind. Cas. 303 (P.C.)

———S. 102 — Affirmation of facts — Damages— Damage by irrigation.

Burden of proof of damage lies on the person, who alleged that he has sus ained damage owing to irrigation works carried on by Government. 32 Mad. 141: 5 M.L.J. 148: 19 M.L.J. 131: 2 Ind. Cas. 325.

———S. 103—Affirmation of fact—Date of birth.

The burden of proving that a person was born on a particular date is on the person who alleges it. 3 L.W. 210: (1916) 1 M.W.N. 208: 33 Ind. Cas. 969.

———Ss. 101 to 104—Affirmation of fact—Date of document—Plea that a document was ante-dated—Onus.

The onus of showing that a document duly executed and registered and dated was ante-dated is on the party alleging that it was ante dated. 44 Cal. 622, Foll. 85 Ind. Cas. 882: 1925 M.W.N. 632: A.I.R. 1925 Mad. 932: 49 M.L.J. 252.

———Ss. 101 to 104—Affirmation of fact—Onus on executant.

The onus of proving that on the date of executing a deed the executant was a minor is on him. 63 Ind. Cas 525: 8 O.L.J. 324: A.I R. 1921 Oudh 160.

———S. 102—Affirmation of fact—Dedication— Impugning validity of.

Obiter.— Where the objections to a wakf are legal and the wakfnama was duly executed, the onus of proving that having regard to the value of the property, the wakf, was merely illusory lies upon the party who seeks to set aside the endowment. 31 All. 136: 6 A.L.J. 115: 1 Ind. Cas. 763.

———S. 103—Affirmation of fact—Discharge—Onus on debt.

Where the defendant admits the execution of the lost bond but pleads payment. the burden lies on him to prove payment. 2 O L.J. 498: 32 Ind. Cas. 349.

———Ss. 103 and 114—Affirmation of fact—Discharge lost bond—Suit on—Discharge—Onus on defendant.

Where in a suit on a lost bond the defendant admitted execution but pleaded payment Held, the burden of proving payment was on the defendant. 37 All. 426: 13 A.L J. 567: 29 Ind. Cas. 606.

———S. 102—Affirmation of fact — Discharge— Partial discharge—Promissory note.

A person pleading partial discharge of the amount due under a promissory note must prove the same. 9 M.L T. 314: 10 Ind. Cas. 674.

———S. 103—Affirmation of fact—Discharge— Payment towards particular debt.

A person alleging a payment towards a particular debt is bound to prove first the fact of payment and second that it was towards that particular debt. 4 Bur. L.T. 172: 11 Ind. Cas. 811.

———Ss. 101 to 104—Affirmation of fact—Execution proved—Plea of not binding—Onus.

When once the execution of a document is proved, if a party alleges circumstances that would make the document not binding on him, it is for him to prove such circumstances. 116 Ind. Cas. 143 (Mad).

———Ss. 101 to 104—Affirmation of fact—Expenditure — Deductions for expenditure claimed — Each item to be proved.

In a suit for profits when certain deductions are to be made from the gross income for expenditure it is for the defendant to prove each item of expenditure alleged by him and not admitted by the plaintiff, with proper accounts and vouchers. 93 Ind. Cas. 196: 9 N.L J. 7: A.I.R. 1927 Nag. 62.

———Ss. 101 to 104—Affirmation of fact—Inclusion in holding—Suit for possession—Onus on plaintiff.

In a suit for possession of land the plaintiff has to prove that the land lay within his holding and not for the defendants to prove that it lay outside. 33 C.W.N. 227: 56 Cal. 805: A.I.R. 1929 Cal. 325.

———Ss. 101 to 104—Affirmation of fact—Illegitimacy.

The onus of proving that plaintiff is an illegitimate son in a suit by the illegitimate son for partition or maintenance is upon the plaintiff and his alleged paternity might be established like any other disputed question of relationship (*vide* S. 32, Cl. 5 and S. 50, Evidence Act) (1903) 27 M. 32.

———Ss. 101 to 104—Affirmation of fact—Inheritance depending upon the fact of a person surviving a female.

Where in answer to a suit in ejectment persons set up a title to certain property as heirs of another who would have obtained title to the property only in the event of his having survived a certain female. the onus of proving that that other persons did so survive the female, is upon those who allege it. (1909) 19 M.L J. 502: 6 M.L.T. 153: 2 Ind. Cas. 977.

———S. 103—Affirmation of fact—Insanity — Onus of proof.

The burden of proving that a person was of unsound mind at and from a particular date when a document was executed by him and which is sought to be avoided is on the person alleging the lunacy. 19 C.W N. 45: 27 Ind. Cas. 459

———S. 102—Affirmation of fact—Insanity—Proof of.

Where a person is found to be a lunatic (under Act 35 of 1858) the onus is on those who assert at

any later date, that he is of sane mind, to prove that he is so. 3 L.W. 290 : 19 M.L.T. 243 : 33 Ind. Cas. 578.

———Ss. 101 to 104—Affirmation of fact—Knowledge —Decree not binding onus to prove.

Where it was the case of a creditor of the deceased person instituting a suit making as defendant in the action a person who, but for the will would have been the proper legal representative then it follows that the burden is upon the legal representative to show the circumstances under which or the reasons for which that decree is not binding. 108 Ind. Cas. 409 : 1927 M W.N. 894 : A.I.R. 1928 Mad. 243.

———Ss. 101 to 104—Affirmation of fact— Knowledge —Transfer by grantee—Knowledge of grantor to be proved by transferee.

Where the question is whether the grantor knew of the tansfers made by the grantee tenure-holder.

Held, that the onus of proving the negative could not be laid on the grantor as in cases such has these the likelihood is that the grantor would have no such knowledge. 71 Ind. Cas 999 : 3 P.L.T. 628 : 24 Cr. L.J. 279 : A.I.R. 1923 Pat. 76.

———Ss. 101 to 104—Affirmation of fact—Defective title mortgagor—Mortgagee's knowledge of—Onus on mortgagor

The burden of proving mortgagee's knowledge is upon a mortgagor.

A joint family consisted of the plaintiff, his brother's widow and another brother's daughter. The two former for family necessity mortgaged the whole property suppressing the fact that the third had any interest in the property. On the death of the latter the plaintiff sued for one-third of the property, representing the interest of the daughter of his brother, who did not join in the mortgage, from the assignee of the mortgagee who had brought the property at the mortgage sale in execution of the decree against plaintiff and his brother's wife.

Held, if mortgagee did not know then the mere fact that the assignee who claims through mortgagee may have known the fact as to the existence of interest of plaintiff's brother's daughter, does not prevent his getting a good title to the properties and relying on the estoppel which mortgagee could have set up againt any claim by plaintiff in any suit. As soon as the mortgage-deed was produced which contained a representation with regard to a share in the property to which the mortgagor later on obtained title, the burden was no longer on the mortgagee or his assignee to establish that he did not know the true position but the burden of proof shifted on the mortgagors and those claiming under them to show mortgagee's knowledge of the true facts. 70 Ind. Cas. 385 : 27 C.W. N. 943 : 36 C.L J. 78 : A I.R. 1922 Cal. 542.

———Ss. 101 to 104—Affirmation of fact—Loss—Loss in business surety for managing partner—Onus on the other partners to prove loss.

Plaintiff stood surety for the managing partner and executed a security bond which provided if that the business suffered any loss and the managing partner refused to pay his share of loss on demand the other partners would be entitled to deduct, from the security money, the share due to them on account of the loss:

Held, the burden of proof to show that the business had suffered a loss and that they had called upon the managing partner to pay his share lay upon the other partners. 77 Ind. Cas. 251 : 4 L.L.J. 214 : A.I.R. 1922 Lah. 235.

———S. 103—Affirmation of fact—Majority—Decree against person as minor—Suit to set aside on ground of no minority.

When a decree passed against a minor is sought to be set aside on the ground that he was not a minor, the burden of proving that he was a major lies on the person making the allegation. 10 N.L.R. 137 : 26 Ind. Cas. 816.

———S. 102—Affirmation of fact—Marriage—Maintenance.

In maintenance proceedings under the Code the onus is on the wife to show that she is the wife of the accused. 7 Bur. L.T. 71 : 15 Cr. L.J. 484 : 24 Ind. Cas. 572.

———Ss. 101 to 104—Affirmaton of fact—Marriage —Lapse of time.

It is for the person who alleges his legitimacy to bring forward satisfactory evidence in support of the alleged marriage. Held, also, that in the particular case before their Lordships, making all due allowance for the difficulties occasioned by lapse of time and the deaths of persons who might have thrown light upon the question, their Lordships were unable to hold that the marriage was proved. (1906) 5 C.L.J. 1 : 9 Bom. L.R. 264 : 17 M.L.J. 56 (P.C.).

———Ss. 101 to 104—Affirmation of fact—Membership of a Community—Onus on party alleging.

If any person asserts in a Court of law that he is a member of a certain section of the community and this fact is denied he must prove the assertion before it can be accepted. 76 Ind. Cas. 980 : 19 N.L.R. 104 : A.I.R. 1923 Nag 317.

———Ss. 101 to 104—Affirmation of fact—Minority of executant—Onus on person alleging.

The burden of proving that a particular deed is bad on the ground that its executant was a minor at the time of its execution, lies upon the person who makes this allegation. 114 Ind. Cas. 801 : 5 O.W.N. 1111 : A.I R. 1929 Oudh 113.

———Ss. 102 and 103—Affirmation of fact—Mistake —Recitals Onus of proving incorrectness.

The onus of proving that a document to which a person has affixed his signature does not contain a correct statement of the facts and of the intentions of the parties is on the person making the allegation. 4 Pat. L.W. 237 : 44 Ind. Cas. 399.

———Ss. 103—Affirmation of fact—Mistake—Onus on person.

The onus of proving that a property was included by mistake for another property, in a document is on the person setting up that plea. 41 Cal. 972 : 1 L.W. 1050 : 41 I.A. 910 : 27 M.L.J. 80 : (1914) M.W.N. 462 : 16 M.L.T. 6 : 18 C.W.N. 817 : 19 C.L.J. 484 : 16 Bom. L.R. 400 : 12 A.L.J. 774: 23 Ind. Cas. 637 (P.C.).

———S. 102—Affirmaton of fact—Novation—Plaintiff alleging uncoditional taking over of liability.

Where *A* owed a debt to *B* and *B* alleged that *A*'s brother *C* unconditionally took over the liability, but he replied that he only agreed so set off the amount against the price of the bricks which *B* might purchase from him. **Held**, that the burden of proving unconditional liability was on *B*. 4 Bur. L.T. 156 : 11 Ind. Cas. 774.

———S. 102—Affirmative of a fact—Onus.

Where a defendant pleads occurrence of a fact, it is for him to prove that occurrence and not for the plaintiff to prove its non-occurrence. 33 Ind. Cas. 516 (Oudh).

———S. 101—Affirmation of fact—Pre-emption—Preferential right.

A persoon claiming a preferential right of pre-emption over another co-sharer by reason of the relationship must prove it. 56 Ind. Cas. 148 (All.).

———Ss. 101 to 104—Affirmation of fact—Receipt of money—Wagering contract receipt of money by agent—Onus on principle to prove receipt.

A suit cannot be brought in which the cause of action is based directly on the wagering contract, but if, as a result of a wagering contract, an agent has received money on his principal's behalf, he is then liable to account to the principal for that money and the onus lies on the principal to prove affirmatively that the agent actually received the money on his behalf. 119 Ind. Cas. 740 : 7 Rang. 300 : A.I.R. 1929 Rang. 244.

———Ss. 101 to 104—Affirmation of facts—Plea of invalidity of Registration on the ground of non-existence of property—Onus.

Where it is contended that registration is invalid for the reason that a certain property alleged to be situated in a place has no existence, the onus of proving the plea is on the party who urges it. (1903) 8 C.W.N. 362.

———Ss. 101 to 104—Affirmation of fact—Nearest reversioner—Limit of proof.

It is incumbent on a plaintiff seeking to succeed to property as reversioner, to establish affirmatively the particular relationship which he puts forward. He is also bound to satisfy the Court that to the best of his knowledge there are no nearer heirs and for this purpose he can rely on the statement of witnesses called for defence. He cannot be expected to do anything more. It is for those, who claim that their kinship is nearer than that of the plaintiff, to prove that relationship. 40 Mad. 654, Foll. 102 Ind. Cas. 167 : 49 All. 779 : 25 A.L.J. 500 : A.I.R. 1927 All. 767.

———Ss. 101 to 104—Affirmation of fact—*Prima facie* evidence must be adduced.

Where plaintiff claims certain relief as the nearest reversioner, it is for him to adduce prima facie evidence of his being nearest reversioner. It is not sufficient to rely upon the statements in the plaint or on an unapproved genealogical trees. 23 All. 72 (P.C.) and 40 Mad. 654, Foll. 100 Ind. Cas. 500 : 38 M.L.T. 45 : A.I.R. 1927 Mad. 1149 : 52 M.L.J. 155.

———Ss. 101 to 104—Affirmation of fact—What must be proved.

In a suit by a reversioner the plaintiff must prove not merely that he is reversioner but that he is the nearest reversioner. 69 Ind. Cas. 421 : 9 O.L.J. 186 : 26 O.C. 109 : A.I.R. 1922 Oudh 218.

———Ss. 101 to 104—Affirmation of fact—Relationship—Onus on him setting up.

Where the plaintiff's right to succeed depends upon his being an agnatic relation of the defendant the onus is on him to prove that he is so related. 67 Ind. Cas. 464 : A.I.R. 1923 Pat. 309.

———Ss. 101 to 104—Affirmation of fact—Revenue sale—Proof of irregularity.

The onus is on the person who seeks to have a sale set aside to establish that the requirements of the statutes had not been complied with by the Collector. (1905) 10 C.W.N. 137 : 2 C.L.J. 325.

———Ss. 101 to 104—Affirmation of fact—Self-acquisitions—Thrown into common stock.

The onus of proving that property acquired without the aid of joint funds or joint exertions have become joint property by being thrown into the common-stock is upon those who allege it. 7 (1905) Bom. L.R. 169.

———Ss. 101 to 104—Affirmation of fact—Separation—Onus on him setting up.

Where jointness up to a certain date is proved the onus of proving a separation subsequent to that date is on the party alleging such separation. 101 Ind. Cas. 249 : 1927 M.W.N. 96 : 31 C.W.N. 533 : A.I.R. 1927 P.C. 52 : 53 M.L.J. 658 (P.C.).

———Ss. 101 to 104—Affirmation of fact—Sequence of events—Must be affirmatively proved.

The plaintiff who comes into Court alleging that on the happening of certain events in a certain order certain rights to property accrued to him is bound to establish by affirmative and satisfactory evidence the occurrence of such events in such order. Thus a plaintiff alleging that a certain person died before another must prove the fact affirmatively. 88 Ind. Cas. 249 : 1925 M.W.N. 232 : A.I.R. 1925 Mad. 1005.

———Ss. 101 to 104—Affirmation of fact—Service of summons — Affidavit of service — Onus to disprove service.

When there is an affidavit, of the peon serving the notice, of proper service thereof, the party who impugns the fact ought to prove that there was no service. 117 Ind. Cas. 552 : A.I.R. 1928 Cal. 722.

———Ss. 101 to 104—Affirmation of fact.

Person who alleges regular service of summons must prove it. 94 Ind. Cas. 907 : 43 C.L.J 113 : 27 Cr.L.J. 715 : 31 C.W.N. 148 : A.I.R. 1926 Cal. 1208.

———Ss. 101 to 104 — Affirmation of fact — Status—Public prostitutes — Onus on them to prove they are not.

Suit by alleged public prostitutes for grant of a perpetual injunction against the Municipal Committee to the effect that the Committee be restrained from taking any action against the plaintiffs under the notice under S. 152 of the Municipal Act on the ground that they were not public prostitutes the burden is on plaintiffs to show that they were not public prostitutes. A.I.R. 1926 Lah. 461, Foll. 100 Ind. Cas. 1010 : A.I.R. 1927 Lah. 358.

———Ss. 101 to 104—Affirmation of fact—Transfer of possession—Surrender by previous tenant—Onus on the subsequent tenant to prove transfer.

It is for the rival tenant in order to make out a valid surrender to establish that the previous tenant has given over possession at the latest by the com-

mencement of the year, when the patta in his favour took effect. 6 O.W.N. 1094: 11 L.R.A. Rev. 24: A.I.R. 1930 Oudh 69.

———Ss 101 to 104—Affirmation of fact—Transfer—Party setting up should prove it.

A party who sets up a transfer should prove it. (1900) 5 C.W.N. 217: 24 M. 377: 28 I.A. 46 (P.C.).

———Ss. 101 to 104—Affirmation of fact—Unchastity—Onus on him who alleges.

Where the defendant alleges unchastity of the plaintiff the burden of proof is on the defendant to prove it. 44 All. 683: A.I.R. 1922 All. 321.

———Ss. 101 to 104 — Affirmation of fact — Wilful disobedience—Of employee—Onus on employee.

In a case for compensation for the death of a deceased employee, the onus to prove wilful disobedience lies on the employer. 112 Ind. Cas. 328: 8 Pat. 24: 9 P.L.T. 511: A.I.R. 1928 Pat. 508.

5. Alluvion and diluvion.

———Ss. 101 to 104—Alluvion and diluvion.

In a suit for rent, where the rights of the parties are governed by the general law and not by any express contract when the tenant pleads he is not liable to pay the full agreed rent on account of diluvion and where there is an admission by the plaintiff or it is proved that some diluvion has taken place, the onus is upon the defendant to prove the extent of diluvion and the corresponding abatement of rent which he may claim. A.I.R. 1931 Cal. 537: 54 C.L.J. 31: 35 C.W.N. 1011: 59 Cal. 155: 133 Ind. Cas. 577 (F.B.).

———Ss. 101 to 104—Alluvion and diluvion—Assessment—"Added land"—Onus on Government to establish.

Where Government seek to assess lands under the Bengal Alluvion and Diluvion Act, the burden will lie upon the Government to establish that the lands sought to be assessed are "added lands" within the meaning of S. 6 of that Act. 70 Ind. Cas. 510: 50 Cal. 276: 36 C.L.J. 345: A.I.R. 1923 Cal. 233.

———Ss. 101 to 104—Alluvion and diluvion—Possession up to diluvion proved—Continuance of possession during submersion presumed.

If the plaintiff shows his possession down to the time of the diluvion his possession is presumed to continue as long as the land continued to be submerged.

Further in the case of land covered by water the Court may and generally should presume, in the absence of evidence to the contrary, that a possession enjoyed by the plaintiff before the twelve years, has continued until within the 12 years. In other words when the plaintiff has shown that he was in possession of the land at the time of diluvion, it must be presumed that he has continued to be in possession within 12 years of the suit. 9 Cal. 744 (F.B.) and 19 Cal. 660 (P.C.), Foll. 2 P.L.T. 59: A.I.R. 1921 Pat. 234.

———Ss. 102 and 104—Alluvion and diluvion — Suit for possession—Onus.

In a suit to recover possession of a certain land as being a contiguous accretion to the other plots belonging to plaintiff the latter must establish the nature of accretion. 46 Ind. Cas. 555 (Cal.).

———S. 102—Alluvion and diluvion—Gradual reformation—Portion appeared within 12 years of suit.

In 1888 a Chur was formed and the Government took possession of it. In 1902, the defendant and the plaintiff each claimed the Chur as theirs, but the Chur was released to the defendant who held it up in occupation since that time. In 1904 the plaintiffs who were wards of the Court until January, 1894 instituted this suit for possession of the Chur: Held, that the possession of the Government was adverse to the plaintiff and the suit was barred. Where the defendant urged that the reformation of the Chur was gradual and that portions of it may have appeared above water within 12 years of the suit. Held, that the burden of proving, that portions of the land were of this description, would lie upon the plaintiffs. 14 C.W.N. 317: 11 C.L.J. 373: 3 Ind. Cas. 15.

———Ss. 101 to 104—Alluvion and diluvion—Ownership of alluvial and diluvial lands—Revenue settlement, decision in.

Where both the decision of the Revenue authorities in the settlement operations and that of the local authorities in proceedings taken under the Code of Criminal Procedure in respect of the ownership of lands (here alluvial and diluvial) were in favour of one party, it would require very strong evidence on the part of the other to disturb the conclusion so arrived at. (1905) 9 C.W.N. 889: 2 A.L.J. 623: 7 Bom.L.R. 872: 27 A. 655: 32 I.A. 165: 2 C.L.J. (P.C.) 185: 15 M.L.J. 349.

6. Appeal.

———S. 101—Appeal—Question of onus.

The question of onus is of subordinate importance in appeal when both sides have let in evidence and the appellate Court has to come to a conclusion on the whole evidence. A.I.R. 1935 Mad. 769: 42 M.L.W. 321: 1935 M.W.N. 528 (2): 58 Mad. 841: 160 Ind. Cas. 768.

———S. 101—Appeal.

Party accepting burden of proof in trial Court, but failing to discharge — He cannot, in appeal, turn round and complain about it. A.I.R. 1934 Lah. 1019.

———S. 102—Appeal.

Onus of proving judgment appealed against to be wrong is on the appellant. A.I.R. 1933 Oudh 142: 10 O.W.N. 201: 150 Ind. Cas. 330.

———Ss. 101 to 104—Appeal — Judgment appealed from—Burden of showing it as wrong.

In appeals the burden of showing, that the judgment appealed from is wrong, lies upon the appellant. If all he can show is nicely balanced calculations, which led to equal possibilities of the judgment on either the one side or the other being right, he has not succeeded. A.I.R. 1922 P.C. 39, Foll. 99 Ind. Cas. 255: 3 O.W.N. Supp. 282: A.I.R. 1927 Oudh. 66.

———Ss. 101 to 104—Appeal — Burden of proof—Tenability—Error of principle—Appeal lies.

A decision based on an error of the principles governing the question of onus will be set aside. 96 Ind. Cas. 820: A.I.R. 1926 Lah. 653.

———Ss. 101 to 104 — Appeal—Burden of proof—Appellant must show that judgment appealed from is wrong—Appeal.

In appeal the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of judgment on either the one side or the other being right, he cannot be said to have succeeded. 65 Ind. Cas. 305: 20 A.L.J. 22: 35 C.L.J. 116: 1922 M.W.N. 95: 26 C.W.N. 322: 3 P.L.T. 311: 24 Bom.L.R. 346: 15 M.L.W. 417: 30 M.L.T. 234: A.I.R. 1922 P.C. 39: 42 M.L.J. 253 (P.C.).

———Ss. 101 to 104 — Appeal — Judgment appealed from—Onus of proving it wrong.

The onus of proving that the judgment and decree appealed against are wrong is on the appellants. 65 Ind. Cas. 182 (Cal.).

———S. 103—Appeal — Question of fact — Onus on appellant.

On questions of fact, the onus is on the appellant who invites the Appellate Judges, who have not seen or heard witnesses, to overrule the decision of Judges who after a prolonged and elaborate enquiry arrived at the conclusion that they could not believe the evidence called in support of a will. 13 C.W.N. 782: 5 M.L.T. 384: 3 Ind. Cas. 997 (P.C.).

———Ss. 101 to 104—Appeal—Onus wrongly placed.

Where the misplacement of onus has been acquiesced in by the parties in the first two Courts the High Court would be reluctant to interfere with the result unless the error has occasioned miscarriage of justice. (1903) 5 Bom.L.R. 177.

———S. 103—Appeal—Proof of wrong judgment

The appellant must show that the judgment appealed against is wrong. 241 P.L.R. 1913: 143 and 204 P.W.R 1913: 19 Ind. Cas. 964.

———Ss. 101 to 104—Ex parte decree—Appeal—Onus on plaintiff to show summons duly served. 1901 A.W.N. 1: 23 A. 99.

———Ss. 101 to 104 — Appeal — Onus of showing lower Court's judgment is wrong—Duty of respondent to show that it is right.

When an appeal is preferred against a judgment, it is for the appellant to show it is wrong, and not for the respondent to show it is right. 19 I.A. 140. Foll. (1901) 4 Bom.L.R. 167: 12 M.L.J. 83: 6 C.W.N. 386: 29 C. 187: 29 I.A. 24 (P.C.).

7. Assets.

———Ss. 101 to 104—Assets—Receipt by executor—Proving extent—Onus on executor.

Where a question is raised as to the extent of assets received by an Executor on the death of the testator, the burden of proof on the point is entirely on the executor. 70 Ind. Cas. 548: 36 C.L.J. 367: A.I.R. 1923 Cal. 79.

———S. 102—Assets—Extent of.

Where a decree is passed against the legal representative of a deceased person the onus of showing the extent of the assets he received and the application thereof is on the legal representative when the decree-holder proves that he had actually received some assets. 30 M. 454; 2 Ind. Cas. 18; 12 Ind. Cas. 253; 26 M. 792; 35 Ind. Cas. 224, Foll. 30 M.L.J. 391: (1916) 2 M.W.N. 92: 35 Ind. Cas. 224.

———S. 101—Assets—Burden of proof.

In a case the finding that the defendants took some of the properties of a deceased person who owed money to plaintiff, is sufficient to throw the burden on the defendants of proving that they did not receive so much of the property of the deceased as would satisfy the plaintiff's debts. 6 M.L.T. 362: 4 Ind. Cas. 43.

8. Banker and Customer.

———S. 102—Banker and customer—Forged draft—Onus.

Onus of proving forgery of draft, where the draft is apparently in order, lies on the customer who seeks to recover the money paid on it by a banker. 8 Ind. Cas. 98 (Bom.).

———S 102—Banker and customer—Deposit of money—Burden of proof.

The burden of proving that money was paid into the bank is on the constituent and the burden is discharged when it is shown that money was made over to the cashier or some employee of the Bank authorized to receive money and it is not necessary either to allege or prove fraud on the part of the Bank Officials. 34 Ind. Cas. 176 (L.B.).

9. Benami.

———Ss. 101 to 104—Benami—Suit to recover loan.

In a suit to recover a loan, it is for the plaintiff to establish that he has such an interest in the loan as would entitle him to maintain the suit. He must prove his own case. There is no question of rebutting the defendant's case. A.I.R. 1942 All. 82: 1941 A.W.R.H.C. 385: 1942 A.L.J. 29: 198 Ind. Cas. 863.

———Ss. 101 to 104—Benami.

Debtor and creditor — Suit to recover amount advanced as loan — Defendant simply admitting receipt of money — Plaintiff, held must prove that advance was by way of loan. A.I.R. 1939 Lah. 386: 41 P.L.R 650

———Ss. 101 to 104—Benami.

Objection to attachment rejected on the ground that the claimant was a mere benamidar of the judgment-debtor—The claimant filing a suit under O. 21, R. 63, Civil P.C.—The burden of proving that he was a bona fide purchaser and not a benamidar, held was on the claimant. A.I.R. 1937 Pat. 76: 17 P.L.T. 785: 3 B.R. 264: 167 Ind. Cas. 118.

———Ss. 101 to 104—Benami.

Where a person has passed a receipt in favour of another, the burden of proving that the money advanced did not belong to the latter is heavily on the former. A.I.R. 1931 Nag. 97: 132 Ind. Cas. 459.

———Ss 101 to 104—Benami—Parties to sale—Near relations—Onus on vendee to prove valid sale.

Obiter.—Where the vendor and vendee are near relation and the sale-deed is in possession of the vendor the burden of proving that the sale is not bogus is on the vendee. 103 Ind. Cas. 812: A.I.R. 1927 Nag. 327.

———Ss. 101 to 104—Benami.

The onus of proving that the ostensible owner is not the real owner is on the party so alleging. 94 Ind. Cas. 33: A.I.R. 1926 Cal. 850.

———Ss. 101 to 104—Benami—For plaintiff's benefit —Onus on him.

The burden of proving that a bond, a suit brought thereon, and an execution sale under the decree obtained in the suit, were all benami for the plaintiff lies upon him. 81 Ind. Cas. 774: 39 C.L.J. 98.

———Ss. 101 to 104—Benami—Shifting of onus.

There is no doubt that the onus of proving benami was upon the defendants who set it up, but after the definite statements made by his witnesses as to the plaintiff's dealings with the property indicating that he was the owner of the property, the plaintiff ought to have examined himself and denied those statements on oath. 76 Ind. Cas. 241: 27 C.W.N. 38: 37 C.L.J. 265: A I.R. 1923 Cal. 121.

———S. 103—Benami — Non-payment of—Registered sale—Onus.

In a suit for possession on the basis of a sale-deed the vendee has to prove his title where the vendor who is in possession pleads that he is only a benamidar. The vendee shows a prima facie title by producing and proving his conveyance which contains a recital of the receipt of consideration. In such a case, the onus is upon the vendor to show non-payment of consideration. 20 C.W.N. 254: 29 Ind. Cas. 696.

———S. 103—Benami—Money paid by another.

Where property is purchased in the name of another the burden of proving that the purchaser has no beneficial interest in the property and that the purchase is really benami lies on the person alleging it. Payment of money by one and purchase in another's name does not establish a benami transaction if the payer intended to benefit the ostensible purchaser. 133 P.W.R. 1913: 224 P.L.R. 1913: 19 Ind. Cas. 770.

———S. 102—Benami—Nominal sale.

The burden of proving that a sale is nominal lies primarily on the person alleging it, but where the vendee can produce none of the documents which form the basis of his case and there is no satisfactory evidence as to possession, the burden of proof is thrown on him. 34 Ind. Cas. 617 (Mad.).

———Ss. 102 and 103—Benami—Sham transaction — Onus — Sale-deed — Non-delivery of possession.

In a suit for a declaration that a sale-deed was a nominal transaction the burden of proof is on the plaintiff to prove any circumstances relied on for the purpose of showing that the sale was not a real and honest transaction. The question whether possession passed under the sale to the vendee is a material element though not a decisive circumstances. Even here it is for the plaintiff to prove that possession did not pass and not on the defendant to show that possession did pass 16 Ind. Cas. 749 (Mad.).

———S 101—Benami—Purchase by father in name of son—Presumption.

In India, when a piece of land is bought by father with his money in the name of his son the presumption is that it was bought benami in the name of the son, and if it is alleged to be purchased for the advancement of the son, the fact must be proved by the party asserting it. 3 Bur. L.T. 62: 8 Ind. Cas. 450.

———Ss. 101 to 104—Benami—Proof Onus—Husband and wife—A judgment-creditor who obtained a decree against a person attached properties standing in the name of the judgment-debtor's wife. The wife put in a claim petition which was dismissed She brought a suit for a declaration that the property attached was hers. Held, that in the circumstances of the case, it lay upon the wife to prove the purchase money was supplied by her and for her enjoyment, and in the event of a failure to discharge the same, the suit should be dismissed. (1907) 17 M.L.J. 339.

10. Carrier.

———Ss. 101 to 104—Carrier—Railway Company—Necessary pleas.

It is necessary expressly to plead "loss" and the execution of risk note, if the defendant railway wishes to escape the ordinary liabilities of a bailee. 74 Ind. Cas. 431: 4 P.L.T. 443: A.I.R. 1924 Pat. 25.

———Ss. 101 to 104—Carrier—Weight, etc., unknown —Shortage—Onus on him alleging.

Burden is on the plaintiff to prove shortage where the bill of lading expressly says "weight contents and value when shipped unknown". 72 Ind. Cas. 408: 17 M.L.W. 363: A.I.R. 1923 Mad. 523.

———S. 103—Carrier—Railway Risk Note Form B —Loss of goods—Burden of proof.

If the plaintiffs wish the Court to believe that there was wilful neglect or theft by railway servants, it lies on them to prove the fact. In the absence of proof of wilful neglect or theft by railway servants the Administration is to be held free from responsibility in the case of a risk note in Form B. If, however neglect or theft by railway servants is proved the administration will escape liability for loss, if proof is given of robbery from a running train. 43 Bom. 769: 21 Bom. L.R. 779: 52 Ind. Cas. 516.

11. Consideration.

———Ss. 101 to 104 — Consideration — Burden of proof — Definite and clear receipt of consideration in handwriting of each of several executants in presence of Sub-Registrar—Onus is strongly upon executants to show non-receipt.

In a registered document executed by several persons where there is definite and clear receipt in the handwriting of each of the executants in the presence of the Sub-Registrar that they have received a certain amount of money as part of the consideration in cash, a strong onus is placed upon the executants to show that they did not in fact receive the money. (Upon consideration of all evidence, oral and documentary, held that entire consideration was paid to the executants. A.I.R. 1946 Pat. 225: 12 B.R. 268: 222 Ind. Cas. 439.

———S. 102—Consideration— Burden is on executant to show want of consideration.

Although, under ordinary circumstances, the party to a deed, an agreement to lease for period of ten years on payment of Rs. 20,000 cash and Rs. 10,000 within four years, duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the lessee had silently submitted to the withholding of possession for upwards of six years combined with the continuous possession of the lessor, favours the allegation of the latter that possession had been withheld because of the non-payment of consideration and raises such a counter presumption as to make it incumbent on the lessee to give evidence that consideration had, in fact, passed. At least, it goes very far to discharge the burden

of proof which lay on the lessors to prove absence of consideration A.I.R. 1943 Sind 192: I.L.R. (1943) Kar. 263: 211 Ind. Cas. 99.

——Ss. 101 to 104 — Consideration.—Where, in a suit based on hundi, the defendant has admitted its execution, the burden of proving that it was without consideration lies heavily on him. (1940) 187 Ind. Cas. 225.

——Ss. 101 to 104—Consideration.

In a suit for recovery of interest due on the mortgage, the mortgagor did not deny the consideration. The deed contained the acknowledgment of the same. The suit was decreed. In execution of the decree, the equity of redemption was sold. Subsequently in the suit on the mortgage, the purchaser denied consideration:

Held, that the onus to prove want of consideration was on the purchaser. A.I.R. 1938 Lah. 463: 40 P.L.R. 313 and 709: 181 Ind. Cas. 505.

——Ss. 101 to 104—Consideration—Deed reciting passing of consideration—Persons claiming through transferor must prove that property belonged to them and that no consideration passed which they allege. A.I.R 1938 Nag 152: I.L.R. (1938) Nag. 333: 176 Ind. Cas. 315.

——Ss. 101 to 104—Consideration—Persons claiming through transfe or must prove that no consideration passed which they allege.

A person who had an undoubted right to convey certain property, conveyed it to his wife in lieu of dower debt. In the deed of conveyance, it was recited that the consideration did pass. The persons claiming through him contended that no consideration passed and that in fact the property belonged to them:

Held, that the mere fact that the consideration was wrongly recited, would not be enough to invalidate the deed.

Held, also that the burden to show that no consideration passed and that the property belonged to them was on the persons contending it. A I R. 1938 Nag. 152: I.L R. (1938) Nag. 333: 176 Ind. Cas. 315.

——Ss. 101 to 104—Consideration—Strangers.

Where the parties to the transaction uphold the passing of consideration, no stranger can complain of the want of inadequacy of the consideration. A.I.R. 1938 Nag. 30: I.L.R. (1940) Nag. 94: 176 Ind. Cas. 57.

——Ss. 101 to 104—Consideration—Onus to prove that no consideration passed.

Where there is a fact recorded in the sale deed itself that the consideration was paid in the presence of the Registrar, the burden to prove that no consideration passed and that the deed was fictitious is on the party alleging it. A.I.R. 1938 Pat. 281: 4 B.R. 682: 1768 Ind. Cas. 129.

——Ss. 101 to 104—Consideration—Promissory note—Admission by executant—Onus as to consideration.

If the execution of the promissory note in suit is admitted by the executant, the onus is, prima facie, on him to prove absence of consideration or other circumstances exonerating him from liability. A.I.R. 1937 Mad. 223: 44 M.L.W. 572: 1936 M.W.N. 1137: (1937) 1 M.L.J. 414: 169 Ind. Cas. 435.

——Ss. 102, 103—Consideration.

Where vendors had admitted receipt of consideration both in the sale deed and before the Sub-Registrar the burden of proof is upon them (vendors) to show that a part of consideration still remains unpaid. (1936) 19 N.L.J. 301.

——Ss. 101 to 104—Consideration—Execution of entry proved—Burden of proving want of consideration.

Where, by the evidence of finger-print expert, the execution of an entry is proved, the burden of proving want of consideration is on the executant. A.I.R. 1935 Lah. 147: 36 P.L.R. 477: 155 Ind. Cas. 799.

——Ss. 101 to 104—Consideration.

Transfer by insolvent—The onus of proving absence of consideration and presence of bad faith is on the Official Receiver and not on the transferee A.I.R. 1931 P.C. 75: 9 R. 170: 35 C.W N. 577: 1931 A.L.J. 444: 53 C.L.J. 373: 60 M.L.J. 652: 1931 M.W.N. 615: 33 Bom L.R. 867: 34 M.L.W. 36: 58 I.A. 115: 131 Ind. Cas. 767 (P.C.).

——Ss 101 to 104—Consideration.

In the case of a document in which the receipt of consideration by the executant is recited the burden of proving want of consideration is on him who denies it. (1931) 134 Ind. Cas. 102: 32 P.L.R. 77.

——Ss. 101 to 104—Consideration.

In the case of a trust created by an insolvent for his creditors prior to his adjudication, the burden of proving the bona fides of the trust, that is, that the trustee is a purchaser in good faith and for valuable consideration is on the trustee. A.I.R. 1931 Mad. 366: 33 M.L.W. 468: 61 M.L.J. 27: 130 Ind. Cas. 753.

——S. 102—Hand-note—Execution—Consideration—Burden of proof.

When the execution of a hand-note is admitted the onus of proving that no consideration passed is thrown entirely on the defendant. But where the defendant only admits he put in his signature and thumb-mark on some other document the onus of proving the execution of the hand-note sued upon is on the plaintiff. A.I.R. 1931 Pat. 266: 12 P.L.T. 231: 134 Ind. Cas. 632.

——Ss. 101 to 104—Consideration—Circumstances of parties - Shift burden of proof.

Debtors were majors and literate having a fair knowledge of English and claiming to be businessmen possessed of large property. They were neither "expectant heirs" nor had just come of age. The creditor had not been proved to be a professional money-lender and the execution of the pro-notes in question was admitted.

Held, that the onus to prove want of consideration should be placed on them. 120 Ind. Cas. 417: 11 L.L.J. 511: A.I.R. 1930 Lah. 65.

——Ss. 101 to 104—Consideration—Admission in a document—Onus on him alleging failure.

Where it has been admitted or proved that an admission of consideration has been made or executed in a document, the onus of proving want of consideration rests on the person asserting want of consideration. A.I.R. 1925 Lah. 471 (F.B.) and A.I.R. 1927 Lah.

272, Foll. 104 Ind. Cas. 173: A.I.R. 1927 Lah. 823.

———Ss. 101 to 104—Consideration—Pro-note—Different stories at different stages—Onus on payee.

Where, in a suit on promissory note, plaintiff set up different stories as to consideration at different stages, the burden of proving consideration shifts on him. 48 P.R. 1915, Foll. 102 Ind. Cas. 42: 28 P.L.R. 295: 9 L.L.J. 254: A.I.R. 1927 Lah. 864.

———Ss. 101 to 104—Consideration—Admission in a document—Onus on executant to prove failure.

Where an unregistered document, the execution of which is admitted or proved, contains an admission of the payment of the consideration the onus lies on the person executing the document to prove that what he himself admitted to be true, was, as a matter of fact, false and that he did not receive the consideration. A.I.R. 1925 Lah. 471 (F.B.), Foll. 100 Ind. Cas. 60: 8 Lah. 123: 27 P.L.R. 768: A.I.R. 1927 Lah. 272.

———Ss. 101 to 104—Consideration—Execution of mortgage admitted—Consideration recited but denied onus on mortgagor—Gross inadequacy—Inference.

Where a mortgagor admits execution of a mortgage-deed, it is for him to prove that he has not received the consideration recited in the deed. The mere fact that he was a reckless borrower does not affect the question of onus. Gross inadequacy of consideration can lead a Court to the conclusion that the party did not understand what he was doing. 92 Ind. Cas. 346 (Lah.).

———Ss. 101 to 104—Consideration—As against purchaser of equity of redemption, mortgagee has to prove consideration—Onus how discharged.

A mortgagee as against a purchaser of equity of redemption from the original mortgagor has to prove by affirmative evidence the validity of the consideration and also that it had passed from the creditor to the debtor. The mere admission of the debtor in the mortgage-bond does not shift the onus as it would have been if the suit had been brought against the mortgagor himself alone. He has to give the best evidence possible that the bond was for a really good consideration.

Where the bond debts which formed part of the consideration were debts going back to about forty years from the time when the suit was brought and the plaintiff was able to produce two of the numerous attesting witnesses to the bond, who not only proved the mortgage bond but also stated that the consideration for the bond was admitted by the debtor before them, and there was practically no effective cross-examination of those witnesses on this point.

Held that it could be safely said that consideration for the bond had been established by the evidence of those witnesses. 89 Ind. Cas. 927: A.I.R. 1926 Cal. 295.

———Ss. 101 to 103—Consideration—Admission in a document—Onus to prove failure on execu ant.

Where an unregistered document, the execution of which is admitted or proved, contains an admission of the payment of the consideration the onus lies on the person executing the document to prove that what he himself admitted to be true was, as a matter of fact, false and that he did not receive the consideration. A.I.R. 1925 Lah. 471, Foll 96 Ind. Cas. 820: A.I.R. 1926 Lah. 653.

———Ss 101 to 104—Consideration—Admission in mortgage-deed—Execution proved—Onus to prove failure on mortgagor.

The onus of proving consideration in the first instance lies on the mortgagee, but when execution of the document sued upon has been proved or admitted, if the document contains a recital admitting receipt of the consideration, the onus would then lie on the opposite party to show that that admission was false. 96 Ind. Cas. 630: 7 Lah. 297: 27 P.L.R. 463: A.I.R. 1926 Lah. 494.

———Ss. 101 to 104—Consideration—Execution admitted, consideration denied—Onus is on executant. 71 Ind. Cas. 783: 5 L.L.J. 198: A.I.R. 1924 Lah. 39.

———Ss. 101 to 104—Consideration—Admission in unregistered document—Execution proved—Onus on executant to prove failure no difference in effect between registered and unregistered documents.

Where an unregistered document, the execution of which is admitted or proved, contains an admission or recital of the payment of the consideration, the onus lies on the person executing the document to prove that he did not receive the consideration. There is no valid reason in principle for drawing a distinction between an admission in a registered deed and that contained in an unregistered document, in so far as the question of onus probandi is concerned. 88 Ind. Cas. 301: 7 L.L.J. 306: 6 Lah. 470: 26 P.L.R. 369: A.I.R. 1925 Lah. 471 (F.B.).

———Ss. 101 to 104—Consideration—Pro-note—Onus on maker to prove failure—But payee's failure to make out can be availed of by maker.

Though it is undoubted that the onus does lie upon the defendant, to prove that no consideration was given, nevertheless, if a plaintiff, when consideration was denied in the written statement, goes into the witness box, and if the result of his examination is that he fails to establish the point which he set out to make, namely, that he gave the consideration and the Court is thus satisfied that he did not give the consideration which he alleges, the defendant can avail himself of that and has a right to decree. This in no way trends upon the ordinary rule that the defendant must prove absence of consideration if that is his case. 79 Ind. Cas. 464: 67 Ind. Cas. 684: A.I.R. 1923 All. 214.

———Ss. 101 to 104—Consideration—Admission in registered document.

Where plaintiff recited and admitted the receipt of a sum in the registered document, the burden of proof to show that he did not receive it is on him. 76 Ind. Cas. 916: 6 L.L.J. 457: A.I.R. 1923 Lah. 404.

———Ss. 101 to 104—Consideration—Promise to pay—Consideration denied onus on payee.

Where the document was couched in the following terms:—

"Undersigned promise to pay to Lala Hira Lal and Assa Ram the sum of Rs. 1,000 (rupees one thousand only) payable during the period of one year without interest".

Held, that the burden of proof was on the executee to prove consideration where the executant admitted only execution while the other members of the family of the executant denied both execution and consideration. 86 Ind. Cas. 230: A.I.R. 1923 Lah 346

———Ss. 101 to 104—Consideration—Admission in sale-deed—Onus on person pleading failure—Purchaser not in po,session—Insuffi ient to discharge.

Where a vendor admits in his sale-deed the receipt of consideration, the onus of proof hat consideration was not paid lies on the person p'eading the absence of consideration. The mere fact that the purchaser was not in possession after his sale is insufficien' to discharge it. 68 Ind. Cas. 732: A.I.R. 1923 Nag. 15.

———Ss. 101 to 104—Consideration—Admiss'on of execution—Onus of failure on defendant.

Defendant having admitted the execution of the document it is for him to establish that consideration did not pass. 70 Ind. Cas. 804: 1923 P.H.C.C. 20: A.I.R. 1923 Pat. 205.

———Ss. 101 to 104—Consideration—Unstamped entry—Plaintiff's failure to pr.duce account books—Onus of failure not on defendant.

The plaintiffs claimed certain sum of money, principal and interest included It was alleged that this transaction had been entered in the plaintiff's account book, which had been duly signed by the defendant, who had also made an entry in the same account book in his own handwritting. Defendant denied having borrowed any money from the plaintiffs and alleged that there had formerly been a partnership between him and them. He stated that the plaintiff contemplated carrying on another kiln in partnership with him and that under that impression and thinking that the plaintiffs would contribute a similar sum towards the partnership capital, he had signed and written the memorandum in question, without however having received any sum of money. The entry was not stamped and attested because it was intended to have the whole transaction duly attested and completed when land could be procured.

Held, the burden of proof of the failure of the consideration could not be thrown on the defendant. The failure to produce the Bahikatha of the previous year by the plaintiffs to contradict the defendant who alleged partnership, strengthened defendant's position. 60 Ind. Cas. 730: 4 L.L J. 73: A.I.R. 1922 Lah. 305.

———Ss. 101 to 104—Consideration—Renewal bond—Consideration yet to be proved by plain iff.

In a suit on a bond, the plaintiff is not absolved from proving the consideration merely because the suit bond was executed in consideration of previous bond. 40 P.L.R. 1921: A I.R. 1921 Lah. 374.

———Ss. 101 to 104—Consideration—Execution admitted partial failure pleaded—Onus on debtor.

Where the execution of the bond had been admitted and the receipt of consideration was not denied but it was alleged that full consideration could not be admitted, and finally repayment of the debt was definitely alleged.

Held, that the onus was on the debtor to show that the bond was without consideration. 77 Ind. Cas. 246: 4 L.L.J. 199: A.I.R. 1921 Lah. 199.

———Ss. 101 to 104—Consideration—Partial failure—Onus on mortgagor.

Where in a suit by mortgagee for possession as mortgagee the mortgagor did not deny receipt of whole consideration but pleaded non-receipt of a part.

Held, that the onus to show that consideration had not passed in full is on the mortgagor. 20 P.L.R. 1915: 64 Ind Cas. 901: 2 Lah. 249: 106 P.L.R. 1921: A.I.R. 1921 Lah. 128.

———S. 102—Consideration—Recitals.

Where a registered conveyance of land recites that consideration is fully paid the plaintiff in his suit to recover consideration must prove that the entry in the document is incorrect. 57 Ind. Cas. 954 (Cal.).

———S. 102— Consideration— Promissory note—Admission of execution.

Where in a suit on a pro-note the defendant admits execution but pleads want of consideration the burden of proof is on him to prove his plea. 2 L.L.J. 609: 56 Ind. Cas. 638.

———Ss. 102 and 103—Consideration—Sale of land—Title-deeds handed over to vendee—Presumption.

Mere denial by the vendor of the receipt of the consideration acknowledged in the recitals of deed of sale is not in all cases sufficient to cast upon the vendee the burden of proving the payment of the consideration especially when the vendee has been in possession and enjoyment of the subject-matter and in possession of the title-deeds. 4 Pat L.J. 517: 53 Ind. Cas. 83.

———S. 102—Consideration—Onus—Recitals.

If a mortgage-deed expressly mentions the passing of consideration from the mortgagee to the mortgagor, the onus of proving the contrary in a suit on the mortgage is on the mortgagor and his representatives in interest. 1 Pat. L.W. 413: 39 Ind. Cas. 63[illegible].

———S. 102— Consideration —Hiba-bil-iwaz— Payments of consideration.

The person in whose favour a Hiba-bil-iwaz is executed must show that the consideration as described in the instrument was paid. 25 C.L J. 286: 38 Ind. Cas. 882.

———Ss. 102 and 103— Consideration— Presumption as to receipt of.

The vendor's admission at the time of registration, of his having received consideration throws the onus on him to show that he did not in fact receive it; and the onus is not discharged by mere denial of such receipt. 29 P.W.R. 1917: 37 Ind. Cas. 874.

———S. 103—Consideration—Non-receipt of.

The burden of proof as to the non-receipt of the consideration money for a bond, the execution of which is proved, is on the executant. 3 O.L.J. 473: 37 Ind. Cas. 31.

———Ss. 102 and 103—Consideration—Presumption—Evidence Act, S. 114.

Where it is pleaded that no consideration passed for a mortgage the burden is on the mortgagor to establish it. Where the statement of mortgagor renders it probable that he executed the document without consideration, the onus is shifted on to the other side but where the document is in the hands of the mort

gagee the presumption is that consideration has passed. 1917 Pat 40: 3 Pat. L.W. 226: 35 Ind Cas. 56.

———S. 103—Consideration—Non-payment of—Plea as to.

If the executant of a deed which is admitted are proved sets up non-payment of the consideration money he must prove it. 23 C.L.J. 553: 34 Ind. Cas. 777.

———S. 103—Consideration—Onus of proof—Mortgage.

In a suit brought against the heirs of an original debtor for the recovery of moneys advanced on the security of mortgage-deeds the onus lies on the plaintiffs to establish that full consideration passed. 58 P.R. 1916: 74 P.W.R. 1916: 58 P.R. 1917: 32 Ind. Cas. 454.

———S 102—Consideration—Promissory note—Admission of execution.

If a defendant admits execution of the pro-note and pleads absence of consideration the onus is upon the plaintiff, but such onus shifted to the defendant as in this case he was a man of business with sound knowledge of English who had admitted having received a portion of the consideration and signed a pro-note expressly providing that it was 'for value received'. 100 P.R. 1915: 189 P.W.R. 1915: 32 Ind. Cas. 40.

———S. 103—Consideration—Want of.

The onus is on executant to prove non-receipt of consideration after he had acknowledged to have received it at the time of registration. 78 P.R. 1915: 173 P.W.R. 1915: 31 Ind. Cas. 212.

———S. 103—Consideration—Mortgage—Want of onus.

The onus of proving want of consideration lies heavily on the party alleging it. But if it is found that he is a man of weak intellect and hard of hearing who played the part of an irresponsible puppet in the hands of the opposite party, the onus is mitigated, and the Court might for its own satisfaction demand proof of consideration from the opposite party. 2 O.L.J. 1: 27 Ind. Cas. 581.

———S. 103—Consideration—Burden of proof of non-receipt of full consideration.

A mortgagor disputing the receipt of a portion of the mortgage money which he admitted to be due by him before Sub-Registrar, has to show that the consideration did not pass in full. 20 P.L.R. 1915: 245 P.W.R. 1915: 26 Ind. Cas. 913.

———Ss 102 and 103—Consideration—Acknowledgment of receipt of consideration—Effect of.

Mere proof of acknowledgment of receipt of consideration does not necessarily shift the burden or must not necessarily be taken as insufficient to shift the burden of proof. 28 M.L.J. 92: 26 Ind. Cas. 899.

———Ss. 102 and 103—Consideration—Delay in suing for possession—Registered sale.

When, after a very long delay the vendee sues for possession of the property sold to him, the onus is on him to show consideration for the sale. 68 P.R. 1900, Foll. 58 P.R. 1914: 236 P.L.R. 1914: 152 P.W.R. 1914: 25 Ind. Cas. 538.

———Ss. 102 and 103—Consideration—Admission—Onus—Recitals—Presumption

The recital of receipt of consideration in a mortgage document is prima facie evidence of its having passed not only against the mortgagor but also persons claiming under him subsequent to the date of mortgage. 36 All. 478: 12 A.L.J. 806: 25 Ind. Cas. 426.

———S. 103—Consideration—Want of—Undue influence.

Where a defendant admits execution of a deed but pleads failure of consideration and undue influence the burden of proving these lies on him. 21 Ind. Cas. 581 (Oudh).

———S. 103—Consideration—Assignment.

Where receipt of consideration before the Registering Officer is admitted in a deed of assignment, the onus is on the assignor to prove want of consideration. 21 Ind. Cas. 8 (Oudh).

———Ss. 102 and 103—Consideration—Execution and registration of bond.

Mere execution and registration of bond without any other proof is not conclusive to prove that consideration passed between the parties. Oral evidence to explain the purpose of a registered deed purporting to be a bond is admissible. 24 M.L.J. 355: 13 M.L.T. 191: 15 Bom. L.R. 452: (1913) M.W.N. 155: 17 C.L.J. 284: 17 Ind. Cas. 842 (P.C.).

———S 103—Consideration—Fiduciary relation—Sale to a person in a position of active confidence.

In the case of a person in a position of active confidence the onus is on the vendee to prove that the transaction was for consideration and for good faith. 11 M.I.A. 551, Foll. 8 N.L.R. 150: 17 Ind. Cas. 363.

———Ss. 102 and 103—Consideration—Execution admitted by mortgagor but denied by transferee—Onus.

In a suit on a mortgage against the mortgagor and his transferee the mortgagor admitted execution but denied consideration and the transferee denied both execution and consideration: held, that the burden of proving the payment of consideration lay upon the plaintiff. 10 A.L.J. 108: 15 Ind. Cas. 121.

———Ss. 102 and 103—Consideration—Purchaser of equity of redemption.

A purchaser of an equity of redemption cannot be in a better position than the mortgagor himself: so the burden would lie on the purchaser to prove want of consideration. Where in such cases the mortgagor himself has not raised the plea of undue influence or unconscionable bargain, the purchaser who buys the property subject to such a mortgage cannot take those pleas and ask the Court to reduce the interest on such grounds. 15 O.C. 211: 15 Ind. Cas. 5.

———S. 102—Consideration—Portion left in the hands of the mortgagee—Burden of proof.

If under the terms of a mortgage a portion of the consideration is left with the mortgage for payment to some creditors, the mortgagee in the first instance has to prove payment. The execution of mortgage and the proceedings at the time of registration involve no admission that the mortgagee had fulfilled his part of the contract. 14 Ind. Cas. 136 (Oudh).

———S. 102—Consideration—Mortgage.

The fact that a usufructuary mortgagee took no stock to recover possession of the mortgaged property until the last day of the limitation raises a presumption that he did not consider himself entitled to it; and therefore the burden of proving consideration lies on the mortgagee. 33 All. 483: 8 A.L J. 368: 10 Ind. Cas. 927.

———S. 103—Consideration—Failure of—Onus.

Plaintiff brought a suit to set aside a release deed on the ground that there was failure of consideration. Defendent admitted that the consideration mentioned in the deed was false, but contended that there was consideration **Held**, that it lay on the plaintiff to prove want of consideration. 9 M.L.T. 480: 10 Ind. Cas. 501.

———S. 103—Consideration—Assignment—Burden of proof.

The assignee must prove the reality of the consideration in the case of an assignment. 9 M.L.T. 407: 10 Ind. Cas. 291.

———S. 102—Consideration—Mortgage suit against Insolvents.

In a mortgage suit against a person against whom a petition for adjudication as an insolvent has been made the burden of proving that consideration passed and that the mortgage was created before the date of the insolvency is on the plaintiff, while that of showing that the mortgage was void as being a voluntary settlement lies on the Official Assignee. (1910) M.W.N. 532: 8 M.L.T. 335: 8 Ind. Cas. 293.

———S. 102—Consideration — Mortgage—Delay in proof.

Where execution of mortgage-deed is admitted but consideration denied the executant must show non-receipt of consideration. The onus is not shifted by the delay in bringing suit. 27 All. 71, Foll. 7 Ind. Cas. 646 (All.).

———S. 103—Consideration — Mortgage — Execution admitted—Consideration denied—Burden of proof.

Where in a suit on a mortgage-deed instituted by the assignee of the mortgage, the mortgagors admitted execution but denied consideration, the burden of proving that consideration did not pass, is on the mortgagors and not on the assignee. 7 Ind. Cas. 69 (All).

———Ss. 102 and 103—Consideration—Admission before registering officer—Value of.

If the vendor admits receiving the consideration for a sale before the Sub-Registrar and the admission was followed by mutation of names in favour of the vendee, there is sufficient proof that it was paid to the former by the latter. 89 P.W.R. 1909: 83 P.L.R. 1909: 4 Ind. Cas. 890.

———S. 102—Consideration—Burden of proof—Bord reciting receipt of consideration—Subsequent denial of receipt of consideration.

Where execution of a bond is admitted and the bond contains an admission that consideration has passed, it is for the executant to get rid of the admission which he has made in the bond. It is not enough for him to prove that prior to the institution of a suit on the bond he denied receipt of consideration even if such denial was made before the registering officer. 1904 A.W.N. 163: 1 A.L.J. 423: 27 A. 71.

———S. 102— Consideration — Execution of deed admitted—Effect of.

If the execution of a bond is admitted by the executant the burden of proving want of consideration lies upon him. 9 M.L.J. 630: 4 Ind. Cas. 725

———Ss. 101 to 104—Consideration—Proof of payment—Burden of proof—Revision—Civil cases—Material irregularity.

The plaintiff sued on a hundi. The defendant pleaded want of consideration The plaintiff produced a hundi in lieu of which he alleged the hundi in suit was executed. The Court decreed the claim. On appeal, the District Judge dismissed the suit holding that the burden of proving the passing of consideration lay on the plaintiff and he had not discharged it. The plaintiff applied for revision. **Held**, that the onus of proving want of consideration lies on the drawer of a negotiable instrument; that the defendant, on whom the onus should have been placed. not having discharged it was liable for the amount due on the hundi. 24 P.L.R. 1910: 25 P.W.R. 1910: 5 Ind. Cas 891.

———Ss. 101 to 104—Consideration — Pro-note—Admission of execution— Consideration— Onus of proving want of consideration or illegal consideration.

Where the defendant admitted execution of a pro-note in favour of the plaintiff, a woman, but pleaded that as it was for the purpose of future co-habitation and the consideration was illegal, the onus lay upon the defendant to prove such a case. Where there was no plea of absence of consideration and the defendant failed to prove his case of illegal consideration, there must be a decree on the pro-note, notwithstanding that the plaintiff had not proved her case, *i e.*, cash consideration. Where the plea is that consideration is immoral, a special plea that there was failure of consideration is superflous and immaterial. (1902) 13 M.L.J. 7.

12. Contract.

———Ss. 101 to 104—Contract—Concluded contract.

In an action on an alleged contract, the burden of proof is of course upon the plaintiffs to show that a firm contract has been entered into between the parties and that something more than mere negotiations had taken place. A.I.R. 1939 Rang. 423: 185 Ind. Cas. 705.

———Ss. 101 to 104—Contract—Grounds of invalidity—Onus on him who alleges.

If a contracting party alleges that an agreement is opposed to public policy, it is for him to set out and prove those special circumstances which will invalidate the contract. 1 C.L.J. 261 and 8 N.L R. 182, Foll. 107 Ind. Cas. 903: A.I.R. 1928 Nag. 273.

———Ss. 101 to 104—Contract— Condition — Onus of proving it—Conditional.

The party who alleged that a contract is conditional on the happening of a certain contingency must prove the existence of such a condition by clear and unequivocal evidence. 105 Ind. Cas. 265: A.I.R. 1927 Lah. 481.

——Ss. 101 to 104—Contract—Different intention—Onus on party asserting.

The ordinary presumption is in favour of the legality of a contract and it is for those, who assert that it was not intended to perform the contract in the manner recited therein, to prove their assertion. 94 Ind. Cas. 304=7 Lah. 442=A.I.R. 1926 Lah. 318.

——Ss. 101 to 104—Contract—Intention not to enforce—Party alleging must prove.

The party disputing that he was liable under certain contracts on the ground that they were wagering contracts would have to show that at the time the contracts were entered into, the parties did not intend to carry out the contracts, but agreed to abide by the prices ruling at the due dates, when differences would be paid or received. 73 Ind. Cas. 1032=25 Bom. L.R. 520=A.I.R. 1923 Bom. 458.

——Ss. 101 to 104—Contract—Wagering—Onus on party pleading.

In contracts, the burden of proof, that they are of wagering nature is on the person who takes that defence. 66 Ind. Cas. 943=24 Bom. L.R. 115=A.I.R. 1922 Bom. 81.

——Ss. 102 and 104—Contract—Damages.

In a suit for damages for breach of contract, it is for the plaintiff to establish both the contract and its breach. 33 Ind. Cas. 838 (Cal.).

——S. 103—Contract—Breach—Damages.

Where there is a **prima facie** breach of contract, the party guilty of the breach has to prove that the breach is excusable under any of the exception clauses of the agreement which he relies on. 20 C.L.J. 133=20 C.W.N. 159=27 Ind. Cas. 7.

——Ss. 101 to 104—Contract—Presumption of irrevocability—Proof of revocability.

Per **Mukerjee, J.**:—Every contract is **prima facie** permanent and irrevocable and it lies upon a person who says that it is revocable or determinable, to show either some expression in the contract itself or something in the nature of the contract, from which it is reasonably to be implied, that it wsa not intended to be permanent and irrevocable but was to be in some way or other, subject to determination. The contract may for instance, be shewn to be for a limited time terminable upon the happening of a particular contingency or terminable at the option of either party upon reasonable notice. In each case, however, it lies upon the parth who asserts that the contract is terminable to show how and in what manner it is revocable or determinable. (1907) 6 C.L.J. 727.

13. Criminal trial.

See also—(1) CRIMINAL P. C., Ss. 208, 286, 290 AND 367.

(2) CRIMINAL TRIAL—EVIDENCE—APPRECIATION OF.

(3) EVIDENCE ACT, S. 114—(*i*) NON-PRODUCTION OF EVIDENCE. (*ii*) RECENT POSSESSION.

——Ss. 101 to 104—Criminal trial—Duty of prosecution—Lacuna in case—Benefit to accused—Shifting of onus.

In proving its case the prosecution will have to place before the Court materials or circumstances from which an inference compatible with the innocence of the accused is not possible. Not only that, the prosecution will have to further establish that the circumetances are incapable of explantion upon any other reasonable hypothesis than that of his guilt. If there are certain lacuna in the case, the benefit cannot go to the prosecution. In criminal cases the onus of proving the general issue never shifts. It always lies on the prosecution to prove beyond reasonable doubt the guilt of the accused. The accused is entitled to the benefit of any gaps in the case for the prosecution. If at the end of the case it appears to the Court that the prosecution has failed to make out its case, the verdict must be of 'not guilty'. A.I.R. 1946 All. 227=227 Ind. Cas. 269=47 Cr. L.J. 10411=945 A.W.R. (H.C.) 298(2).

——Ss. 101 to 104—Criminal trial—Duty of prosecution—Benefit of doubt.

Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence. The prosecution must, even though there may be some lacuna in the defence, not strictly consistent with the innocence of the accused, still prove his guilt beyond all reasonable doubt. A.I.R. 1946 All. 191=1945 O.W.N. (H.C.) 334 (2) =1945 A.W.R. (H.C.) 287=1946 A.L.J. 86=224 Ind. Cas. 366=47 Cr.L.J. 611.

——Ss. 101 to 104—Criminal trial—Fight between two parties—Persons on either side injured—Prosecution and defence evidence unworthy of credit—Accused, held could not be convicted.

Where in the case of a fight between two parties, some persons on either side receive injuries and the entire evidence for the prosecution and defence is unworthy of credit, neither side giving a true account of the incident, the accused cannot be convicted merely because they had injuries on their persons indicating their active participation in the flight, for to do so would offend against two cardinal principles of criminal justice, namely, that the prosecution must prove its case, and that there is no burden of proof on the accused. A.I.R. 1944 Sind 94=I.L.R. (1943) Kar. 294=45 Cr.L.J. 526=212 Ind. Cas. 109.

——Ss. 101 to 104—Criminal trial—Burden of proof on prosecution and on accused, distinction—Degree of certainty—Burden on prosecution to prove guilt beyond reasonable doubt.

When the burden of the issue is on the prosecution, the case must be proved beyond a reasonable doubt. Where, however, the burden of an issue is on the accused, he is not required to prove it beyond a reasonable doubt or, in default, to incur a verdict of guilty; it is sufficient if he succeeds in proving a **prima facie** case, for then the burden of proving such issue is shifted to the prosecution which has still to discharge its original and major onus that never shifts, *i.e.*, that of establishing, on the whole case, guilt beyond a reasonable doubt. Where the Court is left in doubt whether the circumstances bringing the case of the accused within a general exception exist or not, the accused is entitled to acquittal. The test is not whether the accused has proved beyond all reasonable

doubt that he comes within the exception but whether a reasonable doubt is thrown on the guilt of accused.

Consequently, in a murder case, though the burden of proving an accident is on the accused person, it cannot be said that the onus is a heavy one or even as heavy as the onus on the prosecution to prove its case. A.I.R. 1943 Lah. 56=44 P.L.R. 554=44 Cr.L.J. 397=205 Ind. Cas. 552.

——Ss. 101 to 104—Criminal trial—Accused not producing any evidence to show that they were innocent—If can be taken into consideration.

It is not for the accused to prove how the man was murdered but where, in a village of two hundred houses, the murder had taken place just after the sun rise, the fact that the accused could not produce any evidence to show that they were innocent can be taken into consideration with other evidence against them. A.I.R. 1942 Oudh 193=1941 O.W.N. 1246=43 Cr.L.J. 243=1941 A.W.R.C.C. 354=17 Luck. 376=197 Ind. Cas. 701.

——Ss. 101 to 104—Criminal trial—Exceptions—Burden of proof—Benefit of doubt. *Per* **Iqbal Ahmad, C. J., Bajpai, Md. Ismail and Mulla, JJ. (Allsop, Collister and Braund, JJ. dissenting).**

Accused pleading general exception—Evidence not sufficient but sufficient to create doubt in mind of Court—Accused is entitled to acquittal. A.I.R. 1941 All. 402=1941 A.L.J. 619=43 Cr. L.J. 177=I.L.R. (1941) All. 843=1941 A.W.R.H.C. 320=197 Ind. Cas. 525 (F.B.).

——S. 102—Criminal trial.

Where an accused who is prosecuted for violating an order under S. 144, Criminal P. C. denies knowledge of the order, all that can reasonably be demanded of the prosecution is proof of circumstances from which it may be inferred that the accused had knowledge of the order. If such proof is forthcoming, the onus is on the accused to prove ignorance of the order despite publication. A.I.R. 1941 All. 70=1940 A.L.J. 885=1940 A.W.R.H.C. 642=I.L.R. (1941) All. 186=42 Cr. L.J. 298=192 Ind. Cas. 466 (F.B.).

——Ss. 101 to 104—Criminal trial—Fundamental principle of administration of criminal justice.

The fundamental principle upon which the administration of criminal justice is founded in this country, is, that an accused person must be presumed to be innocent until the contrary is proved by credible testimony adduced by the Crown, a duty cast upon the prosecution, and on the prosecution alone, though certain limited exceptions under specified safeguards are, no doubt, to be found in the Criminal P. C. and the Evidence Act. A.I.R. 1941 Mad. 1=1940 M.W.N. 1105=52 M.L.W. 710=43 Cr. L.J. 677=195 Ind. Cas. 129.

——Ss. 101 to 104—Criminal trial—Duty of prosecution—Presumptions against accused.

There is a certain sense in which the onus of proving the guilt of the accused always lies on the prosecution, for even in those cases in which the accused is required to produce evidence on some point or other, (as for example under Ss. 105 and 106 of the Evidence Act) and does so, the rejection of this evidence as unsatisfactory does not necessarily warrant the conclusion that he is guilty, and the prosecution is bound to fail in every case in which the guilt of the accused is not established on the entire evidence beyond reasonable doubt That the onus of proving the guilt of the accused beyond reasonable doubt "never changes, it always rests on the prosecution" is a proposition supported by very high authority. But its importance really lies, in the way the defence evidence is to be treated. If an explanation is given by the accused which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal because the Crown has not discharged the onus of proof imposed upon it, of satisfying the jury beyond reasonable doubt of the prisoner's guilt. A.I.R. 1941 Pat. 175=42 Cr. L.J. 215=21 P.L.T. 1021=191 Ind. Cas. 702=7 B.R. 241.

——Ss. 101 to 104—Criminal trial—Onus to prove guilt—General rule that it always lies on prosecution is subject to exception in S. 105.

The general rule that the onus always lies on the prosecution to prove the guilt is subject to statutory exception contained in S. 105. The prosecution cannot claim a verdict of guilty because the accused puts forward a false defence. The guilt must be determined on the strength of the prosecution evidence alone, but where the accused puts forward a plea that he did commit the offence charged but in circumstances that excused or mitigated it, the prosecution in such cases can show that no such circumstances exist and so the claim is averted. With the rejection of the defence version, however, the duty of the prosecution does not end and they have still to show that the accused caused death in circumstances which make the offence murder and in this sense, the onus never shifts from the prosecution. A.I.R. 1940 Lah. 54=41 Cr. L.J. 447=187 Ind. Cas. 15.

——Ss. 101 to 104—Criminal trial—Accused having special knowledge.

Burden is on prosecution to establish that the act alleged to constitute murder was really the act of a person other than the deceased. The burden is not cast upon an accused person of proving that no crime has been committed though it has been established that the accused has special knowledge on the point whether crime was committed or not. A.I.R. 1940 Mad. 1=1939 M.W.N. 883=50 M.L.W. 452=41 Cr. L.J. 369=186 Ind. Cas. 704.

——Ss. 101 to 104—Criminal trial—Prosecution must prove case irrespective of defence.

It may be that the accused were not well defended at the trial, and did not put forward a defence which was obviously open to them but they cannot be convicted upon a criminal charge merely on that account, since the prosecution must clearly establish its case irrespective of the defence taken. A.I.R. 1940 Pat. 701=41 Cr. L.J. 795=189 Ind. Cas. 737=6 B.R. 854.

——Ss. 101 to 104—Criminal trial—Court doubting truth of prosecution version—Benefit of doubt.

Once the Court has any doubt about the truth of the version even as first recorded in the first information report, then the accused is entitled to the benefit of that doubt. A.I.R. 1940 Pat. 365=41 Cr. L.J. 114=185 Ind. Cas. 162=6 B.R. 110.

——Ss. 101—104—Criminal trial—Intention and motive.

When criminal intention is an ingredient of an offence, it is on the prosecution to prove that intention just as much as any other ingredient. A.I.R. 194

Pat. 14=40 Cr. L.J. 833 (2)=20 P.L.T. 879=183 Ind. Cas. 660=5 B.R. 978.

——Ss. to 101 ti 104—Criminal trial.

A person against whom the conditional order is made and who is required to show cause against the same has only to show cause in respect of the matter complained of, and the complainant has to make out a **prima facie** case, that is to say, he has to produce before the Court legal evidence as in a summons case which would justify a finding that what is complained of amounts to a public nuisance. The burden of proof is not on the person served with the conditional order. A.I.R. 1939 Bom. 92=41 Bom. L.R. 84=40 Cr. L.J. 444=180 Ind Cas. 511.

——Ss. 101 to 104—Criminal trial.

Prosecution must prove the guilt of the accused—There is no burden on the accused to prove his innocence. It is sufficient for him to raise a doubt as to his guilt. He is not bound to satisfy the jury of his innocence. A.I.R. 1939 Sind. 209=41 Cr. L.J. 28=I.L.R. (1940) Kar. 249=184 Ind. Cas. 474.

——Ss. 101 to 104—Criminal trial—Merely proving *prima facie* case, if sufficient.

Prosecution's duty in a criminal case is not merely to prove a **prima facie** case. The prosecution have to do more than that; they must prove the guilt of the accused; and there is no principle in the English Law whereby if the prosecution has proved a **prima facie** case, the accused must bring evidence in rebuttal or be convicted. A.I.R. 1939 Sind 209=41 Cr. L.J. 28=I.L.R. (1940) Kar. 249=184 Ind. Cas. 474.

——Ss. 101—104—Criminal trial—Evidence against accused—No explanation by accused—He must suffer consequences.

An accused person is required to explain the circumstances which appear in the evidence against him and if he cannot or will not do so, he must take the consequences. If he chooses to take up the position that he relies upon the technicality that the whole burden of proof was upon the prosecution and refuses to say anything about the matter, he can hardly be surprised if he is convicted on the evidence produced by the prosecution if that proves circumstances from which his guilt can be inferred. A.I.R. 1938 All. 252=1938 A.L.J. 222=1938 A.W.R. 147=39 Cr. L.J. 548=I.L.R. (1938) All. 422=175 Ind. Cas. 233.

——Ss. 101 to 104—Criminal trial—Prosecution must establish guilt.

The accused must be presumed to be innocent unless the prosecution have satisfactorily and without any reasonable doubt shown that the guilt is brought home to the accused. A.I.R. 1938 Pat. 12=18 P.L.T. 915 =39 Cr. L.J. 254=172 Ind. Cas. 944=4 B.R. 204.

——Ss. 101 to 104—Criminal trial—Prosecution should first make out the case before accused is called upon to answer.

Before an accused person is called upon to make any answer to the case for the Crown, there must be some credible account of the circumstances before the Court. Where the only facts which have been proved beyond question are that the accused was watering his land when he was attacked by two members of the prosecution party who at least felled him to the ground that very soon afterwards there were three, possibly four, members of the prosecution on the spot, and also four or five members of the accused's party, and that they proceeded to fight; the members of both parties were injured; on the prosecution side there was at least one spear and one **takwa**; and on the accused's side, one spear and some other sharp weapons; with only this amount of evidence before the Court, it would be impossible to come to any definite conclusion on the matter. Apart from the plea of self-defence, therefore, it would be difficulty to convict the accused and impossible to apply S. 149, Penal Code:

Held, however, that the plea of self-defence was established on evidence, that the accused had no course left open to them in the circumstances except to put up fight in support of their seriously injured friend and that when a fight like this had started, in which several of the attackers were armed with sharp-edged weapons, it might sometimes be necessary to take the risk of killing a member of the opponent's party. (1938) 171 Ind. Cas. 906=39 Cr. L.J. 7=40 P.L.R. 17.

——Ss. 101 to 104—Criminal trial—Prosecution case of explosion by petrol.

Where the cause of explosion is alleged to be by use of fire, it is not for the defence to prove that there was some cause for explosion other than petrol. A.I.R. 1937 P.C. 108=38 Cr. L.J. 503=1937 M.W.N. 385=46 M.L.W. 125=42 C.W.N. 1=166 Ind. Cas. 67 (P.C.).

——Ss. 101 to 104—Criminal trial—Murder.

The question how the deceased met his death is really not necessary for the defence to answer, as it is for the prosecution to establish affirmatively that he died in the way they allege. (1937) 39 P.L.R. 629.

——Ss. 104 to 104—Criminal trial—Defence evidence—Rejection of—Position of prosecution.

When defence evidence is rejected, the situation simply is as if the evidence had never existed. If the defence evidence is believed, it would, of course, rebut the prosecution. If it is not believed, the prosecution is left just where it was before the defence witnesses were called. A.I.R. 1937 Mad. 975=1937 M.W.N. 878=46 M.L.W. 522=(1937) 2 M.L.J. 620=39 Cr. L.J. 147 =172 Ind. Cas. 498.

——Ss. 101 to 104—Criminal trial—Defence false—Burden still lies on prosecution.

A conviction should not be based upon the failure of the accused to make good their defence. Even if a defence is palpably false, the burden still rests upon the prosecution, which must establish beyond reasonable doubt that no other alternative than the truth of the prosecution case will explain the facts. A.I.R. 1937 Mad. 968=1937 M.W.N. 733=47 M.L.W. 140=39 Cr. L.J. 144=172 Ind. Cas. 501.

——Ss. 101 to 104—Criminal trial—Difference between Civil and Criminal Courts.

In civil suits reliance may be placed on some probable events but when one comes to criminal prosecution the onus is on the prosecution to establish beyond all reasonable doubt the guilt of the accused. (1937) M.W.N. 987.

——Ss. 101 to 104—Criminal trial—Murder case—Intention or knowledge.

Law in India does not regard every case of homicide to be **prima facie** murder—The burden of proving certain intent or knowledge is on the prosecution by the

statutory definition of culpable homicide and murder. This burden is thrown on prosecution in case of every offence under Penal Code. The maxim **actus non facit reum, nisi mens set rea,** has no application in India. A.I.R. 1937 Nag. 274=39 Cr. L.J. 92=172 Ind. Cas. 204.

——S. 101—Criminal trial.

The burden of proving the right of private defence is on the accused. A.I.R. 1937 Pesh. 101=39 Cr. L.J. 142=172 Ind. Cas. 499.

——Ss. 101 to 104—Criminal trial.

Where a witness called by the prosecution fails to corroborate the prosecution story, it is no part of the accusedto seek to remedy the omission in cross-examination. A.I.R. 1937 Rang. 516=39 Cr. L.J. 187 =172 Ind. Cas. 902.

——Ss. 101 to 104—Criminal trial—Case falling under exception—Effect.

Accused denying **in toto** acts alleged—Evidence for prosecution showing act falling under exception—Presumption enacted in last line of S. 105 does not at all arise—The burden is on prosecution to establish guilt beyond reasonable doubt and if upon review of materials on record there appears a reasonable doubt as to whether the case falls within exception, the prosecution has failed to discharge that burden and the accused must be acquitted or convicted only of the minor offence, as the case may be. A.I.R. 1937 Rang. 83= 14 Rang. 666=38 Cr. L.J. 524=168 Ind. Cas. 193 (F.B.).

——Ss. 101 to 104—Criminal trial—Accused making false statement—Inference.

Where an inference adverse to an accused person can be drawn from a number of circumstances, if the accused person is unable to offer any explanation which is compatible with his innocence or if it is proved that any explanation which he offers is false, that is a further circumstance from which an inference can be drawn against him, but it is unsafe to hold that an accused person is necessarily guilty because he is making a false statement. Every case must be considered on its own merits. A.I.R. 1936 All. 833=1936 A.L.J. 1124=1936 A.W.R. 927=38 Cr. L.J. 205=166 Ind. Cas. 430.

——Ss. 101 to 104—Criminal trial—Onus of proof, shifting of.

The onus of proof in criminal cases never shifts to the accused and they are under no obligation to prove their innocence or adduce evidence in their defence or to make any statement. A.I.R. 1936 Cal. 73=40 C.W.N. 432=37 Cr. L.J. 394=63 Cal. 929=64 C.L.J. 154=161 Ind. Cas. 74.

——Ss. 101 to 104—Criminal trial.

In accordance with the principles of English and Anglo-Indian procedure it is for the prosecution to prove its case. A.I.R. 1936 Lah. 28=37 Cr. L.J. 428 =161 Ind. Cas. 344.

——Ss. 101 to 104—Criminal trial—Failure of accused to explain suspicious circumstances—Inference of guilt.

Though in a criminal case the burden to prove the guilt is always on the prosecution and never shifts to the accused, it is open to the prosecution to rely on an inference from the failure of the accused to give an explanation of acts, suspicious in themselves with which he is connected. A.I.R. 1936 Nag. 160=I.L.R. (1937) Nag. 38=39 Cr. L.J. 349=173 Ind. Cas. 639.

——Ss. 101 to 104—Criminal trial—Duty of prosecution—Shifting of burden.

In criminal trial, the burden of proof is always on the prosecution, and it is only when a good **prima facie** case has been made out against the accused sufficient to justify his conviction of that offence, that the burden shifts upon the accused to prove that he is not guilty of any such offence. (1936) 165 Ind. Cas. 458=1936 O.W.N. 1013=37 Cr. L.J. 1130.

——Ss. 101 to 104—Criminal trial.

Where the existence of a right of way is not denied do if there is no reliable evidence in support of the irnial, the Magistrate should then proceed to the enquiry under Ss. 137 and 138, Criminal P. C. and in this enquiry it is for the Crown to lead evidence and the person proceeded against is to answer it. A.I.R. 1936 Pat. 639=17 P.L.T. 791=38 Cr. L.J. 29=165 Ind. Cas. 942=3 B.R. 107.

——Ss. 101 to 104—Criminal trial—Accused is presumed to be innocent—Rebuttal—Considerations.

Every accused person is entitled to be presumed to be innocent till there is evidence of his guilt and the presumption ought not to be too easily displaced; and it may be right to have regard to the position in life of the accused in considering whether it is displaced. That is not to say that by reason of wealth, position or age, any subject is to be deemed to be immune from the consequences of his actions if, in fact, they are criminal. A.I.R. 1936 Pat. 626=17 P.L.T. 794=38 Cr. L.J. 2=165 Ind. Cas. 931.

——Ss. 101 to 104—Criminal trial.

In a criminal case, the accused being entitled to the presumption of innocence, the presumption will be that if the facts will bear an explanation compatible with his innocence, that view should be adopted unless it is proved to be false; but if the circumstances are such that only one inference can follow in the mind of any reasonable man, in such a case there can be a conviction. A.I. R. 1936 Pat. 108=37 Cr. L.J. 219=160 Ind. Cas. 12=2B.R.153.

——Ss. 101 to 104—Criminal trial.

It is one of the fundamentals of criminal juris prudence that an accused person should never be condemned out of his own mouth—Prosecution must prove the guilt beyond reasonable doubt. A.I.R. 1936 Rang. 90=38 Cr. L.J. 927=170 Ind. Cas. 502.

——Ss. 101 to 104—Criminal trial—Duty of prosecution.

In criminal trials, it is not for the accused to say anything unless he chooses and in any case the prosecution must prove their case, apart from any statement made by the accused or any evidence tendered by him. A.I.R. 1935 Cal. 678=39 C.W.N. 1303=36 Cr. L.J. 1462=158 Ind. Cas. 791.

——Ss. 101 to 104—Criminal trial—Benefit of doubt—Great suspicion but nothing inconsisten

with accused's story being true—Accused, if can be convicted.

Where the case is of very great suspicion against the accused and there are a number of facts which lead one to suspect that the real truth has not been placed before the Court either by the accused or by some of the witnesses for the prosecution, but there is nothing in the evidence which is inconsistent with possibility of the story of the accused being either wholly or to a large extent true, in such a position, it would not be right or just to convict the accused of the offence. A.I.R. 1935 Cal. 304=62 Cal. 666=37 Cr. L.J. 698=162 Ind. Cas. 910.

——Ss. 101 to 104—Criminal trial—Presumption is that the accused is innocent.

An accused person is entitled to be considered innocent until he is actually found to be guilty both during the preparation of his trial and during the hearing of his case, although it may be that for the purpose of bringing the trial about and bringing the accused person before the Court, he must be forcibly placed under restraint. A.I.R. 1935 Cal. 101=39 C.W.N. 259=36Cr. L.J. 615=62 Cal. 384=154 Ind. Cas. 1006.

——Ss. 101 to 104—36 Criminal trial.

Accused found with gun, **lathis,** etc., in a room—Prosecution proving offence under S. 399, I. P. C.—Accused offering no explanation of incriminating circumstances—**Held,** prosecution evidence must be accepted. A.I.R. 1935 Oudh 471=36 Cr. L.J. 1003=1935 O.W.N. 770=156 Ind. Cas. 815.

——S. 101—Criminal trial.

False entries in account books alleged by prosecution to have been made by accused—Accused pleading that his father was partner in complainant's firm and entries were made under his authority :

Held, it was the duty of prosecution to prove the negative of the allegations made by accused. A.I.R. 1934 Cal. 500=59 C.L.J. 83=36 Cr. L.J. 74=152 Ind. Cas. 226.

——Ss. 101 to 104—Criminal trial—Onus of proof.

In criminal cases, the onus remains always on the prosecution to prove its case in its entirety and it does not change merely because the prosecution has succeeded in proving one part of its case. All the elements making up the offence have to be proved by the prosecution. A.I.R. 1934 Cal. 425=35 Cr. L.J. 715=38 C.W.N. 474=148 Ind. Cas. 559.

——Ss. 101 to 104—Criminal trial—Accused putting on record statement of his criminal activities—Absence of repudiation—Statement if conclusive.

If a person voluntarily elects to put on record a statement of his criminal activities, and thereafter neither repudiates that statement nor offers a reasonable explanation of it, he has no grievance whatever if the Court regards that statement as conclusive against him. In such circumstances, there is no burden placed on the Crown of establishing the truth of the admissions of guilt **aliunde.** A.I.R. 1934 Cal. 221=35 Cr. L.J. 334=147 Ind. Cas. 32 (F.B.).

——Ss. 101 to 104—Criminal trial—Prosecution failing to prove stains on the clothes as those of human blood—Presumption.

Where the prosecution fails to prove that the blood stains on the clothes found in the possession of the accused were those of human blood, no presumption can be made against the accused, but if it is proved that those stains were of human blood then the accused can be called upon to explain the fact. A.I.R. 1934 Oudh 373=11 O.W.N. 969=35 Cr. L.J. 1265=151 Ind . Cas. 274.

——Ss. 101 to 104—Criminal trial.

When the law presumes the affirmative then the negative is to be proved. Thus where it is admitted by the complainant that there had been sexual intercourse between a man and a woman, the mere co-habitation affords an inference of greater or less strength that marriage has been solemnised between them. The law, therefore, presumes against vice and immorality and on this ground, the presumption is strongly in favour of marriage ; so under S. 366, I. P. C., it is the duty of prosecution to prove the negative. A.I.R. 1934 Sind 119=36 Cr. L.J. 62=28 Sind L.R. 285=151 Ind. Cas. 984.

——Ss. 101 to 104—Criminal trial.

In a criminal case, the onus is on the prosecution to prove the guilt of the accused beyond doubt. It is wrong to suppose that in a criminal case the burden is in some cases shifted to the accused. A.I.R. 1933 All. 893=1933 A.L.J. 1534=35 Cr.L.J. 621=56 All. 250=148 Ind. Cas. 141.

——Ss. 101 to 104—Criminal trial—Standard of proof.

There is only one standard of proof in all the charges and that is that the Crown must prove the charge beyond all reasonable doubt. The nature of the sentence cannot affect the question of proof. A.I.R. 1933 All. 834=1933 A.L.J. 1597=55 All. 639=35 Cr. L.J. 353=146 Ind. Cas. 957.

——Ss. 101 to 104—Criminal trial—Witnesses—Duty of prosecution.

Prima facie, it is for the purpose of prosecution to call such witnesses as they think will establish their case. If the Public Prosecutor knows of a witness who favours the accused, it is his duty to call the witness himself or to see that the defence is supplied with the name of the witness and given an opportunity of calling him. A.I.R. 1932 Bom. 279=34 Bom. L.R. 571=33 Cr. L.J. 613=56 Bom. 434=138 Ind. Cas. 503.

——Ss. 101 to 104—Criminal trial.

If a person takes the trouble to go to a Magistrate and gets an order upon another person restraining him from doing something, **prima facie,** it is very unlikely for him not to take steps so that the other person may know of the restraint imposed upon him, and the burden of proving that the order was not served upon him and that proceedings were conducted behind his back, is on the person against whom the order was made. A.I.R. 1931 Cal. 262=32 Cr. L.J. 680=53 C.L.J. 64 =131 Ind. Cas. 271.

——S. 102—Criminal trial.

Discovery of money with **couries**—Confiscation of whole amount without evidence to show how much was used for gambling—The onus is on prosecution to prove how much was used or intended to be used for gambling. A.I.R. 1931 Mad. 777=61.

M.L.J. 474=34 M.L.W. 710=32 Cr. L.J. 1279=1931 M.W.N. 1310=134 Ind. Cas. 991.

——Ss. 101 to 104—Criminal trial,

A Magistrate acts illegally in institutiing proceedings under S. 110, Criminal P. C., against a person when he is outside the local limits of his jurisdiction. But the burden is on the person bound over to show that he was not within the jurisdiction of the Magistrate when the proceeding was drawn up. A.I.R. 1931 Cal. 65 (1)=35 C.W.N. 255=52 C.L.J. 415=129 Ind. Cas. 688.

——Ss. 101 to 104—Criminal Trial—Qualified privilege—Onus of good faith on defamer.

Qualified privilege, as the term indicates, provides only a qualified protection, and the person charged with the defamation must prove that he used the privilege honestly, and the onus of establishing that lies upon him. 77 Ind. Cas. 913=A.I.R. 1923 All. 167.

——S. 102—Criminal trial—Proof of guilt—Onus on prosecution.

In criminal cases the onus of proving beyond reasonable doubt the guilt of the accused is on the prosecution. 24 C.W.N. 619=31 C.L.J. 310=21 Cr. L.J. 54=56 Ind. Cas. 849.

——S. 103—Criminal trial—Circumstantial evidence.

If conviction is based on circumstantial evidence only, the prosecution must show that the guilt of the accused is the only hypothesis possible. 13 O.C. 1=11 Cr. L.J. 114=5 Ind. Cas. 355.

——S. 102—Criminal trial—Accomplice—Forfeiture of pardon.

The prosecution must prove that the pardon has been forfeited, before an approver can be put on his trial for the offence. 32 Mad. 173=9 Cr. L.J. 571=2 Ind. Cas. 343.

——Ss. 101 to 104—Criminal trial—Offence under Special Act, proof of– Strict proof required.

In the case of an offence under a Special Act, the guilt of the accused ought to be strictly proved. (1905) 2 A.L.J. 411.

——Ss. 101 to 104—Penal Code, S. 325—Criminal trial– Grievous hurt– Homicide– Justification—Evidence Act, S. 105.

When one man takes away the life of another man, the onus is on him to show circumstances which justify his doing so. If the act was done in the exercise of the right of private defence, it still lies on him to show that he did not exceed that right. (1904) 8 C.W.N. 714.

——Ss. 101 to 104—Criminal trial—Prosecution evidence defective—Supplementing prosecution evidence.

It is the duty of the prosecution to prove their allegations by means of sufficient and reliable evidence; and if the evidence of the prosecution is neither satisfactory nor conclusive, that defect cannot be cured by the fact that the accused is unable to make out positively that such evidence is false and has been manufactured by any particular person or persons interested in the prosecution. In a criminal trial even if the evidence in support of a charge is false, it would more often than not be impossible for an accused person to show how it came to be fabricated. (1901) 20 M.L.J. 657 7 M.L.T. 314=1910 M.W.N. 77=6 Ind. Cas. 51=11 Cr. L.J. 222 (F.B.).

——Ss. 101 to 104—Criminal trial—Theft —Dishonest intention.

The prosecution must prove dishonest intention in a case of theft. (1902) 4 Bom. L.R. 936.

14. Custom.

——Ss. 101 to 104—Custom—Custom at variance with *riwaj-i-am*.

The burden is always on the person who alleges that the custom is different to that stated in the riwaj-i-am. A.I.R. 1937 Lah. 483=174 Ind. Cas. 939.

——Ss. 101 to 104—Custom—Party asserting that he is governed by custom in derogation of personal law.

Where a custom is set up in derogation of personal law in regard to succession to self-acquired property, the party setting it up must prove that he is so governed and what that custom is. A.I.R. 1937 Lah. 449=174 Ind. Cas. 708.

——S. 102– Custom.

Where there is an issue between the parties as to the existence of any usage, the onus of proof lies upon the party propounding the same. A.I.R. 1931 All. 583=1931 A.L.J. 390=136 Ind. Cas. 158.

——Ss. 101 to 104—Custom—Chistis of Ferozepur —Ancestral property—Restricted power of alienation—Onus to prove power on vendor.

There is therefore the presumption that among phese Chistis of Ferozepur District the power of alienation is restricted in respect of ancestral property. The onus of proving that vendor had an unresticted power of alienation is on the vendee. A.I.R. 1930 Lah. 900=129 Ind. Cas. 756.

——Ss. 101 to 104— Custom—Riwaj-i-am—Daughters excluded—Onus of proving right to succeed is on daughter.

Where, therefore, there is an entry to the effect that agnates exclude daughters in succession to the property, whether ancestral or self-acquired of their sonless fathers, the onus is on the daughter claiming to succeed to her father's land to show custom entitling her to succeed. A.I.R. 1930 Lah. 761=126 Ind. Cas. 434.

——Ss. 101 to 104—Custom—Presumption—Riwaj-i-am– Correctness of the entries.

The Courts in the Punjab are bound to make an nitial presumption in favour of the correctness of he entries in riwaj-i-am. A.I.R. 1930 Lah. 761=126. Ind. Cas. 434.

——Ss. 101 to 103– Custom– Inheritance– Exclusion of daughters alleged– Onus on party alleging

In the case of High Class Hindus, where a custom is alleged to exist whereby daughter is excluded by

collaterals from inheriting the property of her father own was separate, the onus of proving such a custom is on the party alleging it. 106 Ind. Cas. 225=8 Lah. 541=29 P.L.R. 112=A.I.R. 1927 Lah. 539.

——Ss. 101 to 104—Custom—Onus on person challenging.

Onus of proving an entry in **Riwaj-i-am** to be wrong lies on the party asserting it to be wrong. 45 P. R. 1917 (P.C.), Foll. 85 Ind. Cas. 43=65 Lah. 535=A.I.R. 1925 Lah. 258.

——Ss. 101 to 104—Custom—"Office dhara" contract—Person relying must produce and prove printed forms.

Where a contract is alleged to be on "Office dhara" and where the "office dhara" refers to the practice of certain firms as seen in printed forms used by them, a plaintiff relying on the term "office dhara," must produce and prove the printed forms abovementioned. 86 Ind. Cas. 364=18 S.L.R. 265=A.I.R. 1925 Sind 80.

——Ss. 101 to 104—Custom—Defendant's plea of special custom supported—Plaintiff to prove general custom applies.

Where the defendants plea of the applicability of a special custom to the parties, is supported by entries in the **Riwaj-i-am** the onus will be shifted to the plaintiff to make out that only the general custom applies. 70 Ind. Cas. 227=3 Lah. 392=A.I.R. 1923 Lah. 125.

——Ss. 101 to 104—Custom—Opposed to statutory right—Onus on party relying on custom.

Where the widow of a co-sharer has a statutory right to demand partition and another co-sharer denies her right to compel partition by virtue of a custom to the contrary, the onus of proving such custom is on him. 71 Ind. Cas. 28=19 P.W.R. 1923 =A.I.R. 1923 Lah. 81.

——Ss. 101 to 104—Custom—Contrary to—Onus on party relying.

Where a party wants to rely on a custom opposed to that given in the **Riwaj-i-am** of a certain district, it is incumbent on him to prove the existence of such a custom. 109 Ind. Cas. 326=10 L.L.J. 304.

——Ss. 101 to 104—Custom—Initial onus shifted by entry in.

Though the initial onus is on the collaterals of the 8th degree, to prove their right to succeed in the presence of daughters yet an entry in the **Riwaj-i-am** to that effect is sufficient to shift the onus from the collaterals to the daughters. 67 Ind. Cas. 415=3 Lah. 184=A.I.R. 1922 Lah. 387.

——S. 102—Custom—Onus when shifted on to the opposite party.

The onus of proof that lies on the person asserting that he is ruled in regard to a particular matter by custom, is shifted on to the opposite party in cases where the person alleging the custom happens to be a member of a tribe to which the ordinary agricultural custom is generally applicable. 94 P.W.R. 1916= 122 P.R. 1916=48 P.L.R. 1917=34 Ind. Cas. 126.

——S. 102—Custom—Succession.

The burden of proving title under the rule of succession of the tribe lies on the person asserting it. 58 P.R. 1911=45 P.L.R. 1912=202 P.W.R. 1911=12 Ind. Cas. 857.

——S. 101—Custom—Onus on person pleading.

A person setting up a special custom must prove it. 100 P.W.R. 1909=4 Ind. Cas. 894.

——S. 102—Custom—Exemption.

The burden of proving that a general custom is not recognized n ia particular locality lies upon the person alleging the same. 57 Ind. Cas. 381 (N).

——S. 103—Custom—Special custom.

The burden of proof lies on the person setting up a special custom, which is opposed to the general principles of any law. 10 S.L.R. 126=36 Ind. Cas. 951.

——Ss. 101 to 104—Family custom—Primogeniture.

It lies on the party asserting a rule of primogeniture as a family custom in derogation of the ordinary Hindu Law governing the devolution of property to prove the same. (1904) 32 C. 6.

——Ss. 101 to 104—Custom of succession to property at variance with the lex loci.

A custom of succession to property situate in British India at variance with the **lex loci** must be proved by the person setting it up. 3 A.L.J. 209= 1906 A.W.N. 83=28 A. 458.

——Ss. 101 to 104—Custom—Contrary to law—Onus of proof.

A custom opposed to the ordinary Hindu Law must be proved by those who assert it. When, however, such exceptional custom has been proved or admitted as binding on a particular section of the comguanity, it is necessary for those who rely on it as mainst an individual member of that section to show that such member has not, by his own personal action, excluded himself from its operation. (1903) 5 Bom. L.R. 318.

15. Declaration.

——Ss. 101 to 104—Declaration—Suit for declaration that certain woman is wife of plaintiff—*Soi-disant* husband must prove factum and legality of marriage.

When a suit is instituted for a declaration that a certain lady is the wife of the plaintiff, the declaration sought for is that she is his lawful wife. Therefore, when the factum of marriage and, alternatively, its validity are denied, it is the duty of the **soi-disant** husband to prove not only that a marriage was performed, but that it was validly and legally performed. In a suit for a declaration that a certain person is the wife of the plaintiff, the validity and legality of the alleged marriage are of the very essence of the case. A.I.R. 1936 All. 875=1936 A.W.R. 1139=1936 A.L.J. 1180=166 Ind. Cas. 225.

——Ss. 101 to 104—Declaration—Suit to establish—Sale by judgment-debtor—Consideration,

possession and good faith must be proved in serial order by plaintiff.

In a suit by an objector for establishing sale by judgment-debtor, burden lies on plaintiff of proving con ideration, possession and good faith. Questions of consideration, posession and good faith must be decided in serial order.

The burden of establishing the passing of consideration rests on the plaintiff. That is obviously the primary question to determine ; then the question of possession is to be decided. If these points are found in favour of the plaintiff the onus of establishing good faith would still rest upon plaintiff but would be a much lighter one. 2 N.L.R. 87, Foll. 92 Ind. Cas. 810=A.I.R. 1926 Nag. 293.

——S. 102—Declaration—Possession—Title.

Where plaintiff being in possession of property sued for a declaration of title and confirmation of possession, the defendant disturbing the possession must prove a better title in him. 50 Ind. Cas. 431 (Cal.).

——S. 102—Declaration.

The onus is on the defendant to plead and prove the adverse possession for the statutory period in a suit for declaration of title based on the defendant's alleged repudiation of it. 39 M. 617, Foll. 37 Ind Cas. 794 (All.).

——S. 102—Declaration—Title—Proof of.

In a suit for declaration of right to immovable property the onus is on plaintiff to make out his title to the property. 25 Ind. Cas. 852 (Cal.).

——Ss. 101 and 103—Declaration—Burden of proof—Right to property.

A transferred certain occupancy right in unalienated land in Berar to B, putting him in possession. B sued A, for a declaration that he should be the registered occupant as A had sold the occupancy rights to him. A denied the sale and alleged that the occupancy rights were leased to B for a term of years. The burden of proving that the transfer was a sale and not a lease lay on B. 8 N.L.R. 185=17 Ind. Cas. 889.

16. Duty of Court.

——Ss. 101 to 104—Duty of Coutt—Question of onus, if regarded as final factor in case, cannot be ignored.

When a Court examines only the case of one side and disbelieves his evidence and then dismisses his claim on the ground that he has not proved his assertions, it is clear that the case is bring decided solely on the question of onus and no amount of lip service to a rule which is ignored in the letter and in the spirit will serve to turn what is then a question of law into one of fact. A.I.R. 1939 Nag. 78=1938 N.L.J. 459=I.L.R. (1939) Nag. 160=180 Ind. Cas. 443.

——Ss. 101 to 104—Duty of Court.

It is Court's duty to compel party alleging fraud to produce specific details of it. A.I.R. 1937 P.C. 146=1937 A.W.R. 832=I.L.R. (1937) All. 566=31 S.L.R. 306=46 M.L.W. 745=41 C.W.N. 746=3 B.R. 543=18 P.L.T. 421=1937 O.W.N. 631=1937 M.W.N. 744=39 Bom. L.R. 963=64 I.A. 143=(1937) 2 M.L.J. 650=168 Ind. Cas. 620 (P.C.).

——S. 103—Duty of Court—Self-defence.

As a general rule, it is the duty of the accused to make out a case of self-defence, but the Court has to look into the facts and circumstances of each case. A.I.R. 1933 Lah. 232=34 Cr. L.J. 318=34 P.L.R. 349=142 Ind. Cas. 20.

——Ss. 101 to 103—Duty of Court—*Onus probandi* applies in case of doubt—Court cannot be blind to facts established.

Onus probandi applies to a situation in which the mind of the Judge determining the suit is left in doubt as to the point on which side the balance should fall in forming a conclusion. It does happen that as a case proceeds the onus may shift from time to time. There never is any duty upon the part of the Judge to be blind to facts established before him or to a whole category of facts extending over a long period of time and establishing the possession of property for generations as being in one line and not in two lines. 114 Ind. Cas. 13=31 Bom. L.R. 249=53 Bom. 213=56 I.A. 13=1929 A.L.J. 4=49 C.L.J. 104=29 M.L.W. 231=33 C.W.N. 238=A.I.R. 1929 (P.C.) 8=56 M.L.J. 287 (P.C.).

——Ss. 101 to 103—Duty of Court—Court to fix the burden where it lies in law.

It would be wholly wrong to allow the burden of proof to be shifted by a redundant averment in the pleading or by an incautious acceptance of an issue framed upon that averment. The Court ought to consider where the burden lies in law. 106 Ind. Cas. 150=50 Mad. 927=39 M.L.T. 431=26 M.L.W. 697=A.I.R. 1927 Mad. 1054=53 M.L.J. 709 (F.B.)

——Ss. 101 to 103—Duty of Court—Onus on plaintiff—Defendant cannot be called to traverse.

Where the onus of establishing a positive or negative allegation lies upon the plaintiff, the Court will not order the defendant to give particulars of his traverse of that allegation. 80 Ind. Cas. 958=17 S.L.R. 9=A.I.R. 1921 Sind 106.

17. Ejectment

——Ss. 101 to 104—Ejectment suit—Onus of proof—What plaintiff has to prove—Limitation Act, Art. 142.

A plaintiff suing in ejectment on the strength of his title, must, in order to succeed, should not only make out his title to the property sought to be recovered but should also establish that he has a subsisting title, *i.e.*, that he or his predecessors had been in possession, whether actual or constructive within 12 years prior to the suit. A.I.R. 1950 T.C. 46.

——Ss. 101 to 104—Ejectment suit—Onus.

It is incumbent upon the plaintiff in a suit in ejectment to establish his title to the property in suit and also a subsisting right to possession. 52 Mys. H.C.R. 405=28 Mys. L.J. 1.

——Ss. 101 to 104—Ejectment—Ejectment suit—Onus—Extent of.

In a suit for ejectment, plaintiff has to make out his title and possession within 12 years of the suit. Even

where his title as proprietor is not in issue (for instance where the defendants asserted their tenancies under the plaintiff as proprietor) the onus lies on the plaintiff to prove his title in a limited sense of title to khas possession. A.I.R. 1945 Pat. 453=24 Pat. 379.

——Ss. 101 to 104—Ejectment.

Suit for ejectment, against heirs of original tenant oh ground that they are trespassers—Onus of proving any kind of tenancy is on defendants. (1943) 76 C.L.J. 403.

——Ss. 101 to 104—Ejectment suit—Essentials to be proved by plaintiff.

In a suit for ejectment, it is enough for the plaintiff if he makes out his title ; it is not necessary for him to prove that the person sought to be ejected came into possession as his tenant under a contract which entitled him to eject. A.I.R. 1943 Mad. 756=1943 M.W.N. 246=213 Ind. Cas. 204.

——Ss. 101 to 104—Ejectment—Suit for ejectment of purchaser.

In a suit for ejectment of a purchaser from a tenant of a house in a village, the burden of proving that the village ceased to be agricultural is on the tenant who pleads it. A.I.R. 1934 All. 361=149 Ind. Cas. 385= 17 R.D. 1053.

——Ss. 101 to 104—Ejectment.

In an action for ejectment a plaintiff may be entitled to succeed on the strength of his prior possession only and the defendant is not, in such a case, entitled to set up the right of a third party unless he claims under it and makes good that claim. A.I.R. 1933 Pat. 6=11 Pat. 701=14 P.L.T. 509=141 Ind. Cas. 157.

——Ss. 101 to 104—Ejectment.

In a suit for possession the plaintiff must succeed on the strength of his own title and not on the weakness of the defendant's case. A.I.R. 1931 Lah. 379=32 P.L.R. 867=12 Lah. 590=135 Ind. Cas. 56.

——Ss. 101 to 104—Ejectment.—

Suit for ejectment of a tenant, by the landlord—Tenant setting up defence that he has a right of permanent tenancy—Onus is upon the tenant to prove his permanent tenancy. A.I.R. 1931 Mad. 577= 1930 M.W.N. 874=35 L.W. 400=133 Ind. Cas. 369.

——Ss. 101 to 104—Ejectment—Right to remain—Onus on defendant.

Where in an ejectment suit the plaintiff's main case was that the defendants were on the land and that they were trespassers with no rights to remain on the land and the defendants admitted the plaintiff's superior title to the land.

Held, that the defendants must show that they had a right to remain. 71 Ind. Cas. 319=A.I.R. 1924 Cal. 350.

——Ss. 101 to 104—Ejectment—Claim of occupancy.

Where the recorded tenant of a holding who hat been paying rent to the landlord brings a suit to ejecf his sub-tenants and the latter sets up a claim os occupancy rights, the onus of proving the right is upon them. L.R. 3 A. 54 (Rev.).

——S. 102—Ejectment—Possession—Limitation.

Where some plots are recorded since long as belonging to the defendant, the onus is on the plaintiff to prove possession within limitation. 14 A.L.J. 1056 =36 Ind. Cas. 427.

——S. 102—Ejectment—Proof of title—Plea of adverse possession.

Where a plaintiff, who does not allege dispossession sues for possession of immoveable property based upon title and the plea of adverse possession is raised by the defendant, the onus of proving his own title rests upon the plaintiff before the defendant can be called upon to prove adverse possession. 8 L.B.R. 264=9 Bur. L.T. 242=35 Ind. Cas. 432.

——S. 102—Ejectment—Tenancy not transferable except by custom—Onus.

In a suit for ejectment of the transferee from the renant of a tenancy not transferable except by custom the onus is on the transferee defendant to prove the right to transfer. 20 C.W.N. 322=33 Ind. Cas. 565.

——S. 103—Ejectment—Title—Strict proof.

Where a plaintiff wished to claim property under a relationship to the last male owner which relationship was disputed by the defendant a near relation of last male owner, it was held, that the onus lies on the plaintiff to prove the relationship. 184 P.W.R. 1915 =31 Ind. Cas. 600.

——Ss. 102 and 103—Ejectment—Title, suit based on—Plea of benami—Onus.

A plea of benami raised by the defendants does not relieve the plaintiff of the necessity of proving the title on which he sues. 7 S.L.R. 11=20 Ind. Cas. 523.

——S. 103—Ejectment—Title—Proof of.

A plaintiff must prove his own title before ousting a respasser though the latter has no title. 30 P.W.R. 1912=22 P.L.R. 1912=13 Ind. Cas. 62.

——S. 103—Ejectment—Title—Burden of proof.

The burden of proof in a suit for possession by the owner against a person in possession where the latter denies his title, rests with the plaintiff. But where his title to possession is admitted or proved the burden shifts on to the defendant to prove tenancy entitling him to possession. 14 C.L.J. 175=11 Ind. Cas. 904.

——Ss. 101 to 104—Ejectment—Onus—Tenure-holder.

In a suit in ejectment, where the defence sets up a tenure by right of purchase from the former tenant, if the plaintiff has proved that he is the owner of the land, it lies upon the defendant to make out that he is a tenure-holder and is entitled to remain thereon. (1908) 7 C.L.J. 553.

——S. 102—Ejectment—Confused boundaries.

The general rule of burden of proof does not apply where the question relates to waste and jungle land.

lying on the boundary of the defendant's and plaintiff's talukas and are found to be in the possession of neither. Both of them must help the Court to come to a correct decision as to its possession and ownership. 7 Ind. Cas. 165 (Cal.).

——S. 101—Ejectment—Title.

In a suit in ejectment where the defendant has already succeeded and is in possession of the property and in whose favour mutation of names also has been effected, the onus lies heavily on plaintiff to prove that the right is superior to that of his adversary. 120 P.W.R. 1909=4 Ind. Cas. 965.

——S. 102—Ejectment—Landlord and tenant—Bengal Tenancy Act—Onus.

Where, in a suit for ejectment, plaintiff relies on the fact that the land is 'Zeriat' and also on an alternative ground and the plaintiff proves his title, the onus will be shifted on to the defendant to prove the circumstances on which he relies as a defence to the claim for ejectment. 13 C.W.N. 664=4 Ind. Cas. 531.

——Ss. 101 to 104—Ejectment, suit for—Nijjote land, suit for possession of—Mokuraridar—Occupancy right, plea of.

In a suit for ejectment from nijjote lands where the defence set up a right of occupancy when the plaintiff was admitted to be a mokuraridar of the landlord, it lies upon the defendant to make out that they are occupancy raiyats and are entitled to remain there. (1908) 8 C.L.J. 170.

——Ss. 101 to 104—Ejectment suit—Proof of possession prior to dispossession—Plaintiff's title how far a factor in shifting the onus.

Where in an ejectment suit the plaintiff alleged dispossession by the defendant eleven years before suit the onus of proving plaintiff's possession prior to his dispossession lies upon him, and in this question of evidence the initial fact of the appellant's title comes to her aid with greater or less force according to the circumstances established in evidence. (1906) 3 A.L.J. 363=8 Bom. L.R. 400=10 C.W.N. 630 (P.C.)=1 M.L.T. 135=16 M.L.J. 272.

——Ss. 101 to 104—Ejectment suit—Plea of adverse possession—Submerged land.

When a suit for possession is met by a plea of adverse possession during the limitation period, the question of limitation becomes a question of title and the plaintiff must first furnish **prima facie** proof of subsisting title at the date of the commencement of his spite before the defendant is required to establish his adverse possession. Where land has been submerged, proof of actual possession at the date of submersion would apparently be sufficient primary evidence of possession during the submersion. 1906 A.W.N. 234=3 A.L.J. 567=28 A. 760.

——Ss. 101 to 104—Ejectment suit—Plea of permanent occupancy.

In a suit for ejectment where the defendant sets up a permanent tenancy the onus is upon the defendants to show this. (1903) 7 C.W.N. 734.

——Ss. 101 to 104—Ejectment of tenant—Tenatns setting up mirasi rights—Plaintiff claiming not merely inam, but also mirasi rights.

Where a person claiming inam and mirasi rights over certain lands sues to eject therefrom the defendant, who claims to have mirasi rights over the same, the burden of proving the mirasi rights lies on the plaintiff. (1902) 4 Bom. L.R. 801.

——Ss. 101 to 104—Ejectment suit—Possession dy defendants for over statutory period—Defendant's possession as tenants of plaintiffs.

In an ejectment suit, when defendants prove their possesfion for over statutory period, theonus lies upon the plaintiff who asserts that possession of the defendants was as plaintiff's tenants only to prove the same. (1897) 27 M. 517.

18. Exception to rule.

——S. 101 to 104—Exception to generalrule—Onus.

When a person claims an exception to a general provision of law, the burden is on that person to prove that the comes within the exception. A.I.R. 1934 Rang. 90=12 R. 55=150 Ind. Cas. 667.

——Ss. 101 to 103—Exception to rule—General rule—Prima facie case being made out, onus is on defendant to disprove—Does not apply where defendant is not claiming under the executant.

The general rule that where no other suspicious circumstances appear, the plaintiff by merely proving the execution of the document containing recitals must be taken to have made out a **prima facie** case, and it is for the defendant to meet that case by adducing evidence, applies only to the case where the defendant is executant or person claiming under him. It has no application where the executant mortgages joint family property and defendant is not his heir, but one to whom the family properties came by survivorship. 125 Ind. Cas. 68=33 M.L.W. 264=A.I.R. 1930 Mad. 796.

——S. 103—Exception to rule—Agriculturist—Exemp tion from attachment—C. P. C., S. 60 (c).

The judgment-debtor has to set up and prove that he is an agriculturist within the meaning of S. 60 (c), C. P. C. 20 C.W.N. 874=35 Ind. Cas. 343.

——S. 103—Exception to rule.

A person pleading a certain exception to a rule is bound to bring himself within it. 16 C.W.N. 779=15 Ind. Cas. 30.

——S. 103—Exception to rule—Right to sue in forma pauperis—Exemption—Burden of proof.

There is no existing right to sue in forma pauperis. It is an exemption, from the ordinary rule, and the plaintiff claiming it from the Court must prove tha. he is entitled to it. 33 All. 237=7 A.L.J. 1191=8 Indt Cas. 484.

19. Execution of decree.

——Ss. 101 to 104—Execution of decree—Decree-holder relying on judgment-debtor's acknow-

ledgment for saving limitation—Judgment-debtor alleging forgery—Onus to prove genuineness of signature lies on decree-holder—Value of expert's evidence.

Where, in the execution proceedings, the decree-holder relies on acknowledgments by judgment-debtor for the saving of limitation, and the judgment-debtor challenges that the signature is forged, the burden of proving that the signature is that of the judgment-debtor lies on the decree-holder.

Where the handwriting expert while opining that the handwriting of the acknowledgment does not tally with the acknowledged writings of the judgment-debtors, but at the same time does not claim infallibility for his opinion, this consideration would be of great importance in a prosecution for forgery, in which the onus would be on the Crown to satisfy the Court positively that the handwriting is not the handwriting of the person concerned. In the civil suit, however, it is the contrary proposition which has to be proved, namely that the handwriting is that of the judgment-debtors and the onus is on the decree-holders. Where the evidence on behalf of decree-holders is insufficient to prove that the expert's opinion is incorrect, they must fail. (1946) 12 B.R. 615=225 Ind. Cas. 528 =A.I.R. 1947 Pat. 139.

——Ss. 101 to 103—Execution of decree.

It is for the decree-holder to show, in the first instance, under S. 151, Oudh Rent Act, that satisfaction of the decree cannot be obtained against the movable property of the judgment-debtor, but very little evidence is required to shift the burden on to the judgment-debtor. Whether a judgment-debtor has or has not movable property from which a decree may be satisfied is a matter especially within his own knowledge and if the decree holder shows that there is reason to think that he has no such property, and files an affidavit to that effect, it is for the djugment-debtor to prove that he has such property. A.I.R. 1941 Oudh 374=1941 O.W.N. 638=1941 R.D. 352=16 Luck. 573=194 Ind. Cas. 437.

——S. 101—Execution of decree—Attachment in execution—Objection by wife dismissed—Suit for declaration that property belonged to her—Onus.

Where after the dismissal of an objection brought by the wife of the judgment-debtor in execution proceeding that a certain house sought to be attached is hers, she brings a suit for a declaration that the house belonged to her and was not liable in execution, the burden of proof is upon her to show that the alienation which caused the suit house which was the property of her husband (the judgment-debtor) to become her house, was not a fraudulent alienation and that it was made **bona fide** and for consideration. A.I.R. 1937 Nag. 1=I.L.R. (1937) Nag. 291=157 Ind. Cas. 48.

——Ss. 101 to 104—Execution of decree—Attachment of property—Decree-holder to prove—Judgment debtor's ownership.

It is for the decree-holder to clearly establish that the property belongs to his judgment-debtor only and is liable to his execution of the decree. 77 Ind. Cas. 516=A.I.R. 1923 Lah. 522.

——S. 103—Execution of decree.

The burden of proving that a decree cannot be executed lies on the person alleging it. 108 P.W.R. 1913=181 P.L.R. 1913=109 P.R. 1913=19 Ind. Cas. 481.

20. Execution of document.

——Ss. 101 to 104—Execution of document—Executant, how can discharge onus of proving consideration—Question, whether onus is discharged is one of fact.

In a suit for money due on a bond, the primary burden is on the plaintiff. He must prove execution and consideration. But once he proves, or it is admitted, that the signature or thumb mark is the defendant's then the presumption arises and the burden shifts to the defendant. He can discharge it either by showing that in spite of signing, the circumstances are such that he cannot be charged (fraud, undue influence, mistake, want or failure of consideration, *etc.*) or he can prove that the circumstances are such that the presumption under S. 114, cannot fairly arise. If he succeeds in doing that, then the burden shifts back to the plaintiff. To that extent the matter is one of law. But whether he has succeeded on the evidence, or on the admitted facts, in discharging this burden is a question of fact and not of law. A.I.R. 1939 Nag. 78=1938 N.L.J. 459=I.L.R. (1939) Nag. 160=180 Ind. Cas. 443.

——Ss. 101 to 104—Execution of document—One attesting witness proving execution—Presumption that other did not attest it.

Deed attested by more than two witnesses—One of them proving attestation and deed marked as exhibit without objection—Another attesting witness not formally proving attestation—Presumption, cannot be made that he did not attest deed. A.I.R. 1939 Pat. 555=181 Ind. Cas. 572=5 B.R. 613.

——Ss. 101 to 104—Execution of document—Proof by signature—Shifting of onus.

As an abstract proposition, it is beyond doubt that the initial burden of proving execution when it is denied, is upon the plaintiff who alleges execution. Though the proof of signature is not necessarily proof of execution, and that an admission that a document bears a man's signature is not necessarily an admission of execution, yet if nothing else is known, then the mere fact that a document is proved to bear a certain signature and that it comes from proper custody ought to be enough to raise an inference that it was signed with the intention of execution. This inference arises in India directly from S. 114, Evidence Act. Persons do not ordinarily sign documents without intending to execute them; that is not the common course of human conduct; nor yet the common course of either public or private business. Consequently, if any person wants to rely on an exceptional circumstance, if he wants to show that in some particular instance, the ordinary rule was abrogated, surely he must prove it and thus the burden shifts on him. A.I.R. 1938 Nag. 152=I.L.R. (1938) Nag. 333=176 Ind. Cas. 315.

——Ss. 101 to 104—Execution of document.

Where a deed of gift, on the face of it, is a perfectly valid and genuine document, it is for the party alleging

the contrary to prove that it was executed fictitiously. A.I.R. 1938 Oudh 26=1937 O.W.N. 1058=13 Luck. 697=177 Ind. Cas. 481.

——**Ss. 101 to 104—Execution of document.**

Where a document written in English, is affixed by a person not knowing English, the onus to prove that the document was properly explained and interpreted to such person so as to make him understand its true nature, is on the party relying on the document. A.I.R. 1937 P.C. 274=170 Ind. Cas. 423 (P.C.).

——**S. 102—Execution of document.**

Plaintiff's claim to recover the amount of the bond executed by the defendant—Plea that the debt is a gambling debt.

Held, the onus is on the defendant to prove that the debt was a gambling debt. (1937) 39 P.L.R. 42.

——**S. 102—Execution of document.**

Pro-note—Defendant admitting signature but contending that it was taken on a blank paper—The burden to prove the execution of the pro-note is on the plaintiff. A.I.R. 1934 Lah. 293 (2)=36 P.L.R. 275=151 Ind. Cas. 60 (2).

——**Ss. 101 to 104—Execution of document.**

When a person is proved to have lucid intervals, the burden of proof as to the fact of his being of unsound mind at the time of execution of a doucment is on the person challenging the validity of the document. A.I.R. 1933 Lah. 458=34 P.L.R. 297=144 Ind. Cas. 741.

——**Ss. 101 to 104—Execution of document.**

In ordinary circumstances, once the execution of a document is proved, it is for the party who wants to avoid the consequences of it to prove that he executed it under circumstances which do not make it binding upon him. Where the plaintiff alleges that she signed a petition without knowing its contents and that she did so in consequence of fraud practised on her, ordinarily in accordance with the well-settled principle of law that those who allege fraud must prove it, it will be for the plaintiff to prove facts and circumstances constituting the fraud under which she had signed the documents. A.I.R. 1933 Pat. 306=14 P.L.T. (Supp.) 1=12 Pat. 359=145 Ind. Cas. 1.

——**Ss. 101 to 104—Execution of document.**

Where, in a mortgage suit, the mortgagors pleaded that though they signed the mortgage bond, they never allowed the mortgage bond to come into the possession of the plaintiff :

Held, that an obligation lay upon the plaintiff to prove the execution formally. A.I.R. 1933 Pat. 129 =14 P.L.T. 727=145 Ind. Cas. 698.

——**Ss. 101 to 104—Execution of document.**

In a suit to enforce a mortgage, it was found that the executant was of unsound mind but had lucid intervals, mortgagee contended that it was for the mortgagor to prove that he was of unsound mind at the execution of the deed while the mortgagor contended time of the otherwise. It appeared that the mortgagor executed the registered deed and behaved quite normally when he was taken to the Sub-Registrar :

Held, that no general rule could be laid down as to where burden of proof lay. A.I.R. 1932 Rang. 24 =137 Ind. Cas. 766.

——**Ss. 101 to 104—Execution of document—Proof of execution.**

Where the law places the onus on the plaintiff to prove that a document is duly executed, the onus cannot be discharged by merely proving the identity of the thumb-impression, but it must be further proved that the thumb-impression was given on the document after it had been written out and completed.

If the evidence offered by the plaintiff to prove that the document was duly executed, or that the thumb-impression was given on the document after it had been written out and completed is found to be unreliable, he cannot be deemed to have discharged the onus properly and no onus is necessarily thrown on the defendant merely by reason of the fact that the defendant asserts that the thumb impression was given on a blank piece of paper. A.I.R. 1931 Pat. 219=12 P.L.T. 233=134 Ind. Cas. 635.

——**Ss. 101 to 104—Execution of document—Proof of date—Onus on plaintiff.**

The plaintiff has to state when his cause of action arose, *e.g.*, the date of the execution of a promissory note on which a suit is based and it lies upon him to substantiate that statement. To cast the bruden on the defendants would run counter to the provisions of Ss. 101 and 102, Evidence Act. A.I.R. 1930 Mad. 742=123 Ind. Cas. 197.

——**Ss. 101 to 104—Execution of document—Execution on blank paper—Onus on plaintiff to prove execution.**

Where the plaintiff sued relying on a document which the defendant affirmed to be only a blank piece of paper to which he was asked to affix his signature and thumb impression.

Held, the burden of proof of its execution lay on the plaintiff. 68 Ind. Cas. 809=20 A.L.J. 672= A.I.R. 1922 All. 401.

——**S. 102—Execution of document—Suit for cancellation.**

In a suit to have a bond cancelled as a forgery the onus is on the defendant to prove execution of the bond, as it is he who substantially asserts the affirmative of the issue. The value of the general presumption against misconduct is small where alleged misconduct is the very foundation of the suit. 9 N.L.R 8=18 Ind. Cas. 853.

21. Fraud.

—— **Ss. 101 to 104—Fraud.**

Fraud must be established beyond reasonable doubt. A.I.R. 1941 P.C. 93=1941 A.W.R. 754(2)= 54 L.W. 606=1941 A.L.J. 683=1941 O.W.N. 1392= 44 P.L.R. 18=23 P.L.T. 67=196 Ind. Cas. 404=8 B.R. 56. (P.C.)

——**Ss. 101 to 104—Fraud.**

Where direct evidence on question of fraud is wholly unreliable, Court cannot possible base a finding of fraud purely on a finding that the transaction was unfair. A.I.R. 1941 Pat. 83=7 B.R. 402 =19 Pat. 669=22 P.L.T. 553=192 Ind. Cas. 441.

——Ss. 101 to 104—Fraud.

The party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof, Unless therefore, the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud. A.I.R. 1940 P.C. 98=1940 A.W.R. 82=1940 O.W.N. 451=51 M.L.W, 721=1941 M.W.N. 952= I.L.R. (1940) Kar. (P.C.) (Sup.)2 16=6 B.R. 650=21 P.L.T. 497=42 P.L.R. 343=187 Ind. Cas. 787 (P.C.).

——Ss. 101 to 104—Fraud—Proof of—Fraud imputed to rich person must be proved strictly.

It is a serious thing to impute fraud to a person who is rich and in good position, and the Court must require the strictest proof of it. A.I.R. 1939 Bom. 161=41 Bom. L.R. 353=182 Ind. Cas. 127.

——Ss. 101 to 104—Fraud.

Suit for declaration that gift by husband to wife is fraudulent—Onus of proof that husband was in embarrassed circumstances lies heavily on the plaintiff. A.I.R. 1936 Lah. 222=162 Ind. Cas. 922.

——Ss. 101 to 104—Fraud.

A party who relies on plea of fraud or misrepresentation, must establisq these charges. A.I.R. 1935 Rang. 73 (2)=155 Ind. Cas. 890=13 Rang. 175.

——Ss. 101 to 104—Fraud—Suit for declaration of deed to be void.

Where the donor sues for a declaration of the deed to be void on the ground of fraud and want of independent advice, it is necessary to examine carefully the evidence of the plaintiff and the principal witnesses. A.I.R. 1934 All. 179=3 A.W.R. 51=148 Ind. Cas. 528.

——Ss. 101 to 104—Fraud—Allegation of fraud.

If a person charges another with fraud or mis-representation, it is incumbent on him to substantiate his allegations by making a statement on oath and by giving the other party an opportunity of cross-examining him. A.I.R. 1933 Lah. 1024=149 Ind. Cas. 1124.

——Ss. 101 to 104—Fraud.

Fraud being always secret in its working, it is seldom possible for a party to adduce direct evidence in proof of it. A.I.R. 1931 Oudh 405=8 O.W.N. 1126=134 Ind. Cas. 1013.

——Ss. 101 to 104—Fraud—Effects of fraud removed—Onus on party benefitted by the fraud.

Where fraud has been established in a case against a party who is deriving benefit therefrom it is for him to show that the continuing effects of fraud which was perpetrated have been removed. 17 Bom. 341 (P.C.); A.I.R. 1923 Pat. 435 and A.I.R. 1924 Pat. 496, Foll. 123 Ind. Cas. 637=A.I.R. 1930 Pat. 58.

——Ss. 101 to 104—Fraud—Knowledge of fraud before limitation.

Fraudulent nature of the sale proceedings and the competency of the applicant in the circumstances to have the sale set aside having been established the onus of proving that the fraud was known long before limitation is upon the decree-holder. 12 P. R. 1898, Foll. 112 Ind. Cas. 847 (Lah.).

——Ss. 101 to 104—Fraud—Burden on person alleging.

The burden of proving the fraudulent nature of a transaction lies ordinarily on the persons who seek to impeach it. 94 Ind. Cas. 927=A.I.R. 1926 Oudh 501.

——Ss. 101 to 104—Fraud.

Where a transaction has remained unchallenged for over 50 years, and were the managing trustees atthe date of the transaction are dead, the onus is on the plaintiffs to upset it on the ground of fraud or breach of trust. 70 Ind. Cas. 87=1922 M.W.N. 620=A.I.R. 1922 Mad. 409.

——Ss. 101 to 104—Fraud—*Prima facie* open transaction—Onus on person attacking to prove fraud.

Where a transaction is carried out openly and publicly and everything is done which ordinarily would be done to give effect to it, it certainly lies on the person challenging the transaction to show that the transaction was other than appeared on the face of it and was really intended to cover a fraudulent motive. 66 Ind. Cas. 24=24 O.C. 374=A.I.R. 1921 Oudh 209.

——Ss. 101 to 104—Fraud—Transferee for consideration—Onus of proving fraud is on the other party.

Where the claim of the transferee has been rejected in execution proceedings and a suit is brought to vindicate that claim, the onus lies in the first instance on the transferee. The onus is discharged as soon as he establishes that the transfer under which he claims is for good consideration and then the onus is on the opposite party to establish a fraudulent intention underlying the transfer. 63 Ind. Cas. 111=2 P.L.T. 577=A.I.R. 1921 Pat. 395.

——Ss. 101 to 104—Fraud—Ostensibily *bona fide* transaction—Party alleging fraud must prove it—When onus shifts.

Where outwardly a deed of sale which is duly registered purports to create a title in a certain person, it is ordinarily not for him to prove the **bona fides** of the transaction, or that there was valid consideration. It is for the party who alleges that that was a fraudulent transaction to defeat a cerditor, to prove the fraud alleged and the want of consideration. But when he has established circumstances pointing to the truth of the facts he alleges the onus will be shifted and it will be for the other party to prove consideration. 65 Ind. Cas. 322=11 L.B.R. 89=A.I.R. 1921 L.B. 58.

——S. 102—Fraud—Onus.

In a suit on a bond where there is no dispute as to consideration, the onus is on the defendant to prove

his plea of fraud. 39 P.L.R. 1919=14 P.W.R. 1919 =51 Ind. Cas. 579.

——S. 102—Fraud—Illegality—Compromise—Impeaching validity of.

The burden of proving that a compromise is illegal or void is on the person asserting it. 35 M.L.J. 51 =24 M.L.T. 28=8 L.W. 154=45 Ind. Cas. 489.

—S. 103—Fraud—Undue influence—Onus.

Execution of a document being admitted, the burden of proving that it was executed under fraud or nndue influence is on the party pleading it. 2 P.L.W. 23=2 P.L.J. 398=41 Ind. Cas. 202.

——S. 102—Fraud—Coercion—Misrepresentation.

The burden of proving fraud, coercion or misrepresentation is on the party who alleges those things, and he must prove that he was induced to do an act by pressure put upon him and that the party with whom the contract was entered into knew that his claim was uufounded and false. 9 C.L.J. 19=1 Ind. Cas. 573.

——S. 102—Fraudulent transfer—Good faith.

In a case undcr S, 53, T.P. Act (1882), the burden of proving good faith of the transaction lies on the transieree where the sale appears otherwise voidable. 33 Mad. 334=7 M.L.T. 167=20 M.L.J. 211=(1910) M.W.N. 239=5 Ind. Cas. 33.

——Ss. 101 to 104—Fraud—Proof of knowledge of limitation.

When a man has committed a fraud and has got property thereby, it is for him to show that the person injured by the fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud at a time which is too remote to allow him to bring a suit. (1905) 2 A.L.J. 350=1905 A.W.N. 88=27 A. 540.

22. Genuineness.

——Ss. 101 to 104—Genuineness—Registered sale—Purchaser in possession—Burden of proving that it is bogus.

When a purchaser is in possession of property under a registered sale-deed, the burden of proof that the sale-deed or legal transfer is bogus lies upon the person who wishes to assail it. (1935) 156 Ind. Cas. 871.

——Ss. 101 to 104—Genuineness—Pro-note alleged as forged—Onus on defendant.

Plaintiff sued defendant for a certain sum due on the promissory note. The defendant denied taking the principal sum mentioned in the promissory note, *viz.*, Rs. 1,300 and denied signing the promissory note in the form it had assumed when the case was brought. He admitted that his signature appeared on the note, but said that when he signed it, the only entries were the figures Rs. 300 at the top of the paper, and signature at the bottom.

The case was decreed in favour of the plaintiff, not because the trial Court was satisfied that the loan alleged had been made, but because the defendant had not succeeded in proving affirmatively that the note as produced was a forgery. 105 Ind. Cas. 361=5 Rang. 527=A.I.R. 1927 Rang. 319.

——Ss. 101 to 104—Genuineness—Accounts—Suspicious circumstances—Onus of proving accounts to be fictitious is not on defendant.

The family firm of which the debtor was once a member was once the richest firm, so much so that the plaintiffs themselves were indebted to it to the extent of over three lakhs of rupees, and all their property was mortgaged in favour of it for that debt. Another suspicious circumstances was that they had this debt set off against their own debts. Secondly, there was the fact that they brought the suit after the debtor's death though he lived for more than five years after the date of the last balance. They kept quite for all this long period and did not even obtain fresh acknowledgments from the deceased member year by year which money-lenders generally do to charge compound interest and strengthen the evidential value of accounts. If the accounts were wholly or partly fictitious the deceased member alone could prove the same.

Held, the belated suit and non-renewal of acknowledgments strongly point to the conclusion that the plaintiffs could not trust the debtor and did not consider it safe to see him. Under all these circumstances the onus of proving that the account was fictitious did mot lie upon the defendants. 83 Ind. Cas. 810=A.I.R. 1923 Lah. 471.

—— Ss. 102 and 103—Genuineness—Deed—Execution—Compulsorily registered.

In a suit on a document the onus lies on plaintiff to prove its genuineness where the executant denies execution though the mortgage was compulsorily registered.

The Registrar's belief in a registration enquiry is of no avail in a civil case. (1917) M.W.N. 789=35 M.L.J. 15=43 Ind. Cas. 28.

——Ss. 102 and 104—Genuineness—Gift—Onus of proof—Capacity of executant.

The burden of proving that a deed of voluntary gift executed by an old and infirm woman was executed with full knowledge of its contents and that she did so long willingly and without any pressure or solicitations which might amount to the exercise of undue influence lies heavily on the donee. (1881) 18 Ch. 668, Rel, Any person of full age and sound mind, who has executed a voluntary deed of gift by which he has deputed himself comes to have the deed set aside, especially a long time afterwards, he must prove some substantial reason why the deed should be set aside. 14 Bom. L.R. 340=15 Ind. Cas. 529.

——S. 103—Genuineness—Consideration—Execution of document by illiterate woman—Admission of execution of another document—Onus.

Where an illiterate woman alleged to have put her mark and thumb impression on a document for Rs. 3,000 denies executing such a document but admits having executed another for Rs. 400 only the onus rests on the plaintiff to prove both the genuineness of the transaction and consideration. 4 Bur. L.T. 202 =11 Ind. Cas. 916.

23. Grant.

See also GRANT.

——Ss. 101 to 104—Grant of village to pious Muhammadans by way of shrotrieum Jodi reserved—Grantee to enjoy income of land—For over hundred years, land used entirely for producing crop :

Held, that the onus of proving that the right to take minerals was included in the original grant was on the grantee. A.I.R. 1938 Mad. 734=47 M.L.W. 628= 1938 M.W.N. 409=182 Ind. Cas. 392.

——Ss. 101 to 104—Grant.

When the inamdar alleges that he was the owner of both the **warams,** no presumption can be made that the grant was of both the **warams,** and it is incumbent upon him to prove the affirmative of the issue. Even assuming that he establishes to be the owner of both the **warams,** in order to sustain an action in ejectment, he must prove that the defendant was let in under a terminable tenancy which entitled him to eject him from the land. A.I.R. 1938 Mad. 576=47 M.L.W. 559=(1938) 1 M.L.J. 634=1938 M.W.N. 650=I.L.R. (1938) Mad. 888=178 Ind. Cas. 903.

——Ss. 101 to 104—Grant.

Inference that land is dedicated for use as public road from its long and continuous user is one of fact rather than of law and is open to rebuttal. A.I.R. 1936 Lah. 921=38 P.L.R. 1169=167 Ind. Cas. 524.

——Ss. 101 to 104—Grant—Exemption from Revenue—Onus on claimant.

Title to exemption from revenue must be proved by the person setting up such title and it must be proved, not by inference but by positive proof by a grant to hold as revenue-fee. At least such evidence should be available as would lead to the necessary inference that there was a grant. 4 M.I.A. 466, Foll. 104 Ind. Cas. 742=31 C.W.N. 1012=A.I.R. 1927 Cal 921.

——Ss. 101 to 104—Resumability on grantor.

The burden of founding a resumable grant or tenure is on the grantor. 72 Ind. Cas. 627=17 M.L.W. 514 =32 M.L.T. 399=1923 M.W.N. 343=A.I.R. 1923 Mad. 572.

——S. 103—Grant—Service tenure—Resumption—Zemindar.

Where the Government claim that lands in a Zemindari are chaukidari chakran lands and therefore irresumable by Zemindar the onus is on the Government. 43 Cal. 1104=43 I.A. 172=20 M.L.T. 235= 20 C.W.N. 1245=(1916) 2 M.W.N. 175=4 L.W. 251= 14 A.L.J. 1009=18 Bom. L.R. 838=24 C.L.J. 296= 31 M.L.J. 745=37 Ind. Cas. 223 (P.C.).

——S. 102—Grant—Resumption—Burden of proof.

The burden of proof that land is resumable on account of discontinuance of service lies on him seeking to resume. 18 Bom. L.R. 695=35 Ind. Cas. 860.

——Ss. 101 to 104—Grant—Inams—Impartible character of Inams.

Where a grant was made by the Peishwa to a number of brothers in consideration of their devotion to religious worship and the arduous services performed by the youngest brother, and the youngest brothe continued to manage it with the consent of the other co-sharers. **Held,** that the onus of proving impartibility in a suit for partition lay on the holder. (1903) 7 C.W.N. 409=27 B. 353=5 Bom. L.R. 408=30 I.A 77 (P.C.).

——Ss. 101 to 104—Grant—Inam—Revnue or soil.

A grant to an inamdar may be either of the roya share of revenue or of the scil ; but ordinarily the former. The onus is on the inamdar to show that he is an alienee of the soil. (1905) 7 Bom. L.R. 439=29 Bom. 415.

24. Insurance.

——S. 102—Insurance—Excepted risk.

When loss caused by cooking or smoking is excepted from the risk covered by the policy, the insurers must prove, that the cargo was destroyed by fire caused by cooking or smoking. 36 Cal. 516=13 C.W.N. 425= 1 Ind. Cas. 573.

——Ss. 101 to 104—Insurance.

The insurance company should prove that the assured's statements were incorrect. 9 A.C. 671, Foll. (1901) 11 M.L.J. 379=25 M. 183.

25. Jurisdiction.

——Ss. 101 to 104—Jurisdiction—Document—Registration—Objection—Onus.

When in the document of transfer, it is stated that a certain **mouza** is within a particular district and such document is registered on that footing by the Sub-Registrar without any objection, the burden of proving that the Sub-Registrar had no jurisdiction to register the document is on the party who alleges that the **mouza** is situated within the jurisdiction of another district. A.I.R. 1939 Cal. 148=68 C.L.J. 293.

——Ss. 101 to 104—Jurisdiction—British Indian Act—Burden of proof as to applicability of the Act.

Where a party is described as residing in a particular State or under a particular jurisdiction, and he desires to show that he is not a subject of that jurisdiction, the burden would be on him to show that though resident in a native State or elsewhere, he is, in fact, a British Indian subject and that a British Indian Act is applicable to him. A.I.R. 1934 Bom. 296=36 Bom. L.R. 608 =58 Bom. 513=152 Ind. Cas. 168.

——Ss. 101 to 104—Jurisdiction—Inspection of documents.

While the Court has a certain discretion in ordering inspection limited to the terms of the proviso to O. 21, R. 18 (1), Civil P. C., it would not be a proper exercise of the discretion to refuse inspection on the general ground that it was sought before the written statement was filed. The onus rests on the party resisting an order for inspection to show that it should not be made in the special circumstances of the case. A.I.R. 1931 Mad. 825=1931 M.W.N. 984=34 M.L.W. 654=61 M.L.J. 704=55 Mad. 421=135 Ind. Cas. 745.

——Ss. 101 to 104—Jurisdiction—Onus on party seeking.

The onus of showing that a party is entitled to bring a suit in the Special Revenue Court lies undoubtedly on him. 106 Ind. Cas. 505=A.I.R. 1928 Mad. 375.

——Ss. 101 to 104—Jurisdiction.

Power of Crown to act under a Special Act challenged—Onus is on Crown to show that they come under the statute. 71 Ind. Cas. 849=36 C.L.J. 336=A.I.R. 1923 Cal. 247.

——S. 103—Jurisdiction—Want of—Plea of res-judicata.

A party pleading that a certain decision is not **res judicata** being delivered by an incompetent Court must prove that the decree was passed without Jurisdiction. 6 Ind. Cas. 98 (All.).

——Ss. 101—104—Jurisdiction—Burdeen of Proof—Jurisdiction of Civil Courts—Objection to.

Civil Courts must be taken **prima facie** to have jurisdiction to entertain and dispose of all suits of civil nature and the onus is upon those who allege that the Civil Courts have no jurisdiction in any particular instance to make out the ground on which it is contended Court has no jurisdiction. 1930 M W.N. 945.

——S. 103—Jurisdiction—Land acquisition—Claimants to compensation—Revenue auction-purchaser and lakhraj holder.

Where a question of title to a plot of land arose between claimants to compensation paid by Government after its acquisition under the Land Acquisition Act. One being the purchaser of the estate at a sale for arrears of land revenue, whilst the other was holding it as lakhraj. **Held,** that the former was in the position of the plaintiff and the burden of proof as stated above was on him. A Land Acquisition Court can determine a conflict of title between rival claimants. 20 C.W.N. 1028=36 Ind. Cas. 184.

26. Landlord and tenant.

—— Ss. 103, 106—Landlord and tenant—Tenant claiming reduction of falkar rent.

The onus is upon the tenants under Ss. 103 and 106, Evi. Act to prove that they were entitled to any reduction of the **falkar** rent by reason of the fact that any of the trees on which the assessment had originally been made had ceased to exist or that any of the the trees in respect of which it was sought to recover **falkar** had been planted by the tenants themselves. A.I.R. 1937 Cal. 51=41 C.W.N. 88=I.L.R. (1937) 1 Cal. 491=167 Ind. Cas. 461.

——Ss. 101 to 104—Landlord and tenant.

Under S. 4 of the Madras Estates Land Act, the landlord is **prima facie** entitled to rent for all **ryoti** lands. The burden of proving in a suit for rent that certain lands were left waste through causes beyond the control of the tenant is on the tenat.

A.I.R. 1933 Mad. 101 = 36 M.L.W. 795=63 M.L.J. 884=141 Ind. Cas. 29.

——Ss. 101 to 104—Landlord and tenant—

To succeed in a suit for rent, the landlord must not only show that the tenat is in possession of the subject of the lease but that such possession was attributable to the lease or might be so. A.I.R. 1932 P. C. 28=9 O.W.N. 119=36 C.W.N. 221=55 C.L.J. 72=1932 M.W.N. 275=34 Bom. L.R. 481=62 M.L.J. 336= 59 I.A. 29=59 Cal. 1012=16 R.D. 95 = 35 M.L.W. 112=136 Ind. Cas. 398 (P.C.).

——Ss. 101 to 104—Landlord and teant.

In a suit by the plaintiffs for possession of land on the allegation that they are lessees and that they have been dispossessed by the defendant's landlords, the burden of making out the plea of special limitation is on the defendant. A.I.R. 1932 Cal. 195=35 C.W.N. 1143=136 Ind. Cas. 601.

——Ss. 101 to 104—Landlord and tenant—Permanent tenancy—Right to enhance rent—Onus on landlord.

In the case of permanent tenancy the onus is on landlord to prove a right to enhance rent by agreement, usage or otherwise. A.I.R. 1926 Bom. 52, Foll. 123 Ind. Cas. 492=31 Bom. L.R. 1279=A.I.R. 1930 Bom. 39.

——Ss. 101 to 104—Landlord and tenant—

In a suit for arrears of produce-rent the onus of proving the rate of outturn lies, not on the defendant tenant, but on the plaintiff landlord. 124 Ind. Cas. 848=11 P.L.T. 247=A.I.R. 1930 Pat. 388.

——Ss. 101 to 104—Landlord and tenant—Suit to recover land as mal land—Onus on the zamindar.

Where a zamindar or a person claiming through the zamindar brings a suit for recovery of certain land as forming part of his **mal** land and the defendant contends the suit on the ground that it was the **lakheraj** property of which they were the **shebaits** or which they held through the **shebait,** it is not enough for the plaintiff to show that it lay within the ambit of the zamindari but they must prove that the land lay within the Zamindar's regularly assessed estate or mahal and that it formed part of the **mal** assets at the time of the decennial settlement. The burden then will shift on defendants to prove that it was **lakheraj** property. 51 C.L.J. 41=33 C.W.N. 1168=A.I.R 1930 Cal. 164.

——S. 101—Landlord and tenant—Plea of permanent occupancy—Onus.

The burden of proving a plea of permanent occupancy right in a suit for ejectment is on the tenant. 1930 M.W.N. 874.

——Ss. 101 to 104—Landlord and tenants.

In a suit for produce rent the entire onus is on the tenants to satisfy the Court what was the produce during the years in suit. 117 Ind. Cas. 653=8 Pat. 418=10 P.L.J. 692=A.I.R. 1929 Pat. 384.

——Ss. 101 to 104—Landlord and tenant—Ejectment suit—Permanent tenancy set up—Onus on defendant.

It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant. A.I.R. 1924 P.C. 65 and 16 Cal. 223 (P.C.), Rel. on 107 Ind. Cas. 81=55 Cal. 355=32 C.W.N. 184=A.I.R. 1928 Cal. 315.

——Ss. 101 to 104—Landlord and tenant—Tenant pleading termination of tenancy—Onus on tenant.

Where in a suit for recovery of rent by the landlord, a tenant has alleged that the relationship of landlord and tenant that existed between them had terminated resulting in the termination of his liability, the initial as well as the ultimate onus in such a case is on the tenant. 110 Ind. Cas. 438 (Cal.).

——Ss. 101 to 104—Landlord and tenant—Variation in rent—Tenant to prove the reason.

Where there has been a variation in the amount of rent, the onus is on the tenants to prove why there has been such variation. 90 Ind. Cas. 602=A.I.R. 1926 Cal. 106.

——Ss. 101 to 104—Landlord and tenant—Tenant alleging termination of tenancy—Onus on tenant.

Where a tenant-at-will alleges that his relationship as a tenant ceased to exist, the onus is on him to prove that the relationship subsequently ceased to exist. 79 Ind. Cas. 59=A.I.R. 1925 Sind 36.

——Ss. 101 to 104—Landlord and tenant—Ejectment suit—Permanent tenancy—Onus on tenant setting up—Proof of—Long occupation not sufficient.

When a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such a right is upon the tenant and proof of long occupation at a fixed rent does not satisfy that onus. 82 Ind. Cas. 226 =5 L.R. (P.C.) 33=19 M.L.W. 259=22 A.L.J. 130=51 I.A. 83=34 M.L.T. 10=1924 M.W.N. 293=47 Mad. 337=28 C.W.N. 809=A.I.R. 1924 P.C. 65=46 M.L.J. 546 (P.C.).

——Ss. 101 to 104—Landlord and tenant—Not record as tenant—Onus on tenant.

Where a person is not recorded as tenant and the landlord does not admit that he was a tenant, the burden is upon him to prove that he was a tenant. 68 Ind. Cas. 664=A.I.R. 1923 Nag. 7.

——S. 103—Landlord and tenant—Tenancy—Ryotwari land—Pattadar—Tenants under—Permanent tenancy.

Where the tenants under a pattadar of ryotwari land claim a permanent tenancy the onus is on the tenants to prove this claim. 43 Mad. 567=(1920) M.W.N. 61=27 M.L.T. 102=11 L.W. 399=38 M.L.J. 476=22 Bom. L.R. 578=18 A.L.J. 707=56 Ind. Cas. 117 (P.C.).

——S. 102—Landlord and tenant—Tenancy—Onus.

If a landlord brings a suit for recovery of possession of land on ground that the land in suit was not included in the tenancy. **Held,** that the onus of proving that the land was included in the tenancy lay on the defendant. 56 Ind. Cas. 180 (Cal.).

——Ss. 102 and 103—Landlord and tenant—Tenancy—Ejectment—Area of land demised.

Where defendants are the tenants of the plaintiff and the only dispute is whether the disputed lands are within or without the boundaries of that tenancy the onus depends on the relative situation of the land in question and the admitted lands of the tenancy held by defendant. 29 C.L.J. 607=52 Ind. Cas. 659.

——Ss. 102 and 103—Landlord and tenant—Tenancy—Suit for possession of land—Defendant setting up tenancy—Defendant found tenant of some land under plaintiff—Onus,

Where defendant in a suit for possession of land is found to be tenant of the plaintiff of some land, and the defendant sets up tenancy, the onus is not thereby cast on the plaintiff to prove that the land he seeks to recover is outside the tenancy of the defendant, but it is on the defendant to prove that it is within his tenancy. 19 C.L.J. 408=19 C.W.N. 143=23 Ind. Cas. 69.

——S. 103—Landlord and tenant—Tenancy—Defence of—Onus on defendant to prove his plea.

Where the plaintiff claims the land in suit and the defendant does not deny plaintiff's title but pleads a subordinate interest under the plaintiff and in derogation of the latter's right to possession, the onus is on the defendant to make good his plea. 18 C.L.J. 544 =20 Ind. Cas. 155.

——S. 102—Landlord and tenant—Tenancy—Burden of proof.

Where plaintiff sued for possession of undivided half share of certain land as revenue sale purchaser and the defendant, pleaded its inclusion in a certain **Howla**, the burden of proving its inclusion in a certain **Howla** lies on the defendant. 16 C.W.N. 693= 15 Ind. Cas. 701.

——S. 103—Landlord and tenant—Tenancy—Lease—Burden of proving what lands were demised—Lessee mixing leased lands with his own—Effect.

A lessor suing to recover possession of land demised by him must prove what lands he demised, but the onus of proof will be shifted to the tenant in cases where the lessee mixes his own lands with those demised to him. 14 Ind. Cas. 284 (Mad.).

——S. 101—Landlord and tenant—Tenancy—Zemindari land.

Though the defendants hold sone lands as tenants under the plaintiffs the burden of showing that in respect of other land in the Zemandari which the defendants may be found to be in possession of they have no right as tenants, should not be thrown on plaintiff but on defendant. 20 W.R. 421 ; 11 C.L.R. 476, Foll. 12 C.L.J. 376=8 Ind. Cas. 785.

——S. 103—Landlord and tenant—Tenancy—Suit for possession—Onus on person suing.

A sued B and others for recovery of two plots of land on the ground that the lands were held under a demise. B pleaded that the lands were held under a Kanom. **Held,** that the onus of proving the title by demise was on A who asserted it and on attestation by B of an instrument affecting the plots did not amount to an admission of A's title by B. 35 Mad. 168 = 21 M.L.J. 550=9 M.L.T. 423=(1911) 2 M.W.N. 315 =10 Ind. Cas. 424.

——Ss. 101 to 104—Landlord and tenant—Landlord purchasing tenant's interest—No merger—Proof that the interests continued to be kept apart—Onus.

When a landlord purchases a tenant's interest but there is no merger of the two interests, the onus of proving that the distinction between the interests continued to be kept alive subsequently also is not on the party alleging that the distinction was so kept alive. 88 Ind. Cas. 495=1925 P.H.C.C. 185= 6 P.L.T. 805=A.I.R. 1925 Pat. 530.

——S. 102—Landlord and tenant—Rent—Enhancement of—Right to.

If it is shown, what the previous rent of the tenant was, the landlord, must show that the enhancement is due to the increase in area. 36 Cal. 604=9 C.L.J. 343=2 Ind. Cas. 828.

——Ss. 101 to 104—Land lord and tenant—Rent suit—Rate of rent—Onus of proof.

In a suit for rent, where the defendant denies the rate at which rent is claimed the onus of proving the rate claimed is on the plaintiff ; and even if the case if tried **ex parte** the plaintiff is bound to prove the same (1903) 7 C.W.N. 514=30 C. 947.

——Ss. 101 to 104—Landlord and tenant—Demand for rent—Refusal to pay—Sale of land.

In cases where lands are sold because a tenant refuses to pay rent, the landlord must show that the demand was for the exact sum due. (1902) 26 M. 260.

——Ss. 101 to 104—Landlord and tenant—Burden of proof—Tenant in possession of some land of Zemindar—Land not contiguous to holding—Encroachment.

The mere fact that the defendants hold some lands as tenants under the plaintiffs, is not sufficient to throw upon the plaintiffs the burden of showing that in respect of any other land in the Zemindari which the defendants may be found to be in possession of and which is not contiguous to the admitted holding of the defendants, they have no right as tenants. The burden of proof in a case like this lies upon the defendants. 20 W. R. 421 ; 11 C.L.R. 476, Foll. 12 C.L.J. 376=8 Ind. Cas. 785.

——Ss. 101 to 104

Landlord and tenant—Right to cut trees and right right to appropriate trees cut down—Onus is on the tenants. 10 C.L.J. 25 = 2 Ind. Cas. 955.

——Ss. 101 to 104.

Landlord and tenant—Question whether seized by tenant forms a part of the tenure.—See 6 C.W.N. 105.

——Ss. 101 to 104.

Landlord and tenant enhancement of rent—Increase in area. See 9 C.L.J. 343=2 Ind. Cas. 828=36 Cal. 604.

——Ss. 101 to 104—Landlord and tenant—Occupancy right—Sub-tenants.

In a suit by plaintiff to eject defendants alleging them to be sub-tenants if the latter set up rights of occupancy the onus is on them to prove their claim. L.R. 3 A. 459 (Rev.).

——Ss. 101 to 104—Landlord and tenant—Occupancy right.

The onus of proving that a person derived a permanent right of occupancy from the properietor is on the person setting up such right. (1902) 25 M. 507=12 M.L.J. 119.

27. Legal necessity.

——Ss. 101 to 104—Legal necessity—Alienation—Onus on alienee.

In cases of alienations where necessity is pleaded it is the duty of the alienee to show the validity of the alienation. 65 P.R. 1900, Foll. 117 Ind. Cas. 905 (Lah.).

——Ss. 101 to 104—Legal necessity—By restricted owner—Onus on alienee—How discharged.

In a suit on a bond made by a person with restricted power of alienation the defendants are not required to plead the absence of legal necessity for the borrowing. It is for the plaintiffs to allege and prove the circumstances which alone will give validity to the mortgage. Even though there may not be legal necessity in fact the alienee would be equally protected if he honestly did all that was reasonable to satisfy himself that the required necessity existed. 25 I. A. 183, Foll. 79 Ind. Cas. 961=28 C.W.N. 1050=22 A.L.J. 16=1924 M.W.N. 86=19 M.L.W.107=5 L.R.(P.C.)19=26 Bom.

L.R. 198=51 I.A. 145=34 M.L.T. 20=47 Mad. 181 =39 C.L.J. 194=A.I.R. 1924 P.C. 56=46 M.L.J. 172 (P.C.).

——Ss. 101 to 104—Legal necessity—Suit for declaration as to invalidity—Onus on plaintiff—Not exonerated by defendant's absence.

Where plaintiff sues for declaration that a sale-deed executed by a member of a Hindu family is fictitious and should be set aside, as being executed without necessity, the burden of proving his allegations is on him, and the absence of defendant from suit, would not relieve him from that burden. The granting of a declaration is a matter of discretion of the Court though such discretion should be exercised only on Judicial Principles. 71 Ind. Cas. 749=21 A.L. J. 168=45 All. 311=4 L.R.A. (Civ.) 380=A.I.R. 1923 All. 287.

——Ss. 101 to 104—Legal necessity—Pre-emptor supporting alienation—Onus on him as to necessity—Extent of proof required.

A pre-emptor cannot stand in a better position against the sons than the vendee from father except that, being in a less favourable situation than the vendee to prove proper enquiry as to the existence of necessity or of antecedent debts of the father, less strict proof of enquiry may be required of him. The burden of proving their existence, however, is not shifted by pre-emption from the transferee to the sons, unless the sons were parties to the pre-emption decree. 74 Ind. Cas. 353=25 O.C. 388=9 O.L.J. 601 =A.I.R. 1923 Oudh 147.

——Ss. 101 to 104—Legal necessity—Borrowing—High rate of interest—Onus on lender.

Where the rate of interest is unusally high, the burden lies on the mortgagee to prove that there was necessity to borrow at so high a rate. 87 Ind. Cas. 1035=A.I.R. 1925 Oudh 750.

——Ss. 101 to 104—Legal necessity—Mortgage.

Hindu Law—Alienation—Necessity—Mortgage of joint property by Manager—Party supporting mortgage must prove that conditions imposed were reasonable under the circumstances. 79 Ind. Cas. 35=11 O.L.J. 415=A.I.R. 1924 Oudh 378.

——Ss. 101 to 104—Legal necessity—Hindu widow—Dealings with a Hindu widow—Onus on person so dealing—Proof of fair rent or price alone not sufficient.

A person who deals with a Hindu widow having a limited estate must be aware that he may be called upon to establish the facts which justify the transactions under which he claims.

It is sufficient to say that the mere fact that the rent reserved was a fair market rent or the price, obtained was a fair market price, cannot alone and in themselves be regarded as sufficient. 65 Ind. Cas. 305=20 A.L.J. 22=35 C.L.J. 116=1922 M.W.N. 95= 26 C.W.N. 322=3 P.L.T. 311=24 Bom. L.R. 346= 15 M.L.W. 417=30 M.L.T. 234=A.I.R. 1922 P.C. 39 =42 M.L.J. 253 (P.C.).

——S. 102—Legal necessity—Hindu Law—Alienation.

The burden of proving necessity for an alienation by a Hindu widow is on the alinee. 42 Cal. 876=42 I.A. 64=17 M.L.T. 115=19 C.W.N. 370=13 A.L.J. 223= 2 L.W. 219=21 C.L.J. 225=28 M.L.J. 565=17 Bom. L.R. 426=(1915) M.W.N. 511=27 Ind. Cas. 674 (P.C.).

——S. 102—Legal necessity—Religious endowment—Mortgage.

On a mortgage of endowed property the onus of proof of necessity is on the mortgagee. 40 Mad. 402= 21 M.L.T. 288=32 M.L.J. 369=15 A.L.J. 281=1 P.L.W. 457=5 L.W. 759=21 C.W.N. 761=19 Bom. L.R. 456=25 C.L.J. 589=(1917) M.W.N. 487=44 I.A. 98=39 Ind. Cas. 659 (P.C.).

——S.102—Legal necessity—Minor—Joint family,

If a plaintiff seeks to impose on a minor in a joint family any liability as a member of a family partnership he must show how the minor's liability arises. 27 B. 157, Foll. 56 Ind. Cas. 129 (Nag.).

——Ss. 101 to 104—Legal necessity—Alienation by widow—Proof of legal necessity.

The onus of proving legal necessity in respect of a mortgage executed by a Hindu widow is on the mortgagee. But the mortgagee is not bound to see to the direct application of the money. (1906) 33 Cal. 1079.

——Ss. 101 to 104—Legal necessity—Debts, legal necessity for—Nature of proof by creditor.

Where a debt is incurred for legal necessity, a creditor discharges his duty if he shows that there was legal necessity for the loan and he is not bound to see to the application of the money. (1904) 9 C.W.N. 330 =32 C. 158.

——Ss. 101 to 104—Legal necessity—Hindu Law—Alienation by father—Antecedent debt.

In the case of an alienation by a Hindu father the vendee must prove the existence of an antecedent debt to validate the alienation. (1902) 4 Bom. L.R. 587.

28. Limitation.

——S. 102—Limitation—Burden to prove that action is not barred by time.

When the defendant pleads limitation, it is for the plaintiff to prove the facts which would bring the claim within the time prescribed by the statute. It is for the plaintiff to show that the cause of action is not barred. A.I.R. 1946 Cal. 123=49 C.W.N. 810.

——S. 102—Limitation.

The burden of proving that an application for execution is not transferred and is in accordance with law is on the applicants. A.I.R. 1931 Sind 160 =25 S.L.R. 528=134 Ind. Cas. 1182.

——Ss. 101 to 104—Limitation—Suit by a minor on attaining majority—Onus on him to prove—Date of majority.

It is the duty of the person bringing a suit and claiming exception under Limitation Act, S. 8 to show that he attained majority within three years of the institution of the suit. 121 Ind. Cas. 277= 7 O.W.N. 25=A.I.R. 1930 Oudh 97.

——Ss. 101 to 104—Pro-note—Two different dates of endorsement for same payment—Onus on plaintiff to prove the date bringing the suit in time.

Where there are two endorsements on the promissory note as to the same payment of interest but the dates of the two differ, and if one is correct the suit is in time while if the other is correct, the suit is time-barred; it is the duty of the plaintiff to prove that his suit is within time, and to do that he must prove that the date bringing the suit in time is correct. 104 Ind. Cas. 368=6 Bur. L.J. 102=A.I.R. 1927 Rang. 255.

——Ss. 101 to 104—Limitation—Onus on plaintiff to prove suit is not barred.

Where the defendants plead limitation to a suit, it is for the plaintiff to prove facts which would bring the claim within time. 67 Ind. Cas. 761=24 Bom. L.R. 513=A.I.R. 1923 Bom. 155.

——Ss. 101 to 104—Limitation—Suit by minor on attaining majority—Onus on him to prove that suit is in time.

In a suit by minor on attaining majority to set aside sale by his mother on the ground that she was induced by fraud and misrepresentation the burden lies on plaintiff to prove that his suit is in time. 70 Ind. Cas. 984=A.I.R. 1923 Lah. 254.

——Ss. 101 to 104—Limitation—*Prima facie* barred—Onus on plaintiff to disprove bar.

When a suit or an application is on the face of it barred it is for the plaintiff or the applicant to satisfy the Court of the circumstances which would prevent the statue from having its ordinary effect. 36 Cal. 654, Foll. 74 Ind. Cas. 517=10 O.L.J. 86=A.I.R. 1923 Oudh 254.

——S. 102—Limitation—Onus.

In a suit for redemption the burden of proving that the suit is within limitation lies on the plaintiff. 1 Lah. 21=51 Ind. Cas. 956.

——S. 103—Limitation.

The burden of proving that a suit is in time is on the plaintiff. (1916) 1 M.W.N. 208=3 L.W. 210=33 Ind. Cas. 969.

——Ss. 101 to 104—Limitation Act, Art. 139 (g)—Suit by landlord to eject tenant—Tenant setting up adverse possession—Question when tenancy terminated.

Where a landlord sues his tenant in ejectment and the tenant sets up adverse possession, the tenant must prove when the tenancy terminated. (1902) 4 Bom. L.R. 99=26 B. 442.

29. Malicious prosecution.

——S. 103—Malicious prosecution—Innocence—Burden of proof.

In a suit for malicious prosecution, it is incumbent on the plaintiff to prove his innocence to justify the inference that the prosecution was commenced without reasonable and probable cause. 17 C.W.N. 434=19 Ind. Cas. 24.

——S. 103—Malicious prosecution—Reasonable and probable cause.

In a suit for damages for malicious search the onus of proving want of reasonable and probable cause lies on the plaintiff. 20 M.L.T. 303=(1916) 2 M.W.N. 280=31 M.L.J. 772=38 Ind. Cas. 823.

30. Material alteration.

——Ss. 101 to 104—Material alteration.

Contract originally proposed to be made by plaintiff—Alteration of contract in name of another—Plaintiff sought to be made liable—Very strong evidence is necessary to show that plaintiff remained liable despite the alteration. A.I.R. 1935 P.C. 93=68 M.L.J. 530=41 M.L.W. 661=154 Ind. Cas. 1090 (P.C.).

——S. 103—Material alteration—Onus.

In a suit on a mortgage bond, the burden of proof lies on the defendant to show how that particular clause was an alteration made subsequent to the execution of the bond without the knowledge of the executant. 18 C.L.J. 354=21 Ind. Cas. 79.

——Ss. 101 to 104—Material alteration—Pro-note Alteration in the figure representing consideration—Onus for plaintiff to prove consideration.

Plaintiff sued defendant for a certain sum due on the promissory note. The defendant denied taking the principal sum mentioned in the promissory note, *viz.*, Rs. 1,300, and denied signing the promissory note in the form it had assumed when the case was brought. He admitted that his signature appeared on the note, but said that when he signed it, the only entries were the figures Rs. 300 at the top of the paper, and signature at the bottom.

Held, that all that the defendant admitted was that his signature appeared on the document filed and the case to be decided was not whether the plaintiff had been proved to have committed forgery but whether the plainriff had proved that he lent the Rs. 1,300, to the defendant as he alleged and the burden of proving this loan rested on the plaintiff. 105 Ind. Cas. 361=5 Rang. 527=A.I.R. 1927 Rang. 319.

——Ss. 101 to 104—Material alteration—Erasure or interlineation—Person producing the document must show when it was made.

A writing which is intended to be under hand only can be altered by erasure or interlineation or otherwise before it is signed but it lies upon the party who puts the instrument in suit to explain the alteration and show when it was made. An alteration made while the instrument is in the custody of one party although not made with his knowledge or consent has the same effect in avoiding the instrument as if made by him, on the principle that he who has the custody of an instrument made for his benefit is bound to preserve it is its original state. 81 Ind. Cas. 847=20 N.L.R. 76=A.I.R. 1924 Nag. 250.

31. Minority.

——Ss. 101 to 104—Minority.

Where a document is impigned by a person on the ground of his minority, the onus rests upon him to show that he had not attained majoirty on the date of execution of that document. A.I.R. 1940 Mad. 285=1939 M.W.N. 976.

——Ss. 101 to 104—Minority.

Suit on mortgage—Plea of mortgagor that he was minor at date of execution of mortgage—Onus is upon him. A.I.R. 1938 Mad. 959=1938 M.W.N. 938=(1938) 2 M.L.J. 775=182 Ind. Cas. 312.

——Ss. 101 to 104—Minority.

The burden of showing that the person was a minor on the date when he entered into the contract with the plaintiff lies heavily upon person who asserts it. (*See* REFERRING ORDER). A.I.R. 1934 All. 406=1934 A.L.J. 318=56 A. 766=3 A.W.R. 529=149 Ind. Cas. 781 (F. B.).

——Ss. 101 to 104—Minority—Representation as major—Onus of proving him a minor heavy on those setting it up.

Where a deed is executed by a person who alleges himself to be a major at the time of execution, a heavy burden rests upon him or his representatives when they set up the defence of minority. 109 Ind. Cas. 387=26 A.L.J. 685=47 C.L.J. 628=32 C.W.N. 874=5 O.W.N. 547=28 M.L.W. 17=30 Bom. L.R. 1346=A.I.R. 1928 P.C. 152=55 M.L.J. 88 (P.C.).

——Ss. 101 to 104—Minority—Defendant pleading minority—Onus on him.

In a suit to recover money on a bond executed by defendant who pleads minority at the time of execution of the bond, the burden of proving minority is on defendant. A.I.R. 1924 All. 730, Foll. 87 Ind. Cas. 445=47 All. 493=6 L.R.A. (Civ.) 283=A.I.R. 1925 All. 681.

——Ss. 101 to 104—Minority—Decree against minor—Challenged on attaining age—Proof of invalidity of proceedings—Onus on minor.

The contention that if a minor on coming of age challenges a decree passed against him on the basis of a compromise even though he does not allege in what manner the compromise is invalid the burden is immediately thrown in the opposite party of establishing that all proceedings in the suit were regular is a very startling one and not borne out by the authorities. 74 Ind. Cas. 964= 21 A.L.J. 488=4 L.R.A. (Civ.) 481=A.I.R. 1923 All. 566.

——Ss. 101 to 104—Minority—Contract-deed alleged to be executed by minor—Onus on party setting up the deed to prove competence.

When the validity of a contract is questioned on the ground that the executant is a minor it is for the party setting up the deed to establish by **prima facie** evidence that the contract was valid and entered into by a person who was competent to do so. 66 Ind. Cas. 814=A.I.R. 1922 All. 240.

——Ss. 101 to 104—Minority—Minor acted and appeared like major—Onus of proving minority on those alleging it.

It is doubtful whether any heavier burden is laid on the plaintiff than that of establishing that the plaintiff has good reason to believe the alleged minor was of full age. If the minor acted and appeared like a major, the burden of proving minority lies on the party alleging it and presumably basing its allegation on peculiar knowledge. A.I.R. 1922 Lah. 75.

——Ss. 101 to 104—Minority—No clear evidence as to date of birth—Evidence cannot be strained to favour.

Where the burden of proof of minority is on the plaintiff and his witnesses are not exact as to the date of his birth their evidence cannot be strained in his favour. 66 Ind. Cas. 930=9 O.L.J. 35=A.I.R. 1922 Oudh 50.

— S. 102—Minority.

A person alleging that another was minor at a particular date must prove it. 58 Ind. Cas. 196 (Nag.).

——Ss. 102 and 103—Minority—Onus on person pleading.

Where a person alleges his minority in order to escape liability under a mortgage executed by him the burden lies upon him to prove that he was a minor, at the time the transaction was entered into. 22 O.C. 162=1 U.P.L.R. (J.C.) 83=6 O.L.J. 376=53 Ind. Cas. 136.

——S. 103—Minority—Onus.

The onus of proving the minority of the executant of a deed is on the person asserting it. 45 Cal.909= 45 I.A. 97=16 A.L.J. 576=5 P.L.W. 83=(1918) M.W.N. 406=22 C.W.N. 891=8 L.W. 163=24 M.L.T. 62=28 C.L.J. 192=20 Bom. L.R. 851=35 M.L.J. 46= 45 Ind. Cas. 770 (P.C.).

——S. 102—Minority—Necessaries—What must be proved and by whom.

A plaintiff seeking to recover money for goods supplied to the infant must show that the goods were suitable to the minor's condition in life and that the infant was not plentifully supplied with such goods at the time of sale. 36 Cal. 768=13 C.W.N. 643=1 Ind. Cas. 724.

——S. 102—Minority—Onus on person setting up.

The party who comes to the Court and pleads minority must make out his case before the adverse party can be required to rebut it. 33 Ind. Cas. 143 (Mad.).

——Ss. 102 and 103—Minority—Onus.

It is for the party setting up infancy in the case of a contract to prove it. 24 M.L.J. 517; 26 B. 109; 8 W.R. 371, Foll. 26 Ind. Cas. 407 (Mad.).

——Ss. 102 and 103—Minority—Onus of proof.

When in a suit upon a contract the defendant pleads minority at the time of the contract the onus of proving that he was of age is on the person who tries to enforce the contract. 1 O.L.J. 366=25 Ind. Cas. 648.

——S. 102—Minority—Safe by minor—Burden on vendees.

In the case of a minor's sale, the vendees must prove that they were deceived by the minor's misrepresentations and that they were ignorant of the real state of affairs. 31 All. 21=1908 A.W.N. 267=5 A.L.J. 674 =1 Ind. Cas. 562.

——Ss. 101 to 104—Minority, plea of, by executant of mortgage that he was a minor.

In a suit for foreclosure one of the defendants contended that he was a **minor** at the date of executing the mortgage, and so not competent to enter into a contract. **Held,** that the burden of proving the validity of the contract lay on the plaintiffs in the first instance. 6 A.L.J. 693.=2 Ind. Cas. 839.

32. Mortgage.

——Ss. 101 to 104—Mortgage of joint Hindu family property.

The burden remains heavily upon the mortgagee to establish compliance with the conditions under which the Hindu Law permits the interest of the minor members to be taken from them. A.I.R. 1940 P.C. 145= 44 C.W.N. 1013=1940 M.W.N. 949=1940 A..L.J. 667 =72 C.L.J. 136=1940 A.W.R. 114=52 M.L.W. 669 =1940 O.W.N. 1180=42 Bom. L.R. 1144=I.L.R. (1940) Kar. P.C. Sup. 282=189 Ind. Cas. 433=6 B.R. 870.

——Ss. 101 to 104—Mortgage—Plaintiff mortgagor claiming *muafi* rights mortgaged by him to be inalienable.

Where the plaintiff had represented to the defendant that he held **muafi** rights in certain villages which he was entitled to mortgage and which, in fact, he did mortgage, the onus in a suit challenging the mortgage is upon the plaintiff to prove that these rights are inalienable. A.I.R. 1940 All. 373=1940 A.L.J. 420= 1940 A.W.R. 397=1940 O.W.N. 950=I.L.R. (1940) All. 603=190 Ind. Cas. 3=1940 R.D. 452. (F.B.).

——Ss. 101 to 104—Mortgage—Subrogation.

The onus to prove that there was an agreement to keep the mortgage alive is on mortgagee or vendee. A.I.R. 1939 Mad. 949=1939 M.W.N. 952=(1939) 2 M.L.J. 533=50 M.L.W. 618=189 Ind. Cas 435.

——Ss. 101 to 104—Mortgage—Suit for redemption.

In a suit for redemption, **prima facie** proof in support of the plaintiff's claim for redemption must be forth coming. Where there is no evidence in support of the plaintiff's claim in respect of the alleged mortgage and the particulars thereof, the claim for redemp-

tion must inevitably fail. A.I.R. 1931 Oudh 373=8 O.W.N. 732=7 Luck 94=132 Ind. Cas. 793.

——Ss. 101 to 104—Mortgage—Redemption—Plea of extinction by sale—Onus on mortgagee.

Where once a mortgage has been admitted the onus is on the mortgage to show that the mortgage has been extinguished by subsequent sale. 122 Ind. Cas. 316=1930 A.L.J. 292=32 Bom. L.R. 380=31 P.L.R. 145=31 M.L.W. 321=11 Lah. 199=57 I.A. 86=A.I.R. 1930 P.C. 91= 51 C.L.J. 518=59 M.L.J. 53. (P.C.).

——Ss. 101 to 104—Mortgage—Redemption-Onus on plaintiff to prove subsistence of mortgage.

In a suit for redemption, the onus is on the plaintiff to prove mortgage he set up, *i.e.*, that it was still subsisting. 95 Ind. Cas. 945=8 O.L.J. 401.

——Ss. 101 to 104—Mortgage—Representation by mortgagor—Auction-purchaser with knowledge of defect—Protected.

When a person mortgages a property falsely representing it as his own, and after inheriting it subsequently, claims to recover the same, contending that he had no right to mortgage it, the auction-purchaser gets a good title even if he had knowledge of the facts provided the mortgagee was unaware. 70 Ind. Cas. 385=27 C.W.N. 943=36 C.L.J. 78=A.I.R. 1922 Cal. 542.

——S. 102—Mortgage—Operation of.

A person, setting up a condition that a registered mortgage deed should not operate till the whole consideration money is paid, must prove it. 1 Pat. L.W. 250=2 Pat. L.J. 168=38 Ind. Cas. 877.

——Ss. 102 and 103—Mortgage—Suit for redemption—Burden of proof.

The burden of proof in a suit for redemption where the plaintiff is out of possession is cast heavily upon him, however weak the defence might be. 9 Bur. L.T. 57=31 Ind. Cas. 885.

——Ss. 102 and 103—Mortgage—Redemption—Title to redeem—Onus.

The plaintiff in a suit for redemption must show a subsisting title. 12 A.L.J. 769=25 Ind. Cas. 353.

——S. 103—Mortgage—Redemption suit—Onus of proof.

In a redemption suit, the plaintiff must first prove the mortgage, and if he has given proof thereof, the burden shifts to the defendant to prove that the relationship has ended. 20 Ind. Cas. 29 (All.).

——Ss. 102 and 103—Mortgage—Redemption suit.

In a suit for redemption, the onus is on the plaintiff to prove the initial mortgage. 6 Bur. L.T. 131=20 Ind. Cas. 666.

——Ss. 101 to 104—Mortgage—Subsistence of mortgage—Initial onus on mortgagor—If mortgage is admitted—Onus shifts mortgagee to prove subsequent sale.

Plaintiffs alleged that certain trees had been mortgaged by their ancestor to the predecessors-in-title of the defendants.

Held, the onus of proving that the mortgage subsists at the date of suit, lies on plaintiffs in the first instance. If the defendants admit previous mortgage but allege subsequent sale, the onus is shifted on to them to prove ownership by sale when they produce and prove revenue records in their favour, the onus is re-shifted to the plaintiffs, who must prove their case. 81 Ind. Cas. 336=A.I.R. 1923 Lah. 243.

——Ss. 101 to 104—Mortgage—Larger sum claimed—No burden on plaintiff to prove right to redeem.

The plaintiffs sued to redeem a mortgage. The defendant admitted the mortgage but pleaded that the mortgage amount was more than that alleged by the plaintiffs.

Held, that no burden lay on the plaintiff to prove his right to redeem on payment of the lesser amount. 70 Ind. Cas. 911=4 U.B.R. 114=1 Bur. L.J. 248=A.I.R. 1925 Rang. 24.

——Ss. 101 to 104—Mortgage—'*Neerozhikka Otti Kanom*'—Onus of proving it is irredeemable is on party alleging it.

The person setting up the plea that a mortgage is irredeemable must prove that it is so. There is nothing in books on Malabar Law to show that the tenure **Neerozhikka Otti Kanom** is irredeemable. 70 Ind. Cas. 20=1923 M.W.N. 76=16 M.L.W. 930=A.I.R. 1922 Mad. 185=42 M.L.J. 350.

——Ss. 102 and 103—Mortgage—Redemption—Onus.

Where both plaintiff and defendant relied only on one mortgage and the only question is whether it is subsisting or not the burden of proof is on the defendant as he must be deemed to be aware of the date of the transaction. 26 A. 313; 1 A. 117; 38 All. 540, Foll. 1918 M.W.N. 139=7 L.W. 284=44 Ind. Cas. 447.

——Ss. 101 to 104—Mortgage—By *karta*—Onus on mortgage to prove validity.

In a suit by the mortgagee on a mortgage executed by the **Karta** of a joint family the onus is on the mortgagee to prove that the mortgage was a valid one. 61 Ind. Cas. 20=2 P.L.T. 318=6 P.L.J. 256=A.I.R. 1921 Pat. 99.

——S. 103—Mortgage—Ownership of properties included in—Onus.

In a suit between the mortgagee and a third party the onus of proving that the properties comprised in the mortgage-deed belong to the mortgagor lies upon the mortgagee. 17 Bom. L.R. 49=27 Ind. Cas. 478.

——S. 102—Mortgage—Conditional sale—Onus.

Sale of property followed by agreement to repurchase within a specified time may be a kind of mortgage, but the onus of proving that the transaction does amount to a mortgage lies on the party asserting. 10 Bur. L.T. 4=35 Ind. Cas. 336.

——S. 102—Mortgage—Possession—Burden of proof.

Burden of proving a transaction giving possession to the mortgagee of property which was previously mortgaged to him without possession, lies on the mortgagee; it may be shifted by proof of a report of sale made to the Thugyi or other relevant facts. 5 L.B.R. 40=2 Ind. Cas. 535.

——S. 102—Mortgage—Usufructuary mortgage after simple mortgage of same property—Mortgagee setting up sale in his favour—No mutation of names.

The burden of proof in a case where an usufructuary mortgagee coming in after a simple mortgage of the same property in favour of another sets up a sale in his favour but has not obtained mutuation of names is heavily on the person setting up a sale. 22 Ind. Cas. 806 (L.B.).

——Ss. 102 and 103—Mortgage—Discharge—Onus.

In a suit by a mortgagee for recovery of the mortgage-money, the onus of proving a discharge is on the mortgagor. 30 Ind. Cas. 32 (Cal.).

——Ss. 101 to 104—Mortgage—Discharge.

Mortgaged lands leased to mortgagee does not necessarily discharge mortgage. L.R. 4 A. 43 (Rev.).

——Ss. 101 to 104—Mortgage by widow—Legal necessity, proof of—Lapse of time—Quantum of proof.

Lapse of time is an element of consideration : it may absolve the mortgagee from the high standard of proof that would be required in relation to a recent transac tion, but it cannot dispense with the necessity for some proof, or create a bar to redemption on payment of all that is legally due. (1902) 4 Bom. L.R. 465.

——Ss. 101 to 104—Mortgage—Redemption suit—Usufructuary mortgage—Fact how much debt has been repaid.

The mortgagor must, in taking accounts between him and the mortgagee, prove how much debt has been repaid. (1902) 4 Bom. L.R. 42=26 B. 363.

——Ss. 101 to 104—Mortgage—Fraud—Collusion—Auction-purchaser from mortgagee.

In a suit on a mortgage where collusion and fraud are pleaded by a subsequent auction-purchaser of the mortgaged property, the onus is upon the plaintiff to prove that the transaction was perfectly genuine and free from taint or fraud. (1900) 5 C.W.N. 403.

33. Nature of transaction.

——Ss. 101 to 104—Nature of transaction.—Where the terms of a document show that it was a sale-deed, the burden is on him who contends it was a mortgage-deed to prove it. A.I.R. 1934 Nag. 18=149 Ind. Cas. 354.

——Ss. 101 to 104—Nature of transaction—Onus.

The burden of proof is on the plaintiff who seeks to give to a purchase a different meaning and complexion from those which it bears on its face. This burden must be strictly discharged ; in other words, the plaintiff, in order to succeed, must put the Court in possession of legal and satisfactory evidence, and it will not suffice to point to matters of suspicion or even to plausible conjecture. (1905) 7 Bom. L.R. 293.

34. Negligence.

——Ss. 101 to 104—Negligence.

A company instituted a suit on the basis of a continuing guarantee entered into by certain persons for the due performance of his duties by one *G* while in company's service :

Held, that the burden was upon the company to prove that *G* had been guilty of such lack of diligence and faithfulness as caused a loss to the company and thereby constituted a breach of the agreement of guarantee. The company could not be allowed to cast the blame on a servant who was plainly unfitted or to exact from him a standard of diligence and faithfulness to duty which could be expected only from a much more highly paid servant. A.I.R. 1937 Rang. 37=167 Ind. Cas. 292.

——Ss. 101 to 104—Negligence—Collections of rents—Negligence alleged—Onus on party alleging.

In a suit by a **thekadar** against his joint **thekadar** entrusted with collection of rent and keeping accounts in which the plaintiff seeks to make the defendant liable not only for the profits which the latter has actually collected but for those which through gross negligence or misconduct he has omitted to collect, the burden of proving such negligence or misconduct rests in the first instance on the plaintiff. 99 Ind. Cas. 185=3 O.W.N. (Sup.) 271=8 L.R.A. (Rev.) 31=A.I.R. 1927 Oudh 90.

——Ss. 101 to 104—Negligence Bailment—Proof of care.

The burden of proof lies on the bailee to show that care as a man of ordinary prudence would have exercised, was duly exercised by him in respect of goods entrusted to him. 22 Mad. 524, **Foll.** 74 Ind. Cas. 18=1 Bur. (L.J.) 132=A.I.R. 1923 Rang. 74.

——S. 102—Negligence—Onus.

Where there is damage due to a dangerous article (*i.e.*) a gas plant, which is defectively installed, the onus of proving absence of negligence is in the person relying on it. 14 C.W.N. 151=(1909) A.C. 640=79 L.J.P.C. 13=5 Ind. Cas. 64 (P.C.).

——Ss. 101 to 104—Negligence—Railway Company—Dangerous goods—Explosion—Death.

In a suit against a Railway Company for damages for the death of a person caused by the explosion of dangerous goods permitted to be carried in a Railway carriage by passengers, it is for the plaintiff to make out negligence on the part of the Railway Company, to show that the Company or its servants know or ought reasonably from the appearance of the parcels to have known that dangerous goods were being carried ; it is not for the Railway Company to prove that they were not guilty of any negligence. (1901) 5 C.W.N. 449=11 M.L.J. 156=3 Bom. L.R. 293=28 C. 401=28 I.A. 144 (P.C.).

35. Negotiable Instruments.

——Ss. 101 to 104—Negotiable Instrumnets—Hundi not presented for payment—Loss sustained by drawer—Onus heavy on payee to disprove loss.

Where a hundi is not presented for payment and the drawer withdraws the money after many days the burden of proof lies heavily on the payee to prove that the drawer did not suffer any loss, and the circumstances will be very exceptional in which he could prove hat the drawer could not possibly have suffered any damage and burden is certainly not

discharged by the oral admission of the defendant drawer that some time or other subsequently he got back his money. 88 Ind. Cas. 915=6 L.R.A. (Civ.) 500 =23 A.L.J. 861=A.I.R. 1925 All. 811.

——S. 103—Holder in due course—Negotiable instrument.

Where the plaintiff established that negotiable instruments were caught hold of, by another by fraud, the onus of proving that he became the holder in due course lies upon the defendant. 36 Cal. 239=1 Ind. Cas. 929.

——S. 103—Negotiable instrument—Holder in due course—Burden of proof.

The holder of a bill of exchange which is proved to have been obtained originally for unlawful consideration must prove that he is a holder in due course and therefore in a better position than his transferrer. 15 Bom. L.R. 333=19 Ind. Cas. 789.

——Ss. 101 to 104—Negotiable instrument—Hundi—Suit by one of two joint endorsees of hundi for declaration that half the consideration was payable to himself—Allegation of grant in writing the endorsement made by the other joint endorsee.

One Mathura, as the payee of a hundi ,endorsed it over to Hira Lal and Ganga Bakhsh. Hira Lal and Ganga Bakhsh in turn endorsed the hundi in favour of Keshal Deo. Keshal Deo paid half the money due on the hundi to Ganga Bakhsh, but refused to pay the the other half to Hira Lal without the consent of Ganga Bakhsh. Hira Lal accordingly sued Ganga Bakhsh and Keshal Deo, claiming a declaration that he was entitled to the other half of the money due on the hundi. Ganga Bakhsh set up a defence that the joint endorsement had been made fraudulently and that he alone was really entitled to the whole of the money. **Held,** that under the circumstances of the case, especially as Ganga Baksh had joined in endorsing the hundi over to Keshal Deo, it was for Ganga Bakhsh to prove affirmatively the fraud set up by him and not for Hira Lal to show that no fraud had been committed. 1901 A.W.N. 17.

36. Notice.

——Ss. 101 to 104—Notice.

Where in an action for specific performance of the contract for sale of immovable property the prior contract is established in plaintiff's favour, then the defendants who claim as subsequent transferees from the owner must prove that they are **bona fide** purchasers and that they had no notice of the contract in favour of the plaintiff. A.I.R. 1934 Pat. 518=15 P.L.T. 469=1 B.R. 626=156 Ind. Cas. 558.

——S. 102—Notice—Specific performance of part.

Where a person claims to be a transferee for value without notice of the original contract, the burden lies upon him to prove that he fulfils that character. A.I.R. 1933 Cal. 98=57 C.L.J. 1=36 C.W.N. 1002=141 Ind. Cas. 708.

——S. 102—Notice—Bona fides of purchaser.

Under S. 27, Specific Relief Act, the burden of proving that the subsequent purchaser had no notice of the prior agreement to sell is on the purchaser. A.I.R. 1932 Mad. 71=34 M.L.W. 669=134 Ind. Cas. 1211.

——Ss. 101 to 104—Notice.

When once the plaintiff has proved an agreement to sell arrived at between him and the vendor, it is for the vendee, in order to defeat the plaintiff's claim, to probe that he paid the money to the defendant-vendor under the sale-deed in his favour in good faith and without notice of the prior contract. A.I.R. 1931 Lah. 227=12 Lah. 328 =32 P.L.R. 40=131 Ind. Cas. 289.

——Ss. 101 to 104—Notice.

In respect of movable property possession is a symbol of title and if a person, who has accepted a hypothecation of movable property without obtaining possession, seeks to enforce his right as a prior encumbrancer who has obtained possession of property hypothecated to him and has sold the goods in execution of a decree, it is incumbent upon the prior encumbrancer to satisfy the Court that subsequent encumbrancer had notice of the charge to which the first encumbrancer was entitled. In the absence of proof by him that such subsequent encumbrancer had notice of the prior charge, he is not ntitled to receive in priority to the subsequent encunbrancer, any part of the sale proceeds. A.I.R. 1931 Rang. 201=9 Rang. 182=131 Ind. Cas. 723.

—Ss. 101 to 104—Notice—Asence of notice—Must be alleged and proved.

The defence of a purchase without notice is one which ought to be specifically alleged as well as proved by one who relies upon it: 42 Cal. 625, **Foll.** 110 Ind. Cas. 526=7 Pat. 584=9 P.L.T. 743=A.I.R. 1928 Pat. 587.

——Ss. 101 to 104—Notice—Onus on person setting up notice—Other circumstances than mere registration must be proved.

Registration by itself is no notice. There must be other circumstances in the case from which the Court could come to the conclusion that the subsequent purchaser had notice of the prior registered agreement and the burden of proof lies on the person setting up notice. 73 Ind. Cas. 231=25 Bom. L.R. 375=A.I.R. 1923 Bom. 410.

——Ss. 101 to 104—Notice—Prior mortgage—Onus on purchaser to prove he had no notice of.

Where a subsequent purchaser of property pleads that he had no notice, of a prior mortgage thereon.

Held, that the onus is on him to prove it. This rule applies equally in the case of movable property and immovable property. 75 Ind. Cas. 328=2 Bur. L.J. 63=A.I.R. 1923 Rang. 153.

——S. 103—Notice—Registered and unregistered instrument—Priority.

The burden of proving that a person claiming under a subsequent registered document has no priority over another claiming under a prior unregistered document by reason of the former having had notice of the latter's title, is on the party alleging such notice.25 M. 1, Foll. 19 C.L.J. 352=18 C.W.N. 657=20 Ind. Cas. 195.

——Ss. 101 to 104—Notice to quit—Service of.

The landlord in a suit for ejectment against his tenant must prove that a valid notice to quit has been served on the tenant. (1901) 4 Bom. L.R. 58=26 B. 360.

37. Objection to onus.

——Ss. 101 to 104—Objection to onus—Cannot be made at a late stage.

A party accepting the onus without demur cannot object at a late stage saying that burden was wrongly put on them. 120 Ind. Cas. 168=31 P.L.R. 481=A.I.R. 1930 Lah. 213.

——S. 103—Objection to Onus—Waiver.

Where burden of proof with respect to certain fact lies on the defendant, but the plantiff without waiting for defendant's evidence takes upon himself to prove it, he cannot subsequently say that the defendant did not discharge his burden. 10 Ind. Cas. 223 (All.).

——Ss. 101 to 104—Objection to onus—Objection heard of for the first time—Authority.

Although it is no ground for holding that an objection has no force merely because one of the kind has never been heard of before, it lies on the objector to substantiate his objection by some authority. (1902) 7 C.W.N. 249=30 C. 36.

38. Omission to discharge onus.

——Ss. 101 to 104—Omission to discharge onus—Burden of proof—Inference—Suit in ejectment—Plaintiff unable to prove title through lapse of time—Lapse of time not due to default of defendant but due to default of plaintiff—Inference in favour of plaintiff's title cannot be drawn.

Under a perpetual grant of lands made in favour of the heirs of **A**, each heir was to hold for life only and on the death of an heir the next heir of **A** was to take as such heir and not as heir of his predecessor. **M** was great niece of **A.** In a suit for ejectment by the plaintiffs who were the heirs of **M** it was alleged by them in support of their title that on **A.'s** death in 1842, **M** as **A.'s** heir entered into possession of his estate. The allegation was disputed by the defendants who were the successors of auction-purchasers of the property sold in execution of a mortgage decree passed against **M.** The evidence produced by the plaintiffs did not prove that **M** was an heir of **A.** It was argued that at such a distance of time reasonable inferences should be drawn in favour of the plaintiffs :

Held, that though lapse of time might have prejudiced the chances of the plaintiffs in proving their case, it might well also have prejudiced the defendants in resisting the claim, and the lapse of time was certainly not due to any default on the part of the defendants or their predecessors. The appellants were not so free from criticism. The son of **M** made no effort to support his claim during the 12 years in which he survived her, and his son did nothing during the 29 years in which he survived his father, and the plaintiffs who were his sons themselves did nothing until the expiration of nearly 12 years from the date when their alleged title accrued. There was, therefore, nothing in the circumstances of the case which would justify drawing any inference which might relieve the plaintiffs of any part of the burden of proving their title. A.I.R. 1946 P.C. 59=48 Bom. L. R. 430=1946 A.W.R. (P.C.) 94=1946 O.A. (P.C.) 94=1946 Oudh W.N. 207 = I.L.R. (1946) Kar. (P. C.) 24 = 223 Ind. Cas. 394=1946 A.L.J. 228=81 C.L.J. 107=50 C.W.N. 477=(1946) 2 M.L.J. 98=59 M.L.W. 268 =1946 M.W.N. 389 (P.C.).

——S. 101—Omission to discharge onus.

Plaintiff (who was a minor) seeking to get the decree set aside on the ground that his mother (guardian **ad-litem**) was in collusion with the mortgagee—Mother filing her written statement but not appearing to substantiate the same :

Held, the burden of proving the collusion was on the plaintiff and it was not discharged merely by showing that the mother did not appear to substantiate her statement. A.I.R. 1937 Mad. 846=46 M.L.W. 255 =(1937) 2 M.L.J. 236=1937 M.W.N. 1290=173 Ind. Cas. 537.

——Ss. 101 to 104—Omission to discharge-onus—Burden of proof on pleadings and burden of rebutting prima facie case—Distinction.

The burden of proof on the pleadings which remains constant is different from the burden of proof as it is used in the more restricted sense of the burden of adducing cogent evidence in rebuttal of **prima facie** case made out by one's opponent. If, in adducing such rebutting evidence, a doubt is created in the mind of the Court as to which version to accept, then the party on whom the burden of proof on the pleadings rests has failed to discharge that burden ; but if having established a **prima facie** case on the pleadings, such **prima facie** case remains unanswered, or if the answer given is such as to fall short of creating any serious doubt in the mind of the Court, then the burden of proof on the pleadings has been discharged. A.I.R. 1937 Rang. 276=14 Rang. 704=170 Ind. Cas. 471.

——Ss. 101 to 104—Omission to discharge onus—Party on whom onus lies not producing sufficient evidence to discharge it.

A party on whom the onus lies may take advantage not only of evidence adduced by him, or on his behalf, but also of any fact or circumstance in his favour appearing in the evidence adduced by, or on behalf of, the other party. But when the entire evidence on both sides has been brought before the Court, the party on whom the onus primarily rests but who has failed to adduce evidence sufficient to discharge the onus cannot augment his case by the mere weakness of the evidence adduced by the adverse party although nothing transpires in such evidence which lends support to the case which he seeks to make out. A.I.R. 1936 Rang. 170=1938 Rang. L.R. 323=162 Ind. Cas. 247.

——Ss. 101 to 104—Omission to discharge onus—Suit for refund of money paid under contract—Dfendant admitting receipt of money as damages ·

The plaintiffs sued for specific performance of a contract and in the alternative for recovery of the earnest money paid to the defendants. The defendants denied the agreement but admitted that they had received a certain amount from the plaintiffs by way of compensation for injury caused to their land by the plaintiffs. The Court found that there was no contract and no money passed under the contract. On appeal, it was

contended that as the defendants had admitted receipt of a certain amount, the onus was on the defendants to prove how they obtained it;

Held, that the plaintiffs were not entitled to insist on the defendants proving how they got the money and as they had failed to prove the case set up in the plaint, the suit was rightly dismissed. A.I.R. 1932 Cal. 39=54 C.L.J. 110=134 Ind. Cas. 921.

——Ss. 101 to 104—Omission to discharge onus—Evidence not leading to any particular inference—Party on whom burden lies fails.

Where the Court has to depend upon probabilities based on certain facts which do not lead to one conclusion, the Judge is entitled to draw inferences from the facts proved before him, but the inferences must be such as could be legitimately drawn from the facts. If the facts are such that no reasonable man could draw a particular inference from them or if the particular inference is such as to be equally consistent with non-liability and with liability, then the party who relies on the inference to discharge the onus of proof of establishing liability fails. 52 C.L.J. 235=35 C.W.N. 133 =A.I.R. 1930 Cal. 815.

——Ss. 101 to 104—Omission to discharge onus—Inability to prove the basis of claim—No excuse

The mere inability to prove a thing, on proof of which alone he can succeed, cannot possibly be regarded as a ground for granting relief to the plaintiff. 108 Ind. Cas. 758 (Mad.).

——Ss. 101 to 104—Omission to discharge onus—Facts proving either way—Onus not discharged.

The onus of proof is not discharged by producing evidence which is just as consistent with the allegation of the party on whom the onus of proof lies as with the denial of the opponent. 101 Ind. Cas. 119=8 P.L.T. 578=A.I.R. 1927 Pat. 225.

——Ss. 101 to 104—Omission to discharge onus—Facts proving either way—Onus not discharged.

Where the undoubted evidence is consistent both with the allegation of the plaintiff as with the denial of the defendant, the plaintiff must fail. 67 Ind. Cas. 451=A.I.R. 1923 Pat. 165.

——S. 102—Omission to discharge onus—Effect of.

Where both parties can produce evidence concerning the existence or non-existence of a particular fact, the party upon whom the burden of proof lies, doe not discharge that burden by showing that the other side could equally have proved the contrary. 1 Pat. L.T. 535=58 Ind. Cas. 303.

——Ss. 101 to 104—Omission to discharge—Prima facie case—Weakness of adversary's case.

The party on whom the onus of proof lies must in order to succeed establish at least a **prima facie** case. He cannot on failure to do so take advantage of the weakness of his adversary's case. (1908) 7 C.L.J. 586=12 C.W.N. 761=35 Cal. 1051.

——Ss. 101 to 103—Omission to discharge onus—Over statement of claim—Burden of proof.

A plaintiff is bound to prove his own title and cannot succeed on the weakness of the defendant's case. The fact that the defendant has set up an exaggerated statement of his own claim will not affect the duty of the plaintiff to prove that his own claim is not overstated. If it appears that both parties had overstated their rights that will be no reason for making the defendant alone suffer and for giving the plaintiff more than he has proved himself entitled to. (1903) 5 Bom. L.R. 225.

39. Onus immaterial.

——S. 101—Onus immaterial—All relevant evidence given.

The question of onus of proof is of no importance if all the relevant evidence has been given. A.I.R. 1950 P.C. 25.

——S. 101—Onus of proof immaterial—Both sides adducing evidence.

If each side has adduced evidence, the question of onus of proof loses all the great importance which at one stage it had, and would only resume its importance if on considering the evidence as a whole—irrespective of which side adduced it—the Court is left in reasonable doubt on any material question. I.L.R. (1945) 1 Cal. 565=80 C.L.J. 297.

——Ss. 101 to 104—Onus immaterial—Parties leading all evidence in support of their contentions—Question of onus is not of importance.

The question of onus is of no or very little importance at the stage of appeal when the parties have led all the evidence which they wished to adduce in support of their respective contentions. A.I.R. 1946 Lah. 450 =48 P.L.R. 187=223 Ind. Cas. 505.

——Ss. 101 to 103—Onus immaterial.

When the entire evidence is before the Court the discussion as to the onus of proof is purely academical. Onus however is a determinant factor when there is no evidence or the evidence is so evenly balanced that the Court can come to no definite conclusion. A.I.R. 1946 Nag. 84=I.L.R. (1945) Nag. 892=1945 N.L.J. 630.

——S. 102—Onus immaterial—Evidence adduced on both sides.

No question of onus of proof arises where both parties have adduced evidence and the only question is as to whether upon the evidence so produced the case set up by one of the parties has or has not been established. A.I.R. 1944 Oudh 162=1944 O.W.N. 83=1944 A.W.R. (C.C.) 27=20 Luck. 108.

——S. 101—Onus immaterial—Both parties leading evidence—Onus is immaterial.

Where both parties have led evidence to prove their cases, and the lower Courts have come to the conclusion after appreciating that evidence, there is no question of the finding being vitiated by any erroneous placing of the burden of proof. A.I.R. 1943 Bom. 113 = 45 Bom. L.R. 191 = 206 Ind. Cas. 421.

——S. 101—Onus immaterial—Only when evidence is balanced, question of onus arises.

Onus as a determining factor of the whole case, can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it and need not be further considered. A.I.R. 1943 Sind 192 = I.L.R. (1943) Kar. 263 = 211 Ind. Cas. 99.

——S. 101—Onus immaterial—All evidence on record.

It is academic to argue the question of burden of proof at a stage when all the evidence is on record. A.I.R. 1941 Rang. 108 = 1940 Rang. L.R. 659 = 194 Ind. Cas. 270.

——Ss. 101 to 104—Onus immaterial.

Where the parties have led all the evidence the question of onus is of no importance. A.I.R. 1940 Lah. 336 = 190 Ind. Cas. 466.

——Ss. 101 to 104—Onus immaterial.

When the entire evidence on both sides is once before the Court, the debate as to onus is purely academical. A.I.R. 1940 Rang. 181 = 1940 Rang. L.R. 562 = 192 Ind. Cas. 49.

——Ss. 101 to 104—Onus immaterial.

If the evidence has all been recorded, it does not matter much who was called upon to begin but it matters a great deal upon whom the burden of proof is placed when the Courts come to consider who has proved his case. A.I.R. 1940 Rang. 170 = 189 Ind. Cas. 715.

——Ss. 101 to 104—Onus immaterial—Both parties producing evidence—Defendant, if can ask Court to decide case on evidence of plaintiff alone without looking at his evidence.

There can be no question of any decision on the basis of onus of proof where both the parties produce evidence. It is the duty of the Court to arrive at a correct finding on the whole evidence before it. It is, however, open to the defendant, not to lead any evidence where the onus is upon the plaintiff but, after having gone into evidence, he cannot ask the Court not to look at and act on it. If the defendant does not produce any evidence and the plaintiff fails to discharge the burden that lay on him, his suit would fail, as there is nothing else on which the Court may record any finding. A.I.R. 1939 All. 257 = 1939 A.L.J. 94 = I.L.R. (1939) All. 454 = 1939 A.W.R. 184 = 181 Ind. Cas. 945 = 1939 R.D. 157.

——Ss. 101 to 104—Onus immaterial—Evidence adduced by both parties equally probable —Question of onus does not arise.

The doctrine of the onus of proof is merely academic where both parties give evidence. Where there is evidence on both sides, and the evidence of neither side is not inherently improbable the question of onus does not arise at all and the Judge has to determine the issue between the parties on the evidence before him. A.I.R. 1939 Pat. 108 = 180 Ind. Cas. 619 = 5 B.R. 460.

——Ss. 101 to 104—Onus immaterial—Question of onus, when becomes important.

The question of onus at the close of a case, only becomes important if the circumstances are so ambiguous that a definite conclusion is impossible without resort to it. A.I.R. 1938 Cal. 284 = 66 C.L.J. 324 = 175 Ind. Cas. 610.

——Ss. 101 to 104—Onus immaterial—Full opportunity of placing all evidence—Onus.

The question on whom the initial onus lay is of no importance, where the parties have had full opportunity of placing all evidence in support of their respective cases. A.I.R. 1936 Cal. 22 = 61 C.L.J. 369 = 39 C.W.N. 1270 = 160 Ind. Cas. 691.

——Ss. 101 to 104—Onus immaterial.

Where both parties had led evidence bearing on the point which has been carefully considered by the Judge, the question of onus is of no particular importance. A.I.R. 1936 Lah. 1016 = 39 P.L.R. 396 = 169 Ind. Cas. 228.

——Ss. 101 to 104—Onus immaterial—Both parties adducing evidence—Onus.

Discussion as to the burden of proof is of purely academic interest in a case where both sides have adduced evidence in support of their respective contentions. A.I.R. 1935 Oudh 165 = 11 O.W.N. 1414 = 152 Ind. Cas. 977.

——Ss. 101 to 104—Onus immaterial.

Where both parties have given evidence, question of onus is immaterial. A.I.R. 1934 Lah. 936 = 37 P.L.R. 487 = 153 Ind. Cas. 997.

——Ss. 101 to 104—Onus immaterial—Thumb-mark on receipt proved to be that of plaintiff—Onus of non-payment—Evidence led—Court believing plaintiff's evidence.

Where, in a suit for money, the thumb-mark on the receipt is proved to be that of the plaintiff, the onus of proof of non-payment shifts on to him. But when both parties have led evidence and both parties have entered the witness box and the Court has believed the evidence of the plaintiff and disbelieved that of the defendant, it is not important on whom the onus lay to begin with. A.I.R. 1934 Lah. 542 = 35 P.L.R. 462 = 152 Ind. Cas. 240.

——S. 101—Onus immaterial—Judge's finding determined only by question of onus—Court considering evidence and circumstances on both sides.

If the Judge's finding is determined only by the question of burden of proof, or on a one-sided examination of the evidence due to the view taken about the burden of proof, then the finding stands in need of revision; but if the evidence and circumstances on both sides are duly considered, the question of the burden of proof is of very little importance. A.I.R. 1934 Nag. 253 = 152 Ind. Cas. 441.

——S. 101—Onus immaterial—All available evidence on record—Onus.

It would be idle to attach great importance to the question of onus when all the available evidence has been brought on to the record and the parties have fought out their case on all possible grounds. A.I.R. 1934 Pesh. 134 = 153 Ind. Cas. 71.

——Ss. 101 to 104—Onus immaterial—Evidence on both sides adduced.

The question of burden of proof becomes immaterial where the whole of the evidence in the case is before the Court and it has no difficulty in coming to a conclusion in respect thereof. A.I.R. 1932 P.C. 228 = 36 M.L.W. 441 = 9 O.W.N. 882 = 63 M.L.J. 694 = 56 C.L.J. 330 = 37 C.W.N. 71 = 13 Lah. 687 = 34 P.L.R. 55 = 59 I.A. 386 = 1933 A.L.J. 491 = 138 Ind. Cas. 770.

——Ss. 101 to 104—Onus immaterial.

Where evidence is evenly balanced, question of onus is material and determining factor, otherwise not. A.I.R. 1932 Mad. 415 = 1932 M.W.N. 343 = 35 M.L.W. 511.

——Ss. 101 to 104—Onus immaterial—All available evidence led—Wrong onus.

The fact that onus is wrongly placed makes no difference when the parties have led all the available evidence. 121 Ind. Cas. 377 = A.I.R. 1930 Lah. 677.

——Ss. 101 to 104—Onus immaterial—Evidence let in on both sides.

The question of onus does not matter when both parties have let in their evidence in the case. 125 Ind. Cas. 68 = 33 M.L.W. 264 = A.I.R. 1930 Mad. 796.

——Ss. 101 to 104—Onus immaterial—All material facts before Court.

Where the relevant facts are before the Court and all that remains for decision is what inference is to be drawn from them, the question of burden of proof is not pertinent and this is more so at the appellate stage. A.I.R. 1920 P.C. 67, A.I.R. 1922 P.C. 292 and A.I.R. 1922 Cal. 160, Foll. 124 Ind. Cas. 609 = A.I.R. 1930 Nag. 225.

——Ss. 101 to 104—Onus immaterial—Plaintiff's failure to prove—Can yet avail of defendant's pleading.

A plaintiff, who fails to prove all the facts alleged by him, may yet obtain the whole or any part of the relief claimed by him if the facts pleaded by the defendant and found by the Court, show him to be entitled to it. 4 N.L.R. 86 Foll. 121 Ind. Cas. 39 = 26 N.L.R. 130 = A.I.R. 1930 Nag. 8.

——Ss. 101 to 104—Onus immaterial—Appeal—Question of onus hardly arises.

The question of onus has greater force in original trial and hardly arises in an appeal where the appellate Court has to consider the facts and arrive at a conclusion on the evidence led before Trial Court. 113 Ind. Cas. 406 = 30 Bom. L.R. 1555 = A.I.R. 1929 Bom. 35.

——Ss. 101 to 104—Onus immaterial—Evidence let in on both sides.

The question on whom the burden of proof should fall is of very little importance when evidence has been gone into by both sides. 33 C.W.N. 227 = 56 Cal. 805 = A.I.R. 1929 Cal. 325.

——Ss. 101 to 104—Onus immaterial—All evidence taken.

After all the evidence has been taken, no question of burden of proof remains. 119 Ind. Cas. 222 = A.I.R. 1929 Rang. 183.

——Ss. 101 to 104—Onus immaterial—Whole case before Court—Onus material only in ambiguity.

When all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on the point of onus of proof becomes immaterial. The question of onus only becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it. 107 Ind. Cas. 233 = 30 Bom. L.R. 290 = 47 C.L.J. 339 = 27 M.L.W. 744 = A.I.R. 1928 P.C. 77 = 54 M.L.J. 337 (P.C.).

——Ss. 101 to 104—Onus immaterial—All evidence led.

When evidence is led by both sides, question of burden of proof has no importance. 107 Ind. Cas. 254 = A.I.R. 1928 All. 307.

——Ss. 101 to 104—Onus immaterial—Evidence on particular issue—Wrong allocation of burden—Not entitled to claim remand—Rule not inflexible.

The rule that where parties have led evidence on a particular issue, the wrong allocation of the burden of proof does not entitle the party on whom the burden of proof is subsequently placed to claim a remand, is not inflexible but its applicability must depend upon the facts of the case, the nature of the point involved and the evidence produced by both parties. 109 Ind. Cas. 331 = 10 L.L.J. 309 = 30 P.L.R. 105 = A.I.R. 1928 Lah. 763.

——Ss. 101 to 104—Onus immaterial—All available evidence let in.

Where the parties have produced all their available evidence, the dispute on the point of onus is mainly of an academic nature. 112 Ind. Cas. 89 = 9 Lah. 224 = 30 P.L.R. 154 = A.I.R. 1928 Lah. 432.

——Ss. 101 to 104—Onus immaterial.

When the whole evidence is in, the question of onus is merely academical. 106 Ind. Cas. 243 = 9 P.L.T. 393 = A.I.R. 1928 Pat. 190.

——Ss. 101 to 104—Onus immaterial—All evidence let in.

The question of onus is not very material after the whole of the evidence has been adduced by the parties and gone into in the case. 98 Ind. Cas. 137 = A.I.R. 1927 Cal. 126.

——Ss. 101 to 104—Onus immaterial—All evidence let in—Appeal stage.

When all the evidence is in, the question of burden of proof has little or no importance at the stage of appeal. 103 Ind. Cas. 166 = A.I.R. 1927 Nag. 382.

——Ss. 101 to 104—Onus immaterial—Evidence let in on both sides.

When evidence has been given on both sides the question of the burden of proof is of academic interest only, and the Court has to decide on the evidence that has been given which version of the transaction is true. 103 Ind. Cas. 488 = A.I.R. 1927 Pat. 417.

——Ss. 101 to 104—Onus immaterial—Evidence let in on both sides.

When both the parties adduced evidence in support of their respective allegations, the question of burden of proof becomes almost immaterial. 98 Ind. Cas. 827 (All.).

——Ss. 101 to 104—Onus immaterial—Evidence let in on both sides.

When both sides have produced their evidence, the appellate Court should not decide merely on the onus, but should come to its own finding on the evidence recorded. 96 Ind. Cas. 415 = 8 L.L.J. 238 = 28 P.L.R. 61 = A.I.R. 1926 Lah. 514.

——Ss. 101 to 104—Onus immaterial—Evidence let in on both sides.

Where evidence has been produced by both parties on a particular point and the Court has come to a conclusion on consideration of that evidence, the question of burden of proof becomes a matter of pure academic interest. 95 Ind. Cas. 826 (Oudh).

——Ss. 101 to 104—Onus immaterial—Whole evidence considered in appeal.

The question of onus ordinarily becomes of very little importance when the whole evidence is considered especially by the appellate Court. 87 Ind. Cas. 565 = A.I.R. 1925 Cal. 1262.

——Ss. 101 to 104—Onus immaterial—Wrong onus—Merits not affected.

The question of burden of proof loses its importance when evidence has been adduced on both sides and considered by the Court provided the wrong placing of the onus has not affected the merits of the case. 84 Ind. Cas. 693 = 52 Cal. 121 = 40 C.L.J. 184 = A.I.R. 1925 Cal. 61.

——Ss. 101 to 104—Onus immaterial—All evidence before appellate Court.

At the stage of appeal, when all the evidence is before the Court, the question of the burden of proof is not of great importance. 83 Ind. Cas. 246 = A.I.R. 1925 Nag. 225.

——Ss. 101 to 104—Onus immaterial—Evidence let in on both sides.

Where evidence was given by both parties. *Held*, the question of the initial onus loses its importance. 5 L.R.A. Civ. 354 = A.I.R. 1924 All. 924.

——Ss. 101 to 104—Onus immaterial—All evidence before trial Court.

The question of onus ceases to be pertinent after all the evidence is once before the trial Court. 78 Ind. Cas. 330 = A.I.R. 1924 Nag. 367.

——Ss. 101 to 104—Onus immaterial—Wrong onus—Parties not misled.

Where the burden of proof has been wrongly laid, but the parties have led evidence and the Court has on that evidence material to go upon for deciding any disputed point the question of the burden of proof is not very pertinent. 25 C.W.N. 942 and 43 M. 567, Foll. 75 Ind. Cas. 782 = A.I.R. 1924 Nag. 242.

——Ss. 101 to 104—Onus immaterial—Material for legitimate conclusion present.

The question of onus becomes of little materiality when evidence is adduced from which a conclusion of fact may be legitimately drawn. 72 Ind. Cas. 898 = 47 Bom. 327 = 28 C.W.N. 49 = 17 M.L.W. 405 = 32 M.L.T. 111 = 50 I.A. 49 = 25 Bom. L.R. 527 = 37 C.L.J. 464 = A.I.R. 1923 P.C. 6 = 44 M.L.J. 471 (P.C.).

——S. 101 to 104—Onus immaterial—Evidence let in by both parties.

The question of onus of proof is of no importance when both parties produce evidence. 71 Ind. Cas. 417 = 20 A.L.J. 969 = 4 L.R.A. Civ. 31 = A.I.R. 1923 All. 124.

——Ss. 101 to 104—Onus immaterial—Question of onus—When material—Both parties adducing evidence.

The question of onus of proof only arises where there is a question of fact to be determined and there is no evidence one way or the other which will enable the Court to come to a conclusion. Where evidence is adduced by such parties, then the question of the burden of proof becomes immaterial and the Court has to determine on the evidence before it. 80 Ind. Cas. 170 = 5 L.L.J. 451 = A.I.R. 1923 Lah. 641.

——Ss. 101 to 104—Onus immaterial—Wrong onus—Evidence nevertheless let in.

Where the defendants led evidence on the issue as to notice they cannot be said to have held back their evidence because of the imposition of the onus on the other side. 46 I.C. 659 ; 29 All. 184 ; 25 I.C. 648, Foll. 76 Ind. Cas. 891 = A.I.R. 1923 Lah. 339.

——Ss. 101 to 104—Onus immaterial—All evidence before Court.

The question of onus is not of much importance when the whole of the evidence is before the Court. 71 Ind. Cas. 130 = 16 M.L.W. 936 = 1923 M.W.N. 57 = A.I.R. 1923 Mad. 262.

——Ss. 101 to 104—Onus immaterial—Evidence let in by both sides considered.

The question of onus is not of importance when both sides have given evidence and the Court has considered it and preferred the evidence of one side to that of the other. 69 Ind. Cas. 541 = A.I.R. 1923 Nag. 62.

——Ss. 101 to 104—Onus immaterial—All evidence before Court.

When the entire evidence on both sides is once before the Court the debate as to onus is purely academical. Where the relevant facts are before the Court all that remains for decision is what inference should be drawn from them. 68 Ind. Cas. 538 = 45 Mad. 586 = 16 M.L.W. 102 = 31 M.L.T. 54 = 49 I.A. 286 = 1922 M.W.N. 749 = 37 C.L.J. 199 = 27 C.W.N. 245 = A.I.R. 1922 P.C. 292 = 43 M.L.J. 640 (P.C.).

——Ss. 101 to 104—Onus immaterial—Evidence let in by both sides.

However important the question of burden of proof may be in the early stages of the case, after all the evidence is out on both sides, it must be looked at as a whole and the truth of the occurrence must be inferred from it. 67 Ind. Cas. 921 = 15 M.L.W. 248 = 48 Cal. 757 = A.I.R. 1922 P.C. 195 (P.C.).

——Ss. 101 to 104—Onus immaterial—Evidence let in on both sides.

Where both parties have let in evidence the incidence of onus is an academic question which does not affect the conclusion. 70 Ind. Cas. 417 = A.I.R. 1922 Bom. 233.

——Ss. 101 to 104—Onus immaterial—All evidence before Court.

Where the entire evidence on both sides is once before the Court, the debate as to onus is purely academical the controversy then is past the stage at which discussion as to the burden of proof is pertinent ; the relevant facts being before the Court all that remains for decision is, what inference should be drawn from them. 47 I.A. 767=70 Ind. Cas. 273 = 27 C.W.N. 328 = 36 C.L.J. 196 = A.I.R. 1922 Cal. 461.

——Ss. 101 to 104—Onus immaterial—Evidence on both sides—All facts before Court.

Where evidence has been adduced by both contestants in support of their respective cases and the relevant facts are before the Court, the question of burden of proof is immaterial and importance should not be attached to the question on whom the initial onus lay. 68 Ind. Cas. 577 = 26 C.W.N. 177 = 34 C.L.J. 529 = A.I.R. 1922 Cal. 203.

——Ss. 101 to 104—Onus immaterial—Evidence on both sides let in—Appellate Court.

The question of onus loses its importance when both parties have adduced evidence in support of their respective cases and the Court on an examination of such evidence shifts the burden of proof from one party to the other. This must be more so at the appellate stage. 34 C.L.J. 333, Foll. 68 Ind. Cas. 86 = 35 C.L.J. 473 =27 C.W.N. 134 = A.I.R. 1922 Cal. 160.

——Ss. 101 to 104—Onus immaterial—Evidence on both sides let in.

Where both parties have gone into evidence the question of onus disappears. 69 Ind. Cas. 888 = 9 O.L.J. 404 = 25 O.C. 237 = A.I.R. 1922 Oudh 271.

——Ss. 101 to 104—Onus immaterial—Evidence on both sides—All facts before Court.

Where evidence has been adduced by each of the contestants in support of their respective cases and the relevant facts are before the Court the question of burden of proof is immaterial, and importance should not be attached to the question on whom the initial onus lay. 67 Ind. Cas. 170 = 34 C.L.J. 133 = A.I.R. 1921 Cal. 577.

——Ss. 101 to 104—Onus immaterial—Question of onus—When material—Evidence let in on both sides.

The question of onus of proof arises only where there is no evidence one way or the other which will enable the Judge to come to a conclusion upon the question of fact to be determined ; but where evidence has been adduced by both the parties and the relevant facts are before the Court the question of burden of proof becomes immaterial, and importance should not be attached to the question on whom the initial onus lay ; in such circumstances, the question of the burden of proof is really not pertinent. 66 Ind. Cas. 694 = 34 C.L.J. 333 = 25 C.W.N. 942 = A.I.R. 1921 Cal. 435.

——Ss. 101 to 104—Onus immaterial—Evidence let in on both sides.

The question of burden of proof is not very material where both sides have adduced evidence. 70 Ind. Cas. 27 = 1921 M.W.N. 719 = A.I.R. 1921 Mad. 462.

——S. 102—Onus immaterial—After evidence gone into.

Where all the relevant facts are in evidence before the Court and all that remains for decision is what inference should be drawn from them and the controversy passes the stage at which discussion of burden of proof is pertinent. 43 Mad. 567 = (1920) M.W.N. 61 = 27 M.L.T. 102 = 11 L.W. 399 = 38 M.L.J. 476 = 22 Bom. L.R. 578 = 18 A.L.J. 707 = 56 Ind. Cas. 117 (P.C.).

——Ss. 102 and 103—Onus immaterial.

The question of onus becomes immaterial in second appeal. 1 Pat. L.T. 640.

——Ss. 102 and 103—Onus immaterial—After evidence is gone into.

The question of onus is only one of evidence and when the evidence has been adduced in the case the Court is entitled to come to any findings. 1 Pat. L.T. 102 = 5 Pat. L.J. 151 = 55 Ind. Cas. 841.

——Ss. 102 and 103—Onus immaterial—After evidence gone into.

Where a Court has the full evidence of both parties before it, the question of onus hardly arises. 5 Pat. L.J. 187 = 1 Pat. L.T. 13 = 54 Ind. Cas. 652.

——Ss. 102 and 103—Onus immaterial—After evidence is taken.

The question of onus of proof only arises where there is a question of fact to be determined and there is no evidence one way or the other which will enable the judge to come to a conclusion. In such a case the Court has to decide whether the burden of proving the fact lies upon the plaintiff or the defendant.

Whether in the first instance, the onus lies upon the plaintiff or upon the defendant if there is evidence adduced by both the parties then the question of the burden of proof becomes immaterial and the Court has to determine upon the evidence before it. 1 Pat. L.T. 57 = 52 Ind. Cas. 860.

——Ss. 102 and 103—Onus immaterial—Onus in Appellate Court.

When evidence has been given before the Original Court on both sides, the question of burden of proof is of very little importance in a Court of appeal. 46 Ind. Cas. 929 (Pat.).

——Ss. 102 and 103—Onus immaterial—Whole evidence taken.

The question of burden of proof retains little, if any, importance where there is evidence on both sides. 22 C.W.N. 709 = 44 Ind. Cas. 915.

——Ss. 102 and 103—Onus immaterial—After evidence.

Where the evidence on record is sufficient to enable a Court to come to a clear conclusion of fact, the burden of proof is immaterial. 44 Cal. 858 = 1 Pat. L.W. 593 = 32 M.L.J. 505 = 21 C.W.N. 642 = 15 A.L.J. 398 = 25 C.L.J. 487 = 19 Bom. L.R. 480 = (1917) M.W.N. 482 = 6 L.W. 117 = 22 M.L.T. 310 = 44 I.A. 104 = = 40 Ind. Cas. 337 (P.C.).

——Ss. 102 and 103—Onus immaterial—Whole evidence on record.

Where the whole evidence is on record the Court should examine it without reference to onus. 40 Mad. 108 = 5 L.W. 346 = 32 M.L.J. 237 = 21 M.L.T. 411 = 40 Ind. Cas. 516.

——S. 103—Onus immaterial—Evidence let in.

Where evidence had been let in on both sides and the evidence on one side had been believed no question of the burden of proof arises as the question is one of procedure. 1 P.L.W. 194 = 38 Ind. Cas. 817.

——S. 103—Onus immaterial—After evidence let in on both sides.

There can be no question of burden of proof when the Court has only to determine the case on evidence fully recorded on both sides. 37 Ind. Cas. 353 (Pat.).

——S. 103—Onus immaterial—All evidence taken.

When the Court has all the evidence before it the question of burden of proof is not very important. In deciding whether a mortgage is void under S. 36, the Court need not consider the question whether the mortgage is invalid as a mortgage. 31 M.L.J. 133 = (1916) 2 M.W.N. 236 = 36 Ind. Cas. 903.

——S. 102—Onus immaterial—After evidence taken.

In the absence of an objection by a defendant that the onus was wrongly placed on him by the trial Court, the Appellate Court ought not to have shifted it on to the plaintiff. 81 P.L.R. 1915 = 88 P.W.R. 1915 = 29 Ind. Cas. 194.

——Ss. 102 and 103—Onus immaterial.

Where both parties adduce evidence upon a certain point, no question of burden of proof arises and the Court has simply to decide that point on the whole evidence as it lies before it. 2 O.L.J. 140 = 28 Ind. Cas. 360.

——Ss. 102 and 103—Onus immaterial—In face of finding.

Where the lower Appellate Court clearly finds that a document is a forgery, no question of burden of proof based on the fact, that the document was registered under S. 75 of the Registration Act, can arise. 28 Ind. Cas. 138 (Cal.).

——Ss. 102 and 103—Onus immaterial.

The question of onus is unimportant when the whole of the evidence is before the Court. 38 Mad. 166 = 13 M.L.T. 385 = (1913) M.W.N. 355 = 24 M.L.J. 517=19 Ind. Cas. 452; *also* 28 M.L.J. 92 = 26 Ind. Cas. 899.

——Ss. 102 and 103—Onus immaterial—After evidence let in.

When the whole evidence is before the Court, the question of burden of proof is of very little value. 1914 M.W.N. 595 = 25 Ind. Cas. 123.

——Ss. 102 and 103—Onus immaterial—After whole evidence gone into.

Quaere.—Whether any question of onus remains after the parties go into evidence? 34 All. 511 = 39 I.A. 68 = 12 M.L.T. 392 = 15 O.C. 278 = 14 Bom. L.R. 1073=10 A.L.J. 373=17 C.W.N. 49=16 C.L.J. 629 = (1912) M.W.N. 1052 = 23 M.L.J. 741 = 17 Ind. Cas. 396 (P.C.).

——S. 101—Onus immaterial—Party electing to produce evidence first does not lose right to raise the plea of onus.

If a person under a justifiable impression that the burden of proving a certain fact lies on himself elects to produce his evidence first he does not thereby lose his right to insist that the burden of proof be laid on the right, *i.e.*, opposite party. When the burden of proof is wrongly placed on one party but both parties have given evidence and there is no suggestion that any evidence has been excluded the Appellate Court should proceed as if the burden of proof has been cast upon the right party. 8 A.L.J. 736 = 11 Ind. Cas. 761.

——S. 102—Onus immaterial—Appeal.

Where the trial has ended, and where the plaintiff has led evidence on his own behalf, and undertaken the burden on his own shoulders in the first instance, the contention that the onus of proof was wrongly thrown loses all its force in an appeal because an Appellate Court has to see whether with regard to the evidence given by both parties the Lower Court's conclusion is shown satisfactorily by the appellant to be erroneous or not. The question of onus becomes important and material in appeal only where the evidence is evenly balanced and conflicting. In such a case the party

on whom the onus lay in the first instance must fail. 12 Bom. L.R. 801 = 7 Ind. Cas. 986.

40. Pardanashin lady.

See also CONTRACT ACT, S. 16.

—Ss. 101 to 104—Pardanashin lady—Burden of proof.

As a *pardanashin* woman is a person labouring under a disability, the burden lies on those who rely on any transaction to which a *pardanashin* woman was a party to satisfy the Court by clear, cogent and credible evidence that the lady clearly and fully understood what she was doing and that she voluntarily and freely did what she is alleged to have done. The burden is no light one. At the same time, the doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the lady, subsequently made, that she had not understood what she was doing, obviously cannot in itself be conclusive. The real point is that the transaction must be substantially understood and must really be the mental act, as the signing of her name is the physical act of the lady. It is not, and cannot be the law that a *paradanashin* woman merely because she is a *paradanashin* is exempt from the operation of all legal rules, even when it is clearly established by the evidence that she is an intelligent and competent person, capable of understanding and conducting business, and that she had voluntarily, deliberately intelligently and after fully realising the nature and effect of what she was doing, done things on which other people are, under the law, entitled to rely. A.I.R. 1944 All. 42 = 1944 A.L.J. 19 = 1944 A.W.R. (H.C.) 8 = 212 Ind. Cas. 168.

——Ss. 101 to 104—Pardanashin lady—Transfer—Act, free and independent—Transfer will stand.

In the case of a *pardanashin* lady, if the evidence establishes that in transferring the property, the act is the free and independent act of the settlor, the transaction will stand, whether there has been advice or not. A *pardanashin* lady has just as much right as any other person to give her property away if she wishes to do so. All that the Court is concerned with is whether she fully understands what she is doing and whether she does it of her own free will. The fact that the Sub-Registrar was not summoned to the house for registration of the deed of transfer does not matter if the evidence shows that in executing it the lady fully understood the position. A.I.R. 1943 Mad. 677 = (1943) 2 M.L.J. 99 = 1943 M.W.N. 480 = I.L.R. (1944) Mad. 181 = 211 Ind. Cas. 326.

——Ss. 101 to 104—Pardanashin lady.

In cases in which a deed executed by a *pardanashin* lady comes in question, the burden is in the first instance on the persons founding on that document to show that the grantor intelligently understood the deed. A.I.R. 1941 Oudh 172 = 1941 A.W.R. (C.C.) 22 = 1940 O.W.N. 1318 = 191 Ind. Cas. 885.

——Ss. 101 to 104—Pardanashin lady—*Sayyads* of Jhang District.

Among *Sayyads*, women who take a vow of celibacy generally lead a secluded life and are to all intents and purposes '*pardanashin*'—Gift by such lady—Burden is on the donee to prove that the donor understood the deed. A.I.R. 1940 Lah. 515 = 42 P.L.R. 644 = 192 Ind. Cas. 739.

——Ss. 101 to 104—Pardanashin lady.

In the case of a gift by *pardanashin* lady, the donor's freedom and comprehension must be established by the donee. A.I.R. 1940 Lah. 515 = 42 P.L.R. 644 = 192 Ind. Cas. 739.

——Ss. 101 to 104—Pardanashin lady—Nature of burden of proof.

The ground on which protection is given to a *pardanashin* lady is that she is generally a person over whom influence can be easily acquired and so she is likely to be overreached in her dealings. For this reason, it is incumbent on those who are seeking to enforce agreements executed by such a person to prove that she understood the substance of what she was agreeing to. A.I.R. 1939 Lah. 439 = I.L.R. (1939) Lah. 433 = 41 P.L.R. 843 = 186 Ind. Cas. 77.

——Ss. 101 to 104—Pardanashin lady.

The rule is firmly established that it is incumbent on Court, when dealing with disposition of her property by a *pardanashin* lady to be satisfied that the transaction was explained to her and that she knew what she was doing. A.I.R 1938 P.C. 276 = 1938 O.W.N. 869 = 4 B.R. 840 (2) = 1938 M.W.N. 1271 = 32 S.L.R. 947 = (1938) 2 M.L.J. 902 = 176 Ind. Cas. 773 (P.C.).

——Ss. 101 to 104—Pardanashin lady.

Where the gift is a gift for consideration, it being plain that the *pardanashin* lady, who was at the date of the deed about 58 years of age, derived substantial advantages from its execution and it is, beyond doubt, a reasonable document for her to enter into, nor is the deed an improvident document which the lady, if adequately advised, could not properly have entered into, but is one which might well be to her real advantage, it is not necessary to prove an independent advice. A.I.R. 1938 P.C. 38 = 1938 O.W.N. 97 = 1938 A.L.J. 176 = 47 M.L.W. 214 = 42 C.W.N. 332 = 1938 A.W.R. 28 = 1938 M.W.N. 503 = 32 S.L.R. 285 = 40 Bom. L.R. 697 = 172 Ind. Cas. 720 (P.C.). = 4 B.R. 272.

——Ss. 101 to 104—Pardanashin lady.

Execution of promissory note by free and intelligent act established—Fact that the executrix was a *pardanashin* lady has no importance. 172 Ind. Cas. 631 = 1938 O.W.N. 39 = 47 M.L.W 123 = 32 S L.R. 262 = 1938 M.W.N. 612 (P.C.).

——Ss. 101 to 104—Pardanashin lady.

If a person seeks to enforce a deed executed by a *pardanashin* lady, it is incumbent upon him not only to prove that the bond was executed by her but also that it was explained to her and she perfectly understood its contents and that she executed the document of her own free and independent will. A.I.R. 1938 Mad. 43 = I.L.R. (1938) Mad. 523 = 1938 M.W.N. 1203 = 46 M.L.W. 610 = 176 Ind. Cas. 309.

——Ss. 101 to 104—Pardanashin lady—Deed executed by.

In the case of a document executed by a *pardanashin* woman, it is not sufficient to show that the document was read out to her, it must further be proved that she understood its nature and effect. A.I.R. 1937 Lah. 353 = 39 P.L.R. 591 = 173 Ind. Cas. 277.

——Ss. 101 to 104—Pardanashin lady.

Suit on a deed executed by *pardanashin* lady—Plaintiff must establish that the effect of deed was brought home to defendant—Mere proof of execution by her is not enough. A.I.R. 1936 P.C. 207 = 1936 O.W.N. 611 = 1936 A.L.J. 810 = 38 Bom. L.R. 783 = 63 C.L.J. 511 = 44 M.L.W. 373 = 11 Luck. 346 = 63 I.A. 326 = 40 C.W.N. 1093 = 71 M.L.J. 151 = 1936 M.W.N. 797 = 1936 A.W.R. 736 = 163 Ind. Cas. 156 (P.C.). = 2 B.R. 645.

——S. 103—Pardanashin lady—Burden of proof—Special plea—Mere declaration by pardanashin lady the she did not understand nature of transaction—Creditor proving that document was free and intelligent act of lady.

Where a written statement of a party raises points which are undoubtedly in the nature of special pleas, resting on facts within the special knowledge of the party raising those pleas, it is incumbent upon that party to establish its case founded on special pleas.

A *pardanashin* woman is entitled to receive, in the Courts in India, that protection which the Court of Chancery in England extends to the weak and infirm, and to those who, for any other reason, are specially likely to be imposed upon by the exertion of undue influence over them. But independent legal advice is not essential, and is not necessary in every case ; and the mere declaration by the lady subsequently made, that she had not understood what she was doing, is not in itself conclusive ; it is sufficient if the person enforcing a transaction establishes that the document evidencing the same was the free and intelligent act of the lady.

Held, on the facts and circumstances appearing from evidence, that the lady was not a person in whose case it was necessary for a creditor suing upon a mortgage to establish that she had independent and disinterested advice when entering into the mortgage transaction in question. The application of the general principles and formulae applicable to a case of a *pardanashin* woman would undoubtedly lead to denial of justice to an honest creditor, who, on the evidence, took all necessary precautions in the matter of transactions to which she was a party. A.I.R. 1936 Cal. 378 = 166 Ind. Cas. 842.

——Ss. 101 to 104—Pardanashin lady.

Court will consider a *pardanashin* lady bound by the terms of instrument which she has executed only if it is positively satisfied by direct or circumstantial evidence that she did thoroughly understand what she was purporting to do and thus executed the instrument with full knowledge of its effect. A.I.R. 1935 All. 285 = 1935 A.W.R. 442 = 1935 A.L.J. 695 = 157 Ind. Cas. 192.

——Ss. 101 to 104—Pardanashin lady—Party relying on deed executed by *pardanashin* lady must show that she understood its nature and effect.

It is no doubt true as a general proposition that he who relies on a deed executed by a *pardanashin* lady must show that the lady comprehended the nature and effect of the deed. The dispositions made must be substantially understood by her and must really be her mental act as its execution her physical act. It is not enough that the deed should simply be read over to her. A.I.R. 1935 Cal. 495 = 39 C.W.N. 474 = 157 Ind. Cas. 846.

——Ss. 101 to 104—Pardanashin lady.

Document executed by *pardanashin* lady—It is not sufficient to show that document was read over to her ; it must further be proved that she understood its nature and effect. A.I.R. 1935 Lah. 184 = 37 P.L.R. 1=159 Ind. Cas. 405.

——Ss. 101 to 104—Pardanashin lady.

When a party wants to rely on a deed executed by a *pardanashin* lady, he must prove that the execuiton of the deed was the free and intelligent act of the lady. A.I.R. 1935 Oudh 165 = 11 O.W.N. 1414 = 152 Ind. Cas. 977.

——Ss. 101 to 104—Pardanashin lady—Mortgage by *pardanashin*, illiterate and deaf lady—Proof required from mortgagee.

In the case of a document executed by a *pardanashin* woman, it is not sufficient to show that the document was read out to her, it must further be proved that she understood its nature and effect. The quantum of evidence required to discharge the onus must depend upon the circumstances of each case.

A person, who is interested in upholding a transaction with a *pardanashin* woman, has to prove, not only that the deed was executed by her, but also that it was explained to, and was really understood by her.

Where it was not disputed that a lady mortgagor was not only a *pardanashin* lady, but also illiterate, and, at the time of the transaction in question, old, infirm, "hard of hearing and very deaf" :

Held, that the evidence must show affirmatively that the terms of the deed were understood by the lady. A.I.R. 1934 P.C. 208 = 11 O.W.N. 1081 = 1934 A.L.J. 909 = 38 C.W.N. 1157 = 36 Bom. L.R. 981 = 1934 M.W.N. 976 = 67 M.L.J. 361 = 40 M.L.W. 415 = 60 C.L.J. 128 = 4 A.W.R. 354 = 151 Ind. Cas. 45 (P.C.).

——Ss. 101 to 104—Pardanashin lady.

Those relying upon a deed executed by a *pardanashin* lady must prove that the deed was the free and intelligent act of the executant. A.I.R. 1933 Oudh 170 (2) = 10 O.W.N. 147 = 8 Luck. 538 = 150 Ind. Cas. 346.

——Ss. 101 to 104—Pardanashin lady.

Those who want to take advantage of a document executed by a *pardanashin* lady must prove that she knew its contents and executed it with full knowledge of its effects and consequences and that she had independent advice in the matter. A.I.R. 1933 Pat. 306 = 14 P.L.T. Sup. 1 = 12 Pat. 359 = 145 Ind. Cas. 1.

——Ss. 101 to 104—Pardanashin lady—Proof of independent advice, whether essential.

There is no absolute rule of law that a gift made by a *pardanashin* lady is invalid unless it is proved that she had independent advice. The possession of independent advice or the absence of it is a matter to be taken into consideration and well weighed on a review of the whole citcumstances relevant to the issue of whether the grantor thoroughly apprehended and deliberately and of her own free will, carried out the transaction. 138 Ind. Cas. 616.

——Ss. 101 to 104—Pardanashin lady—Execution by *pardanashins*—Proof of independent advice, whether essential.

There is no absolute rule of law that a gift made by a *pardanashin* lady is invalid unless it is proved that she had independent advice. The possession of independent advice or the absence of it is a matter to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly apprehended and deliberately and of her own free will, carried out the transaction. 138 Ind. Cas. 616.

——Ss. 101 to 104—Pardanashin lady.

In the case of documents executed by *gosha* ladies, the evidence of execution should be clear beyond reasonable doubt. A.I.R. 1931 Mad. 335 = 60 M.L.J. 302 = 33 M.L.W. 727 = 131 Ind. Cas. 840.

——S. 102—Pardanashin lady—*Ex parte* decree—Suit to set it aside on the ground of fraud.

A *pardanashin* lady suing to set aside an *ex parte* decree on the ground of fraud and concealment of facts must prove that the decree was obtained by concealment from the Court of material facts in circumstances which prevented her by fraud from putting the facts before the Court. 36 Ind. Cas. 596 (Pat.).

——S. 101—Pardanashin ladies—Transaction—Burden of proof—On whom thrown.

The onus of proof is thrown upon the creditor to prove that the *purdanashin* understood the nature and character of the transaction and that she signed the deed fully understanding it. To determine whether the transaction was voluntary, the whole of the circumstances should be looked into. 3 O.L.J. 482 = 36 Ind. Cas. 673.

——S. 102—Pardanashin lady—False recitals.

Where a *pardanashin* lady sued to set aside a sale-deed executed by her to her agent on the allgeation that she signed blank sheets and the recitals were made by the agent. *Held*, that as the document contained her signature she must establish that the recitals contained therein are untrue. 20 C.W.N. 638 = 35 Ind. Cas. 284.

——S. 103—Pardanashin lady—Gift by—Binding nature of.

The onus is on a person claiming under a deed of gift executed by a *pardanashin* lady to prove execution and intelligent understanding of the nature of the transaction by the grantor. *Aliter*, where the *pardanashin* is a woman of business-like capacity. 36 All. 81 = 41 I.A. 23 = 16 O.C. 378 = 18 C.W.N. 282 = 12 A.L.J. 115 = 15 M.L.T. 130 = 19 C.L.J. 172 = 1 O.L.J. 67 = 26 M.L.J. 121 = (1914) M.W.N. 112 = 16 Bom. L.R. 147 = 21 Ind. Cas. 985 (P.C.).

——Ss. 101 to 104—Pardanashin lady—Deed by—Court's duty.

The Court when called upon to deal with a deed alleged to have been executed by a purdanashin lady, must before it gives effect to it, satisfy itself upon the evidence, first that the deed was actually executed by her or by some person duly authorized by her with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and thirdly, that she had independent and disinterested advice in the matter. This doctrine applies only to the case of execution of a document by a pardanashin lady properly so called. If a lady is not a pardanashin, or though pardanashin is literate and of considerable intellectual capacity, the Court will not be inclined to interfere with a deed which has been *prima facie* properly executed by her, or to interfere with transactions to which her consent has been deliberately given. 12 C.L.J. 357 = 7 Ind. Cas. 166.

——Ss. 101 to 104—Pardanashin—Deed by—Onus of proof—Nature of proof.

In the case of deeds and powers executed by *pardanashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to and understood by those who executed them. The Courts should be careful to see that deeds taken from *pardanashin* women have been fairly taken and that the party executing them has been a free agent and has been duly informed of what she was about. The Court, when dealing with a deed alleged to have been execued by pardanashin lady must, before it gives to it, satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered, and thirdly that she had independent and disinterested advice in the matter. (1909) 12 C.L.J. 115. = 3 Ind. Cas. 330.

——Ss. 101 to 104—Pardanashin lady—Privilege—Scope.

The protection given under the Privy Council decisions to 'Purdanashin' ladies is given to people who are really kept in seclusion and have little or no commerce with the outer world. It is the protection offered to weakness and ignorance. The test is whether the lady understands what she is doing and whether she has had competent and independent legal advice. 9 C.L.J. 19 = 1 Ind. Cas 573.

——Ss. 101 to 104—Pardanashin, deeds by.

In the case of deeds executed by pardanashin ladies it is requisite that those who rely on them should satisfy the Court that they had been explained to and understood by those who executed them. 8 Bom. L.R. 781 = 31 B. 165.

——Ss. 101 to 104—Pardanashin lady—Independent advice—Nature of liability not understood—Receipt of consideration by lady—Creditor entitled to simple money decree—Simple interest.

Where the evidence showed that a purdanashin lady who had executed a mortgage deed (1) did not receive any independent advice and (2) did not fully understand the liability she was incurring (3) but that the money borrowed was made over to her, the High Court passed a simple money decree with simple interest at the rate of 9 per cent though the bond provided for compound interest with six monthly rests. (1905) 2 A.L.J. 436.

——Ss. 101 to 104—Pardanashin lady—Law applicable to—Finding that the lady is a pardanashin, necessity for.

Before the law applicable to a pardanashin lady is applied, a Court must find *expressly* that the lady is a purdanashin lady. (1902) 4 Bom. L.R. 146.

——Ss. 101 to 104—Pardanashin lady—Deeds and powers executed by—Binding character—Conditions requisite.

In the case of deeds and powers executed by purdanashin ladies it is requisite that those who rely on them should satisfy the Court that they had been explained to and understood by those who execute them. (1902) 4 Bom. L.R. 444 = 6 C.W.N. 682 = 29 C. 749 = 29 I.A. 127 (P.C.).

——Ss. 101 to 104—Pardanashin lady—Execution of mortgage—Knowledge of effect of the document—Amount of proof.

It is not enough merely to prove that the document was read to her; it must be proved that it was explained to her and that she understood the effect of it. 11 M.L.J. 164 = 28 C. 546 = 28 I.A. 71 = 5 C.W.N. 489 = 3 Bom. L.R. 386 (P.C.).

——Ss. 101 to 104—Pardanashin lady—Plea of ignorance of the nature of the transaction.

The plea that a purdanashin, did not understand the nature of the transaction deprecated as frivolous and as one which is raised almost as a matter of course in any case in which a Hindu lady is concerned. 8 C.W.N. 362.

——Ss. 101 to 104—Pardanashin lady—Onus—Presumption.

When dealing with the case of a will or a deed executed by a *purdanashin* lady a particular and peculiar onus rests upon those who come forward to support the document to show that the executant thoroughly understood what she was doing and was thoroughly and fully acquainted with the terms of the document she was executing. The presumptions as to the knowledge of the executant of the contents of the document she is executing do not equally apply in the case of a purdanashin lady as in the case of other persons. (1901) 5 C.W.N. 505.

——Ss. 101 to 104—Pardanashin lady—Deed—Execution—Explanation of contents.

Courts will not act upon a deed alleged to be executed by a *purdanashin* lady, unless it is satisfied that she understood the full import and effect of the document. (1901) 3 Bom. L.R. 658.

——Ss. 101 to 104—Pardanashin lady—Quasi-pardanashin, position of.

A *quasi-pardanashin* woman, *i.e.*, a woman who, not being of the *pardanashin* class, is yet close to them in kinship and habits secluded from ordinary social intercourse, is not entitled to the same amount of protection which the law gives to *pardanashins*. Outside the latter class it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precaution that her action shall be intelligent and voluntary and to prove that it was so in case of dispute. (1900) 5 C.W.N. 1 = 23 A. 137 = 27 I.A. 168 = 2 Bom. L.R. 971 = 10 M.L.J. 279 (P.C.).

41. Partition.

——Ss. 101 to 104—Partition.

Mortgagee of undivided share of one co-sharer—Partition among co-sharers—Mortgagee's security is

limited to divided share of mortgagor and the burden to prove that the partition was fair and equal lies upon the person relying upon the partition. A.I.R. 1942 Cal. 153 = 74 C.L.J. 61 = 46 C.W.N. 33 = I.L.R. (1942) 1 Cal. 326 = 201 Ind. Cas. 353.

——Ss. 101 to 104—Partition—Suit for declaration——Partition alleged by defendant—Survey entry showing family joint on date of partition—Onus of proof of partition.

Where in a suit for declaration of title to and recovery of possession of a property, the defendant alleges a partition of ancestral property but the survey entry shows that at the time alleged by the defendant, the family was joint, the onus of proving the partition is on the defendant. A.I.R. 1933 Pat. 627 = 148 Ind. Cas. 413.

——Ss. 101 to 104—Partition—Survivorship among co-widows—Precluded by—Onus.

The onus of proving that a partition that was effected by the co-widows precludes the rights of survivorship in each other is on the person who asserts the same. 123 Ind. Cas. 35 = 1929 M.W.N. 667 = A.I.R. 1930 Mad. 175.

——Ss. 101 to 104—Partition—Custom as to impartibility—Onus.

Where there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance according to which custom the estate is to be held by a single member and, as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom. A.I.R. 1928 P.C. 10, *Foll.* 118 Ind. Cas. 871 = A.I.R. 1930 Nag. 35.

——Ss. 101 to 104—Partition—Plea of permanent occupancy right—Onus.

Where in a suit for partition defendants resist by setting up acquiescence in their permanent right of occupancy in a part of the land the burden of proving existence of those rights is on them. 116 Ind. Cas. 601 = 31 Bom. L.R. 830 = 33 C.W.N. 734 = 30 M.L.W. 30 = 56 I.A. 248 = 52 Mad. 549 = 1929 M.W.N. 561 = A.I.R. 1929 P.C. 156 = 57 M.L.J. 1 (P.C.).

——Ss. 101 to 104—Partition list proved—Onus to prove jointness.

The onus is heavy on the person who desires to show that certain partition lists were not acted upon and the parties continued to be joint in spite of these lists. 117 Ind. Cas. 720 = A.I.R. 1928 Mad. 865.

——S. 102—Partition—Hindu joint family.

A disruption of the status of jointness of a Hindu family may take place by agreement without division of the estate by metes and bounds. Even an unambiguous expression of an intention by one member of the family to separate and hold his share separately is sufficient. But the question is one of fact and the onus is on the party alleging separation of interest or the intention to separate to establish it affirmatively. 18 A.L.J. 545 = 39 M.L.J. 18 = 56 Ind. Cas. 293 (P.C.).

——S. 102—Partition suit for partition.

In a suit for partition in a Mitakshara family the party who alleges a previous partition must prove it. 43 Cal. 459 = 20 C.W.N. 25 = 33 Ind. Cas. 190.

——Ss. 101 to 104—Partition—Temporary nature of—Onus.

Most partitions that are made are permanent and if any party wishes the Court to believe that a given partition was temporary, he must prove it. 93 Ind. Cas. 193 = A.I.R. 1926 Nag. 301.

——Ss. 101 to 104—Partition—Time of partition—Proof of subsequent partition—Does not shift burden.

It is well-established law that those who allege that the members of a joint Hindu family had separated must prove, unless it is admitted, that there was a separation at some material time. A separation proved to have taken place at a time subsequent to the material time does not shift the burden of proving separation at the material time, on the opposite party. 88 Ind. Cas. 385 = 29 C.W.N. 1037 = 23 A.L.J. 589 = 41 C.L.J. 591 = 22 M.L.W. 211 = 1925 M.W.N. 421 = A.I.R. 1925 P.C. 132 = 49 M.L.J. 55 (P.C.).

——Ss. 101 to 104—Partition—Muhammadans—Acquisition by one member—Proof that it was from joint fund—Onus.

In a partition suit among Muhammadans the burden is on the plaintiff to prove that the consideration for the acquisition of property by one member only came from the joint fund. 78 Ind. Cas. 817 = A.I.R. 1925 Sind 26.

42. Plea under.

——Ss. 101 to 104—Plea under—Best evidence not produced—Advantage of doctrine of onus of proof, if can be taken.

The parties should bring their best evidence, and when this is not done, the Court would be justified in concluding that it would, if brought into Court, not support the case of the party omitting to produce it. Such party cannot be allowed to take advantage of the abstract doctrine of onus of proof. A.I.R. 1939 Lah. 330 = 41 P.L.R. 895 = 186 Ind. Cas. 45.

——Ss. 101 to 103—Plea under—Shifting of onus—Mixed question of fact and law.

The question of onus is not a mere question of law. Once the principle of onus has been settled,the question still remains, whether having regard to the transactions proved, the onus still remains where it was or shifts. So that in each particular case, whether the onus has been shifted or not becomes a mixed question of fact and law or rather a question of the due application of a recognised principle to the shifting scenes and circumstances of the countless varieties of human life in business. 68 Ind. Cas. 805 = 44 All. 756 = 20 A.L.J. 658 = A.I.R. 1922 All. 436.

43. Possession.

——Ss. 102 and 103—Possession.

The mortgagor sued for possession alleging that the mortgagee though described in the mortgage deed a Rajput was not a Rajput member of an agriculturist tribe, but a *komhar* and hence the mortgage offended against the provisions of the Punjab Alienation of Land Act :

Held, that the burden was initially upon the plaintiff mortgagor to prove that the mortgagee was not a Rajput, especially when the defendant mortgagee was described as a Rajput in the mortgage-deed. (1936) 38 P.L.R. 427.

——S. 102—Possession—Plaintiff alleging purchase from nearest reversioner of deceased owner—Denial by defendant—Onus.

Where the defendants were in possession under a sale deed made by a person, who, the plaintiff alleged, was not competent to execute the deed and the plaintiff sued for possession on the ground of his having purchased from a person **K**, the nearest reversioner of the last owner and the issue was whether there were nearer reversioners than **K**.

Held, that it was proper for the Court to require the defendant to state whom the defendant claimed to be nearer heirs and having understood who they were, the plaintiff would be able to produce evidence showing exactly who those people were. A.I.R. 1935 All. 203 = 4 A.W.R. 1458 = 153 Ind. Cas. 545.

——Ss. 101 to 104—Possession.

Where properties are attached as properties of deceased person in the hands of the defendants and the defendants who are in possession claim the properties as their own, the burden is on the decree-holder to prove that the properties belonged to the judgment-debtors. A.I.R. 1933 Oudh 473 = 10 O.W.N. 1017 = 146 Ind. Cas. 1023 = 17 R.D. 939.

——Ss. 101 to 104—Possession—Dispossessed party—Proof of possession within 12 years—Onus.

Where in a case for possession by ejectment of the defendants who, it was alleged, had taken forcible possession of the lands two years before the institution of the suit, it was expressly stated in the plaint that the defendants had no right whatsoever to dispossess the plaintiffs.

Held, that the burden of proving possession by the plaintiffs within 12 years of the institution of the suit was on them. 109 Ind. Cas 320 = 9 L.L.J. 334 = A.I.R. 1928 Lah. 32.

——Ss. 101 to 104—Possession—Usufructuary mortgage—Consideration and possession denied by third party—Onus.

Plaintiff was the purchaser of the interest of a usufructuary mortgagee of certain tenant land. Defendant who was the landlord disputed the validity of the mortgage on the ground that no consideration passed from the mortgagee to the mortgagor, nor did the mortgagee take possession, and that the transaction was therefore *farzi* in character. Documents on which plaintiff relied were found to be executed by the mortgagor who never disputed the passing of consideration. The Record-of-Rights recorded the mortgagee as in possession.

Held, that the onus was not on plaintiff to show that consideration passed but that the onus was on defendant to show that no possession passed to the mortgagee. 115 Ind. Cas. 196 = 7 Pat. 733 = 9 P.L.T. 484 = A.I.R. 1928 Pat. 459.

——Ss. 101 to 104—Possession—Suit for—Proof, that defendants were in possession—Onus.

In a suit for possession in order to be entitled to possession against the defendants, the plaintiffs must satisfactorily prove that at the date when they filed their suit the defendants were in possession of the property.

The plaintiffs must prove possession of defendants within 12 years of the suit. 97 Ind. Cas 1003 = 44 C.L.J. 121 = A.I.R. 1926 Cal. 1166.

——Ss. 101 to 104—Possession—Suit by person dispossessed—Proof of possession within 12 years—Land incapable of actual possession—Presumption as to continuance of possession.

Where the plaintiff sued for possession on the allegation of dispossession.

Held, that he is bound to prove possession within 12 years before suit. In order to prove this, he may rely on the presumption that possession of the lawful owner continues as long as the land is incapable of actual possession. But if he relies on this presumption he must prove that the land was incapable of actual possession within twelve years before suit. 78 Ind. Cas. 679 = 51 Cal. 669 = 28 C.W.N. 637 = A.I.R. 1924 Cal. 855.

——S. 103—Possession—Delivery of possession to auction-purchaser.

Where the auction purchaser has obtained delivery of possession through Court, strong evidence is required to show that he was not in possession. 27 M.L.J. 195 = 26 Ind. Cas. 537.

——Ss. 101 to 104—Possession—Putni sale—Suit by purchaser—Suit for possession—Land within Putni area—Mal or Lukhiraj.

When a purchaser at a putni sale proves his purchase and on his applying for possession is resisted by persons holding lands included within the ambit of the putni tenure, who set up the defence that the lands held by them are lakiraj and not mal, it is for the defendants to prove that the lands have been held not under the putni tenure but as lakhiraj. (1906) 4 C.L.J. 548.

44. Presumption.

See also EVIDENCE ACT, S. 114.

——Ss. 101 to 104—Presumption—Sale certificate—Presumption—Burden of proof for rebuttal.

From the sale certificate which stands in the name of a certain person, the Court is bound to presume that that person is the real owner of the property. The party alleging the contrary has then to rebut this presumption and show that it is not the real state. A.I.R. 1945 Cal. 458 = 79 C.L.J. 248 = 222 Ind. Cas. 319.

——Ss. 101 to 104—Presumption—Document appearing to be in handwriting of certain person—No explanation—Inference.

Where a writing on the face of it appears to be that of a certain person, it is for that person to explain the document and the entries to be found in it. If such person, instead of offering any explanation, chooses to take shelter behind the evasive reply that he did not know whether the document was in his handwriting, the Court is right in inferring that the document was in that person's handwriting and in holding that it was for that person to explain it. A.I.R. 1940 All. 69 = 1939 A.L.J. 1065 = 1939 A.W.R. 842 = 187 Ind. Cas. 277.

——Ss. 101 to 104—Presumption—Motor accident—Damages, suit for—Proof that car at time of accident belonged to defendant—Presumption—Rebuttal.

In an action for damages for injury due to motor car accident, proof by the plaintiff that the car which caused the accident belonged at the time to the defendant, affords *prima facie* evidence that the driver of the car was the defendant's servant. The defendant, of course, can displace that presumption by showing that at the time of accident, the car was not under his control. A.I.R. 1937 Bom. 155 = 39 Bom. L.R. 44 = I.L.R. (1937) Bom. 268 = 168 Ind. Cas. 817.

——Ss. 101 to 103—Presumption—Commission agent—No presumption of acting in a particular agency.

The fact that a party is a commission agent does not raise a presumption that he was acting as an agent in a particular transaction ; the onus is on him who alleges agency. 67 Ind. Cas. 959 = 5 P.W.R. 1923 = A.I.R. 1922 Lah. 408.

——Ss. 101 to 104—Presumption—Consideration—Recited in mortgage-deed—Presumption may be rebutted by even circumstantial evidence.

In a mortgage suit for sale, the initial presumption arising under S. 118, Negotiable Instruments Act and from the acknowledgment admitting the receipt of the entire consideration, can be rebutted even by circumstantial evidence. And when it is thus rebutted the burden of evidence shifts on to the mortgagee to show that full consideration did actually pass.

In a mortgage suit for sale the execution of the mortgage document was established and further the mortgagor had made an acknowledgment admitting the

receipt of the entire consideration as well as the fact that there were hundis and promissory notes executed by him which had been set off or for the payment of which money had been left in the hands of mortgagee. But the mortgagor was a very young man of profligate habits and the mortgagee was in a position to dominate his will and to exercise undue influence over him. Further the mortgagee was not in a position to lend big sum of money.

Held, that the initial presumption of the passing of full consideration was sufficiently rebutted. 29 M.L.J. 236 and 31 I.C. 739, *Foll.* 124 Ind. Cas. 717 = A.I.R. 1930 All. 568.

——Ss. 101 to 104—Presumption—Custom—Presumption of caste approval—Proof to the contrary.

When a particular form of marriage is recognised by custom it is to be presumed that the caste approves of it and no social censure attaches to it, unless the contrary is established. The burden lies on the person who asserts the contrary. 90 Ind. Cas. 358 = 48 All 126 = 23 A.L.J. 981 = 6 L.R.A. Civ. 557 = A.I.R. 1926 All. 1.

——Ss. 101 to 104—Presumption—Cutchi Memons.—Custom of governance by Hindu Law—Onus how discharged.

There is a presumption that Muslims are governed by Muhammadan Law, and if a person alleges that Cutchi Memons are governed by Hindu Law, by custom, the burden of proving the custom lies on him and the onus will be discharged by proof of actual instances in which the alleged custom has been followed. 93 Ind. Cas. 321 = 19 S.L.R. 376 = A.I.R. 1926 Sind 161.

——Ss. 101 to 104—Presumption—Fraud—Conveyance by married woman—Husband not joined—Witnesses, living not called—Writer and attesting witness said to be dead—Presumption of fraud arises.

Where, in a case of conveyance from one married woman to another, husband is not joined; the persons who were said to be present when the consideration was said to have been paid were not called, though they were alive; the attesting witness and the person who drew up the document were said to be dead and were not called.

Held, that a presumption of fraud arose and that consideration must be proved by the plaintiff. 95 Ind. Cas. 384 = 5 Bur. L.J. 49 = A.I.R. 1926 Rang. 133.

——Ss. 101 to 104—Presumption—Joint business—Property acquired from profits—Proof that it is joint—Onus.

Property purchased with the profits derived from a joint business cannot be presumed to be joint and the Hindu Law of joint property is not applicable to such property. Burden of proving that such property is joint is on the party alleging it to be so. 96 Ind. Cas. 199 = 43 C.L.J. 452 = 31 C.W.N. 205 = A.I.R. 1926 Cal. 916.

——S. 102—Legitimacy—Presumption as to lawful connection and legitimacy—Rebuttal.

Where there are circumstances justifying the inference of marriage and legitimacy, the burden is upon those who deny the status of the wife and the son, to produce conclusive evidence to rebut the presumption of lawful connection and legitimacy. 1 O.L.J. 281 = 24 Ind. Cas. 643.

——Ss. 101 to 104—Presumption—Legitimacy.

Presumption of legitimacy and marriages. There is a presumption in favour of legitimacy and marriage, and therefore the onus of proving illegitimacy is on the person interested in making it out. 1905 A.W.N. 214.

——Ss. 101 to 104—Presumption—Foreign law—Presumption in the absence of proof.

It lies on him who asserts it to prove that the law of the foreign State differs from ours and in the absence of such proof it must be held that no difference exists except possible so far as the law here rests on the specific Acts of the Legislature. (1906) 8 Bom. L.R. 525 = 30 Bom. 578.

——Ss. 101 to 104—Presumption—Possession—Kabja receipt—Person named as purchaser—Presumption as to his having got possession.

From the Kabja receipt the Court is entitled to presume that the person named therein as purchaser had obtained possession through the Court, and although it is possible that when Kabja receipts are passed, physical possession of the land may not always be given to the purchaser, there is no reason why the Court should presume that no possession was given in a particular case. 77 Ind. Cas. 479 = A.I.R. 1923 Bom. 364.

——Ss. 101 to 104—Presumption—Promissory note—Date and place of execution—Proof to the contrary.

If pro-note is proved to be genuine and it bears the date and place of execution the presumption is that it was executed at the place and on the date it shows and the onus lies on the party pleading a different place and date, to show it. 109 Ind. Cas. 170 = A.I.R. 1928 Mad. 919.

——S. 104—Presumption—Receipt of letter.

The presumption is that if a letter properly directed is proved to have been posted, it reached its destination and was received by the person to whom it was addressed. 102 Ind. Cas. 821 = 8 P.L.T. 633 = A.I.R. 1927 Pat. 305.

——Ss. 101 to 104—Presumption—Registered document—Bearing date—Presumption as to date of execution—Lapse of time—Effect of.

In cases where a document has been executed and registered and the question arises as to the date it bears there can be little doubt that the presumption is that the document was executed on the date it bears, and the onus is on the contesting party to show that it was not. In all such cases lapse of time does strengthen the onus cast. 96 Ind. Cas. 26 = 23 M.L.W. 664 = 1926 M.W.N. 938 = A.I.R. 1926 Mad. 744.

——Ss. 101 to 104—Presumption—Relationship—Presumption as to continuance—Burden of proving the contrary.

When a particular relationship such as marriage has been shown to exist between two persons, there is a presumption in favour of its continuance, and the burden of proving that they do not stand to each other in that relationship lies on the person who affirms it. 114 Ind. Cas. 74 = 10 Lah. 470 = 30 P.L.R. 7 = A.I.R. 1929 Lah. 6.

——Ss. 101 to 104—Presumption—Suppression of account books.

Where it appeared that the other legatees had seized large portion of the testator's property and the account books kept by the testator and they were suppressing the same.

Held, the residuary legatee need not prove each item of property beyond the possibility of doubt. On proof of *prima facie* case the other legatees were bound to show that the testator did not own the property or that it was subsequently accounted for. 78 Ind. Cas. 274 = A.I.R. 1925 Mad. 164.

45. Recitals.

——S. 104—Recitals—Sale-deed reciting that consideration passed before Registrar—Onus to prove that no consideration passed.

Where there is a fact recorded in the sale-deed itself that the consideration was paid in the presence of the Registrar, the burden to prove that no consideration passed and that the deed was fictitious is on the party alleging it. A.I.R. 1938 Pat. 281 = 176 Ind. Cas. 129 =4 B.R. 682.

——Ss. 101 to 104—Recitals—Endorsements by Registering Officer—Party alleging to the contrary—Onus.

Where there are endorsement by the Registering Officer, the onus lies very heavily on the party who alleges the contrary, to prove it. A.I.R. 1935 Oudh 86 = 1935 O.W.N. 11 = 153 Ind. Cas. 373.

——Ss. 101 to 104—Recitals—Incorrectness of recitals in deed.

The onus proving that the recitals in a deed are incorrect lies heavily upon the executant when he is a literate man and admits that he understood the deed before he signed it. 138 Ind. Cas. 525 = 33 P.L.R 207.

——Ss. 101 to 104—Recitals—Execution admitted—Lack of understanding pleaded—Onus.

Where the execution of a document is admitted, the onus is on the executant to prove that he did not understand its terms, even if he is an illiterate person. 97 Ind. Cas. 71 = 27 P.L.R. 641 = A.I.R. 1926 Lah. 692.

——Ss. 101 to 104—Recitals—Covenant to pay interest—Absence of consent—Onus.

When a stipulation as to interest is found in a bond, the execution of which is either proved or admitted, the onus of proving that a covenant to pay interest has found its way into a bond without the consent of the debtor must ordinarily lie upon the debtor. 79 Ind. Cas. 55 = A.I.R. 1925 Lah. 64.

——Ss. 101 to 103—Recitals—Promissory note—Consideration recited—Plaintiff undertaking to prove—Failed in part—Effect.

In a suit on promissory note, which contained a recital that the consideration was paid in cash, the plaintiff abandoned the recital and undertook to prove that the consideration consisted partly of cash and partly of reduction of defendant's liability to a certain firm which was in turn indebted to the plaintiff. He failed to prove the latter part of the case.

Held, that in respect of the latter part a decree could not be passed in plaintiff's favour merely on the strength of the defendant's signature.

Obiter : He could have got a decree for the whole amount if he had offered no evidence at all but relied on the recital. 80 Ind. Cas 717 = 4 L.R.A. Civ. 458 = A.I.R. 1924 All. 256.

——Ss. 101 to 104—Recitals—Consideration—Proof of non-receipt—Executant and stranger—Difference between.

As against persons who were not parties to a mortgage transaction the recital in the mortgage deed that the consideration has been paid is no evidence and the onus is upon the mortgagees to prove affirmatively the reality and necessity of the transaction. As against the mortgagor, on the other hand, the recital in the deed is weighty evidence and the onus lies upon the mortgagor to establish that the statement contained in the deed is untrue. What a party himself admits to be true may reasonably be presumed to be so, but the party may prove the statement to have been mistaken or untrue. (1907) 5 C.L.J. 653.

——Ss. 101 to 103—Recitals—Possession stated to have been given—Proof to the contrary.

Where plaintiff signed a document saying that possession has been delivered under a gift-deed the onus of proof that she did not give possession is on the plaintiff. 16 M.L.W. 894 = A.I.R. 1923 Mad. 52.

——S. 103—Recitals—Variance with facts—Onus.

Onus is on the defendant to prove that the bond which he signed contained a recital which was not in accordance with the facts. 41 Ind. Cas. 44 (Cal.).

46. Record of rights.

——Ss. 101 to 104—Record of rights—Entry in settlement *khasra* challenged—Onus.

The burden of proving that the entries in the existing settlement *khasras* were wrong lies on the party who disputes their correctness. A.I.R. 1945 Oudh 270 = 1945 A.W.R. (C.C.) 100 = 1945 O.W.N. 160.

——Ss. 101 to 104—Record of rights—Survey papers.

The question whether any particular land was included in the permanent settlement, is a question of fact and not of law and the onus of establishing this fact is on those who affirm that such was the case. Subsequent survey papers will only be relevant evidence for the purpose. The question may or may not be satisfactorily proved by such subsequent survey papers. It will be wrong even to say that the burden of proof is shifted on to the other side by such survey papers. It cannot again be said as a matter of law that such survey papers should be held sufficient proof of the fact. It would not be right to act on the *thak* treating it as decisive in the absence of evidence to the contrary. At the same time, the *thak* is a valuable piece of evidence and where there is no question of any change since the permanent settlement caused by the erosive action of any large and violent river, its probative value is really very great. A.I.R. 1944 Cal. 57 = 77 C.L.J. 194 = 48 C.W.N. 505 = I.L.R. (1944) 1 Cal. 203 = 211 Ind. Cas. 460.

——Ss. 101 to 104—Record of rights.

Inam title deed stating certain acres of land as wet and rest as dry—Onus is on the *inamdar* to prove that the description does not represent the correct state of things. A.I.R. 1939 Mad. 475 = 1939 M.W.N. 73 = 184 Ind. Cas. 447.

——Ss. 101 to 104—Record of rights—Burden of proof to show incorrectness.

It is well settled that it is for the party challenging the Record of Rights to displace the presumption of correctness that applies to it by statute. A.I.R. 1938 Pat. 396 = 175 Ind. Cas 316 = 4 B.R. 561.

——Ss. 101 to 104—Record of rights.

In case of an unregistered *jama bandi*, the onus is on the lessee to prove that the *jama* was taken at a consolidated rent and not at a particular rate per unit area. (1936) 40 C.W.N. 1330 = I.L.R. (1937) 1 Cal. 313.

——Ss. 101 to 104—Record of rights—Party claiming land as appertaining to permanently settled estate.

When certain land is claimed as appertaining to the permanently settled estate, the person who claims in such a way is bound to prove that the land was included in the *mal* assets of the estate at the time of the Permanent Settlement. The burden which lies on the *zemindar* is not discharged by merely showing that the *mouza* is within the ambit of geographical limits of his estate ; he must go further and show that this *mouza* was assessed to revenue. A.I.R. 1935 Cal. 368 = 60 C.L.J. 477 = 62 Cal. 346 = 159 Ind. Cas. 98.

——Ss. 101 to 104—Record of rights—Disputed lands shown as *debutter* in Record of Rights—Plaintiff claiming them to be in his *zemindari*.

Where, in a suit, the disputed lands are *debutter* as shown in the Record of Rights and the plaintiff chal-

lenges that character of the lands claiming that the lands lie within the ambit of his *zemindari*, the onus is on the plaintiff to show by evidence that the *debutter* entries in the Record of Rights are incorrect. A.I.R 1933 Pat. 6 = 11 Pat. 701 = 14 P.L.T. 509 = 141 Ind. Cas. 157.

——Ss. 101 to 104—Record of rights—Onus of rebuttal.

Entries in the Record of Rights being made after enquiry by experienced revenue officials are statutory evidence of great weight and the onus is on the party impugning their correctness to establish by cogent evidence that such entries are incorrect. A.I.R. 1932 Pat. 195 = 13 P.L.T. 264 = 139 Ind. Cas. 143.

——Ss. 101 to 104—Record of rights—Lessee's suit for possession—Land entered as defendant's ancestral holding—Onus on defendant to establish.

Where on the basis of a lease executed by the landlord in favour of the plaintiff, the plaintiff sues defendants for recovery of possession of that land, and that land is recorded in Record of Rights as defendants' ancestral holding, having regard for the lease it is for the defendants to establish that the plot was part of their ancestral holding. 123 Ind. Cas. 410 = A.I.R. 1930 Pat. 149.

——Ss. 101 to 104—Record of rights—Correctness presumed—Entries presumed to be relevant.

The ordinary rule with regard to official document like Record of Rights is that they must be presumed to be correct until the contrary is shown, that is to say, it must be presumed that the entries made in the Record of Rights were those entries and those entries only which are required to be made in the order passed under S. 80, and if any party wishes to dispute the validity of the entry, then the onus would be on him to produce the order passed under S. 80 to show that these particulars were not in fact required. 99 Ind. Cas. 492 = 1926 P.H.C.C. 338 = 8 P.L.T. 239 = A.I.R. 1927 Pat. 97.

——Ss. 101 to 104—Record of rights—Tenure-holders—Recorded as holding within zamindari must prove nature of title—Entered as non-resumable tenure-holders—Burden shifted.

Where the defendants, the tenure-holders, are recorded in the Record of Rights as holding land within the ambit of the zamindari of the plaintiff and that he was paying revenue for the same, the onus of showing the nature of their title is upon the tenure-holders and upon a failure to show that they had had a tenancy therein the plaintiff is entitled to resume. But if it is recorded that the defendants were owners of a non-resumable tenure the onus is shifted upon the plaintiff to rebut the presumption created by the Record of Rights. 94 Ind. Cas. 1007 = A.I.R. 1926 Pat. 369.

——Ss. 101 to 104—Record of rights—Entered as tenants—Proof to the contrary—Rent proved not in excess of revenue—Onus not discharged.

If in the revenue records the defendants were shown as tenants paying rent, the onus is on them to show that they are not tenants, and that onus is not discharged by the fact that the amount of the rent which they paid did not exceed the amount of the revenue and cesses. 69 Ind. Cas. 363 = A.I.R. 1923 Lah. 35.

——S. 102—Record of rights—Official records—Bombay Hereditary Officers Act, S. 15.

Where a whole village is mentioned in a Sanad evidencing a settlement under S. 15, Bombay H.O. Act, 1874, the party alleging that a particular Survey Number of that village is outside the scope of the settlement must prove it. 44 Bom. 237 = 22 Bom. L.R. 275 = 56 Ind. Cas. 411.

——S. 103—Record of rights—Official records—Suit for declaration that defendant's name is wrongly entered in the revenue papers by mistake.

The burden of proving that plaintiff has been in separate exclusive possession and that defendant's name is wrongly entered in the revenue papers lies upon the plaintiff. 27 P.W.R. 1912 = 32 P.L.R. 1912 = 13 Ind. Cas. 960.

——S. 102—Record of rights—Entry challenged—Entry in record of rights.

The burden of proof is upon the party alleging that a certain entry in a record of rights is incorrect. 23 Ind. Cas. 604 (Cal.)

——S. 102—Record of rights—Entry in—Under proprietor.

The burden of proving, that a person who is not recorded, as under proprietor, is an under proprietor, lies on the person making the assertion. 12 O.C. 164 = 2 Ind. Cas. 927.

47. Scope.

——S. 101—Scope—Allegations in plaint denied by defendant—Defendant impleaded at his request—Burden of proof.

The burden is on the plaintiff to prove his case, and in this connection the position of the defendant who is impleaded at his own request and who denies the allegations in the plaint is not different from that of a defendant who is impleaded in the plaint. In the former case, the defendant need not make out a *prima facie*, case before the plaintiff is asked to meet it. A.I.R. 1949 Ajmer 34.

——Ss. 101 to 104—Scope—Burden of proof—Compromise decree—Defendant to pay money by instalments through Court—Suit to be decreed on default—Non-payment not due to defendant's fault—Proof required.

A suit for cancellation of a sale deed and for possession of the property in question filed on the failure of the defendant to pay the balance of the sale price ended in a compromise decree under which the defendant was to pay the amount due in instalments and in case of default in payment of any one of them the plaintiff's suit was to be decreed. The defendant failed to pay one of the instalments and the decree-holder applied for execution of the decree on the ground of default.

Held, that the obligation was on the defendant to pay and as he did not pay, it was for him to prove that the fault was not his. Assuming that the obligation was to pay "through Court" and that that meant that he must pay into the Imperial Bank having first obtained a proper voucher from the Court, yet it was still for him to prove that he took all proper and reasonable steps to make such payment but nevertheless failed to do so. 61 L.W. 127 = A.I.R. 1948 P.C. 17 = 50 P.L.R. 30 (P.C.).

——Ss. 101 to 104—Scope—Lapse of time—Relief.

Although lapse of time may prejudice the chances of the plaintiff in proving his case, it does not relieve him of any part of the burden of proof that rests on him, when the lapse of time is not due to any default on the part of the defendant or his predecessors. I.L.R. (1946) Kar. (P.C.) 24 = 223 Ind. Cas. 394 = 59 L.W. 268 = 50 C.W.N. 477 = 1946 M.W.N. 389 = 1946 A.L.W. 268 = 1946 A.L.J. 228 = 81 C.L.J. 107 = 48 Bom. L.R. 430 = 1946 O.W.N. 207 = 1946 Pesh. L.J. (P.C.) 59 = 1946. A.W.R. (P.C.) 94 = 12 B.R. 459 = A.I.R. 1946 P.C. 59 = (1946) 2 M.L.J. 98 (P.C.).

——Ss. 101 to 104—Scope—Plaintiff to succeed on the strength of his own title.

A plaintiff can only succeed on the strength of his own title. (1904) 6 Bom. L.R. 750 = 9 C.W.N. 105 = 26 A. 581 = 30 I.A. 217 (P C.).

——Ss. 101 to 104—Scope—Duty of parties to present their own cases.

Courts are to decide impartially between the parties and it is the duty and business of the parties to present

such documents and such evidence as they consider relevant and necessary for their respective cases. It is their duty, and not the Court's, to present their own cases. A.I.R. 1945 Nag. 33 = I.L.R (1945) Nag. 74 = 1945 N.L.J. 30.

——**S. 101—Scope—Party relying on negative facts in assertion of his rights must prove those facts—Denial of affirmative allegation and assertion of negative fact—Proof of existence or non-existence of fact.**

If a party wishes the Court to believe in the non-existence of certain facts and the existence of the rights asserted by him depends on the non-existence of such facts, it is as much his duty to establish those negative facts as it would be of proving positive facts if his rights were to depend on their existence. The distinctions between the denial of an affirmative allegation and the assertion of a negative fact and between the proof of the existence or non-existence of a fact and disproof of its existence or non-existence are obvious and should not be lost sight of. The degree of proof in regard to affirmative and negative facts must be, in the nature of things, different although in either case the Court has "after considering the matters before it," to make up its mind whether it does or does not believe in the existence or non-existence of a fact which has to be established or considers its existence or non-existence " so probable that a prudent man ought, under the circumstances of the particular case, to act under the supposition that it exists " or does not exist. When an affirmative fact is to be established, direct evidence to prove that fact can be adduced and the Court has to make up its mind as to its credibility and sufficiency ; but when a negative fact has to be proved, it may be that in a large number of cases, no more than *prima facie* evidence as to the non-existence of the fact that is alleged not to have existed is available or can be adduced and in such cases, a plaintiff can be expected to do nothing more than produce such evidence to substantiate his allegations *prima facie* A.I.R. 1943 Mad. 15 = (1942) 2 M.L.J. 431 = 55 M.L.W. 578 = 208 Ind. Cas. 38.

——**Ss. 102, 105—Scope—Burden of proof in criminal cases—English decisions, if can be referred.**

Per *Iqbal Ahmad, C.J. and Bajpai, Mohammad Ismail and Mulla, JJ.*—Even though the Evidence Act does, in certain respects, differ from English Law and supplies a distinct body of law as to the rules of evidence, the framers of the Indian Law could not or did not intend to depart from the English Law on the subject of burden of proof in criminal cases. Consequently, the English cases can be referred in order to interpret Ss. 102 and 105, Evidence Act, on this subject.

Per *Allsop, Collister and Braund, JJ. (dissenting)*—So far as the Courts in India are concerned, the law of evidence is embodied in the Evidence Act and the Courts in India are strictly bound by its provisions when considering the question of the onus of proof and its discharge. If its meaning is plain, the Courts must follow its plain meaning without any reference to English Law and hence English decisions, even of the highest authority, on the question of burden of proof, have no reference to India. A.I.R. 1941 All. 402 = 1941 A.L.J. 619 = 43 Cr.L.J. 177 = 1941 A.W.R. 320 = I.L.R. (1941) All. 843 = 197 Ind. Cas. 525 (F.B.).

——**Ss. 101 to 104—Scope.**

In fire insurance, as a matter of agreement between parties, the onus of proof of any particular fact or of its non-existence may be placed on either party in accordance with the agreement made between them. A.I.R. 1940 P.C. 199 = 7 B.R. 194 = 190 Ind. Cas. 843 (P.C.).

——**Ss. 101 to 104—Scope—Question of onus, if material.**

When evidence has been adduced on both sides the question of onus is a material or deciding factor only in exceptional circumstances. A.I.R. 1937 Mad. 182 = 1936 M.W.N. 1167 = 44 L.W. 784 = (1937) 1 M.L.J. 543 = I.L.R. (1937) Mad. 299 = 167 Ind. Cas. 819.

——**S. 102—Scope.**

Section 102, Evidence Act, means that when the burden of proof lies on a party, that party must fail if he does not discharge the burden by giving evidence. A.I.R. 1936 Pat. 243 = 162 Ind. Cas. 21 = 2 B.R. 408.

——**Ss. 101 to 104—Scope—Party on whom burden lies, leading weak evidence—When can supplement his evidence.**

If the burden of proof lies upon a person and the evidence called by him is weak, it is always open to his opponent to rely on the weakness of that person's case and refuse to go into the witness-box or call any evidence. If, however, he thinks it necessary to go into the witness-box and to call evidence, then his opponent upon whom the burden of proof lies, is entitled to supplement the evidence which he has already produced by all the evidence which he can elicit by cross-examination in his favour against his opponent from the latter's witnesses. A.I.R. 1935 Rang. 433 = 160 Ind. Cas. 480.

——**S. 101—Scope—Tests for determining.**

To determine on whom the burden of proof lies, it is necessary to ascertain with precision upon what propositions of fact or of law the parties were at variance, and how matters stood when the case reached the High Court. When all the evidence has been recorded, the Court finds on what points of fact and law the parties are at variance. Taking all the admitted facts, the Court has to take those as a basis and then examine the controversial evidence, and the burden of proof ultimately lies upon the party who has got to extract something out of the controversial evidence failing which he must lose his case. A.I.R. 1933 Rang. 211 = 145 Ind. Cas. 413.

——**Ss. 101 to 104—Scope of—Conflicting evidence does not necessarily fail.**

Where the evidence is conflicting the party on whom onus lies does not necessarily fail as in the case where no evidence is led on either side. 123 Ind. Cas. 612 = A.I.R. 1930 Pat. 134.

——**Ss. 101 to 104—Scope—Onus—Not an invariable obligation—Changes according to pleadings and progress of evidence.**

Question as to the onus depends on the pleadings in a particular case. Onus is not an invariable obligation resting on a party to a suit by fixed and pre-determined rules of evidence. It not only changes according to the nature of the pleadings but it also frequently changes according to progress of evidence. 105 Ind. Cas. 410 = 4 O.W.N. 958 = A.I.R. 1927 Oudh 499.

——**Ss. 101 to 104—Scope—Applicability of general rule—Must also show exceptions do not apply.**

Party on whom onus of showing that a rule applies to him lies, must not only establish that the general rule applies to him, but also establish facts showing that the exception of the general rules does not apply. 101 Ind. Cas. 119 = 8 P.L.T. 578 = A.I.R. 1927 Pat. 225.

——**Ss. 101 to 104—Scope—Burden of proof—Benefit of doubt not given.**

Law does not recognise the principle of giving the benefit of the doubt to a party on whom the burden of proof lies. Burden of proving that a person is of an agriculturist tribe is on him, especially when entries in Settlement record are against him. 94 Ind. Cas. 158 = A.I.R. 1926 Lah. 484.

——**Ss. 101 to 104—Scope—Burden of proof—No hard and fast rule—Depends on circumstances of each case.**

As regards the question of burden of proof no hard and fast rule can be laid down in the sense that the rule should apply to all cases. The determination of initial onus of proving a certain fact depends on the particular circumstances of each case, and onus also shifts from time to time during the progress of the trial as the evi-

dence develops and facts are established. 78 Ind. Cas. 850 = 11 O.L.J. 219 = A.I.R. 1925 Oudh 16.

——**Ss. 101 to 104—Scope—Weakness of defendant's title will not avail.**

The plaintiff must succeed on the strength of his own title and is not assisted by any weakness, real or apparent in the case for the defendant. 80 Ind. Cas. 357 = 39 C.L.J. 90 = 28 C.W.N. 1033 = A.I.R. 1924 Cal. 558.

——**Ss. 101 to 104—Scope—Onus—A question of law.**

The question upon which party the onus of proving any particular point lies, is undoubtedly a question of law. 86 Ind. Cas. 745 (Lah.).

——**S. 102—Scope—Dismissal from office—Enquiry into conduct of hereditary temple servants.**

Where trustees of a temple inflict punishment on its hereditary officers, the onus of proving that notice of the enquiry held by the trustees was given to the persons concerned, and that the procedure was legal, is on the trustee holding the enquiry. 4 L.W. 611 = 35 Ind. Cas. 204.

——**Ss. 102 and 103—Scope—Affirmative of issue.**

From first principles, it is clear that the issue must be framed by the party who states the affirmative and not by the party who states negative. 16 C.W.N. 779 = 15 Ind. Cas. 30.

48. Shifting of onus.

——**Ss. 101 to 104—Shifting of onus—Suit for possession—Defendant No. 1 denying plaintiff's title and asserting that of defendant No. 2—Defendant No. 2 supporting plaintiff—Effect.**

In a suit for possession of a plot, on ground that plaintiff was its owner, defendant No. 1 denied plaintiff's title and asserted that of defendant No. 2 who was his lessor. Defendant No. 2 supported the case of plaintiff in his written statement but later on sought an amendment so as to support defendant No. 1:

Held, that the onus of proving his case was upon the plaintiff and the mere fact that the lessor also wanted to support the case of defendant No. 1 could not alter the position in regard to the onus. A.I.R. 1945 All. 197 = 1945 O.W.N. (H.C.) 32 = 1945 A.L.J. 136 = 1945 A.W.R. (H.C.) 36 = I.L.R. (1945) All. 109.

——**S. 102—Shifting of burden of proof.**

In a suit for property, the plaintiff alleged that her husband had, during his lifetime, separated from the joint family and therefore, she was entitled to the suit property as belonging to her husband. The defence was that the partition was fictitious and the suit property was joint family property. In view of previous admission by the plaintiff that the family was joint and that the partition deed was fictitious and was never acted upon :

Held, that whatever onus may initially have lain on the defendants vendees to show that the family was joint, the proof of those admissions of the plaintiff shifted the onus on to the plaintiff to show that the partition was real. It was for the plaintiff to rebut the presumption to which her admissions gave rise, *viz.*, that the partition was not real. A.I.R. 1944 All. 42 = 1944 A.L.J. 19 = 1944 A.W.R. 8 = 212 Ind. Cas. 168.

——**S. 101—Onus of proof—How and when shifts.**

In civil cases, the onus of an issue is never permanently fixed, but constantly fluctuates. If it is placed on a particular party, it may, by adducing evidence, shift the burden on to the other side, who would fail if it is unable to rebut it. A.I.R. 1944 Lah. 276 = 46 P.L.R. 88.

——**S. 102**—No doubt the onus of proving insanity is, in the first place, on the person who alleges it, the normal presumption being of sanity. If, however, there is sufficient evidence to prove that the person whose mental capacity is in doubt is usually of unsound mind, then the burden shifts to the person who alleges his sanity to prove that the document was executed during a lucid interval. A.I.R. 1941 Nag. 251 = 1941 N.L.J. 287 = I.L.R. (1942) Nag. 236 = 196 Ind. Cas. 660.

——**Ss. 101 to 104—Shifting of onus—Right to sue devolving on plaintiff jointly with her sister—Plaintiff establishing *prima facie* her right to sue alone—Rebuttal of evidence.**

It is incumbent on the plaintiff to show how she is entitled to sue alone where the right to sue devolves on her and her sister jointly. Once she succeeds in showing consent or authority or any other fact, such as a partition decree or renouncement of her claim by her sister which would entitle her to bring the action alone, the onus would shift to the other side to rebut the evidence adduced on behalf of the plaintiff by showing that the partition decree is inadmissible for want of registration when ordinarily all the decrees and orders passed by Courts are, under S. 17 (2), Registration Act exempt from registration. A.I.R. 1940 Mad. 412 = (1940) 1 M.L.J. 240 = 1940 M.W.N. 429 = 190 Ind. Cas. 657.

——**Ss. 101 to 104—Shifting of onus.**

Admission in a previous document—Party not bound by such admission. Its only effect is to shift the burden as against the party making admission. (1938) 67 C.L.J. 495.

——**Ss. 101 to 104—Shifting of onus.**

Patwari receiving excess amount on account of land revenue—Amount neither credited not returned but kept with himself. Burden shifts on *Patwari* to show that he received the amount in excess by mistake or that he returned the amount to owner or his agent. A.I.R. 1938 Nag. 445 = 1938 N.L.J. 259 = 39 Cr.L.J. 895 = I.L.R. (1939) Nag. 180 = 177 Ind. Cas. 396.

——**S. 101—Shifting of onus.**

Plaintiff's case that a certain property was jointly held by himself and his brother—Defendants alleging separation—Onus of proving separation is on defendants—Cesser of commensality is evidence by which this can be proved and so far as it shifts the onus, it shifts it in the secondary sense of the term only, and that is not a matter of law. A.I.R. 1937 Nag. 230 = 171 Ind. Cas. 860.

——**Ss. 101 to 104—Shifting of onus—Onus of proof—Rule of.**

The onus is upon the plaintiff and will shift on to the defendant only if the evidence adduced by the plaintiff is held to be sufficient to establish a *prima facie* case. It is not merely a question of weighing feathers on one side or the other. The party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence given. A.I.R. 1937 Pat. 563 = 16 Pat. 622 = 171 Ind. Cas. 715 = 4 B. R. 58.

——**S. 101—Shifting of onus.**

An admission that actual consideration was different from that described in contract, does not shift the burden. A.I.R. 1936 Nag. 130 = I.L.R. (1936) Nag. 142 = 164 Ind. Cas. 740.

——**Ss. 101 to 104—Shifting of onus.**

The affidavit of a process-server that he was unable to find party and had effected service by affixing the summons on his residence is legal evidence and shifts the onus to the party to prove that he was not properly served. (1936) 38 P.L.R. 279 = 164 Ind. Cas. 790.

——**Ss. 101, 102—Shifting of onus—Documents alleging receipts of payments—Third party denying consideration—Onus of proof of actual payment.**

It is true that as between parties to a document, the admission or proof of execution would shift the onus on to the party denying consideration ; but a person who is not a party to the document in question

cannot be held liable on alleged receipts of payments unless there is evidence to prove that the money was actually paid. A.I.R. 1935 Lah. 14 = 157 Ind. Cas. 787.

——Ss. 101 to 104—Shifting of onus—Effect of registration on onus.

The decision of the Registrar that a document is genuine and the registration of the document, have not got even the effect of shifting the onus of proof from the party who alleges that the document is genuine. A.I.R. 1935 Mad. 203 = 1935 M.W.N. 42 = 41 M.L.W. 90 = 68 M.L.J. 95 = 58 Mad. 448 = 155 Ind. Cas. 948.

——Ss. 101 to 104—Shifting of onus.

The proof of an admission shifts the onus because what a party himself admits to be true may reasonably be presumed to be so. It is then for him to rebut this presumption and unless and until that is satisfactorily done, the fact admitted must be taken to be established. A.I.R. 1934 Lah. 662 = 35 P.L.R. 578 = 153 Ind. Cas. 393.

——Ss. 101 to 104—Shifting of onus—Finding that family was joint and there was nucleus—Proof that certain property was one party's exclusive property.

Once it is held in a partition suit that the family of the plaintiff was joint and that there was a nucleus of joint ancestral property, then it is for the party who asserts that a certain property is his exclusive property to prove that fact. A.I.R. 1934 Oudh 293 = 11 O.W.N. 528 = 10 Luck. 61 = 149 Ind. Cas. 244.

——Ss. 101 to 104—Shifting of onus—Suit on pronote—Denial of consideration and plea of fraud.

Where, in a suit on a promissory note, the defendant denies consideration and sets up a plea of fraud, the burden is on the plaintiff to prove execution of the pronote and the passing of consideration. It is not upon the defendant to prove fraud and want of consideration. A.I.R. 1933 Oudh 394 (1) = 10 O.W.N. 839 = 146 Ind. Cas. 709.

——S. 103—Burden of proof—When shifts.

The burden of proof is fixed when the issues are framed, and after that it is merely a case of considering the evidence. Once the pleadings are complete, the burden of proof is not transferred from side to side in the course of the proceedings. A.I.R. 1933 Rang. 174 = 146 Ind. Cas. 445.

——Ss. 101 to 104—Shifting of onus.

In a suit for recovery of money, the defendant pleaded payment and produced an entry in his *bahi* on which he said there was the plaintiff's thumb-mark. The plaintiff denied the thumb-mark :

Held, that the initial onus was rightly placed on the defendant but as soon as the finding was given that the thumb-mark was that of the plaintiff, the onus shifted to the plaintiff. (1931) 133 Ind. Cas. 867 = 32 P.L.R. 407.

——Ss. 101 to 103—Shifting of onus.

In a mortgage suit for sale, the initial presumption arising, under S. 118, Negotiable Instruments Act and from the acknowledgment admitting the receipt of the entire consideration, can be rebutted even by circumstantial evidence. And when it is thus rebutted the burden of evidence shifts on to the mortgagee to show that full consideration did actually pass.

In a mortgage suit for sale the execution of the mortgage document was established and further the mortgagor had made an acknowledgment admitting the receipt of the entire consideration as well as the fact that there were hundis and promissory notes executed by him which had been set off or for the payment of which money had been left in the hands of mortgagee. But the mortgagor was a very young man of profligate habits and the mortgagee was in a position to dominate his will and to exercise undue influence over him. Further the mortgagee was not in a position to lend big sum of money.

Held, that the initial presumption of the passing of full consideration was sufficiently rebutted. 29 M.L.J. 236 and 31 Ind. Cas. 739, Foll. 124 Ind. Cas. 717 = A.I.R. 1930 All. 568.

——S. 104—Shifting of onus—Dispute about land.

Suit for establishing title and ejectment—Plaintiff claiming land in dispute under sale-deed—Defendants contesting the claim as holders of *lakheraj* property—Plaintiff has to prove that the land is within the geographical limits of the patni village.—Burden of proving that the land is dedicated to a foundation as Niskar Pirattar then shifts on the defendants. A.L.R. 1922 P.C. 272, *Foll.* 49 C.L.J. 546 = A.I.R. 1929 Cal. 459.

——Ss. 101 to 104—Shifting of onus.

Where plaintiff has given *prima facie* evidence of loss of profits caused by defendant, the defendant must prove that the loss was less than that proved by plaintiff. A.I.R. 1924 Nag. 117 *Foll.* 94 Ind. Cas. 999 = A.I.R. 1927 Nag. 75.

——Ss. 101 to 104—Shifting of onus.

Onus is liable to shift on proof of particular circumstances. 78 Ind. Cas. 649 = A.I.R. 1925 All. 28.

——Ss. 101 to 103—Shifting of onus—Suit for profits.

In a suit by co-sharers against *lambardar* for profits, the burden of proving the amount of arrears lies on the *lambardar*. 6 N.L.J. 234 = A.I.R. 1923 Nag. 287.

——Ss. 101 to 104—Shifting of onus—Burden shifts according to facts proved.

Burden of proof is often of a shifting character and may change from one party to the other as facts are proved which render the case of one party more probable than that of the other. 70 Ind. Cas. 27 = 1921 M.W.N. 719 = A.I.R. 1921 Mad. 462.

——Ss. 102 and 114—Shifting of onus—Discharge—Trial judge's estimate of testimony—Value of, in doubtful cases.

In a suit to enforce a mortgage bond the defence was that the debt had been discharged by payments endorsed on the bond. The trial Court, on review of the evidence held that the endorsements were fictitious and decided in favour of the plaintiff. But the High Court on appeal dismissed the suit. *Held*, that though the initial burden of proof rests on the appellant in such a c as this, both on general grounds and by reason of S. 114 of the Evidence Act, this burden shifts easily as the evidence is developed and much importance could not be attached in this case to the question on whom the initial onus lay. The evidence in this litigation, taken as a whole, was of such a character and so full of doubtful statements that it could only be weighed adequately by the Judge who had seen the witnesses and the balance of probabilities was also on the side of the conclusion reached by the Trial Judge. 22 C.W.N. 937 = 8 L.W. 233 = 47 Ind. Cas. 337 (P.C.).

——S. 102—Shifting of onus—Insanity—Proof.

A suit was brought on an equitable mortgage against A, B and C buta decree was passed only against A and C, omitting B as being insane. The purchaser in execution of the decree, was subsequently sued on the basis of a mortgage executed by B prior to the suit and the property really belonged to B. The onus of proof shifted from plaintiff to the defendant when he showed the existence of the previous mortgage under which possession was claimed. B was not bound by the decree as he was not a party to it. 4 Bur. L.T. 242 = 12 Ind. Cas. 199.

——S. 101—Shifting of onus—Admissions shift onus.

An admission though not necessarily conclusive is sufficient to shift the burden of proof. 7 N.L.R. 23 = 10 Ind. Cas. 700.

49. Special plea.

——S. 101—Special plea—Plea that plaintiff is alien enemy—Onus—Basis to decide.

It is for the defendants, who say that the plaintiffs are alien enemies, to prove that there are circumstances which bring them within such category in the eye of the law. The question has to be determined on the terms of S. 83, Civil P.C. and the Defence of India Act, 1939, and the rules thereunder. A.I.R. 1944 Mad. 239 = 57 M.L.W. 23 = (1944) 1 M.L.J. 58 = I.L.R. (1944) Mad. 124 = 218 Ind. Cas. 235 = 1944 M.W.N. 200.

——Ss. 101 to 104—Special pleas.

Where a person declares in unambiguous terms that he and members of his family were partners in a certain business, onus to prove contrary lies on him alone. A.I.R. 1944 Mad. 195 = 1943 M.W.N. 684 = (1944) 1 M.L.J. 1 = I.L.R. (1944) Mad. 340 = 217 Ind. Cas. 106.

——Ss. 103, 106—Special plea—Suit for dower—Husband pleading divorce and its communication to wife.

Where in a suit by a Mohammadan lady to recover dower, the husband pleads divorce and communication of the divorce at a time more than three years before the suit was instituted, it is for the husband to prove the facts alleged under Ss. 103 and 106, Evidence Act. A.I.R. 1943 Lah. 215 = 45 P.L.R. 231 = I.L.R. (1944) Lah. 186 = 209 Ind. Cas. 157.

——S. 102—Special plea.

Where a person seeks to recover overpayments made under a contract under a mistake of fact, he must prove not only that he was mistaken as to the facts, but also that it was such a mistake, which caused him to pay. A.I.R. 1943 Pat. 327 = 22 Pat. 220 = 10 B.R. 259 = 210 Ind. Cas. 426.

——Ss. 101 to 104—Special plea—Plea of waiver.

Where a person seeks to get rights under a policy of insurance on the ground that the insurance company has waived its right to challenge the validity of the policy by accepting premiums, strict proof of waiver is required and the burden of proof lies upon the person who alleges it. A.I.R. 1942 Cal. 412 = I.L.R. (1942) 1 Cal. 100 = 46 C.W.N. 759 = 203 Ind. Cas. 548.

——Ss. 101 to 104—Special plea.

In a suit for restitution of conjugal rights in which the defendant wife denies the marriage between them, the burden of proving that the marriage between the plaintiff and the defendant was according to Hindu rites and ceremonies is on the plaintiff. A.I.R. 1937 Rang. 308 = 172 Ind. Cas. 118.

——Ss. 101 to 104—Special plea.

The general rule is that all property is transferable and the onus of proving that a certain property is not transferable lies upon the persons pleading its non-transferability. The onus is heavier where such person has borrowed money on the strength of a mortgage-deed in which he professed to have the power of transfer. A.I.R. 1936 Oudh 121 = 1935 O.W.N. 1232 = 11 Luck. 588 = 159 Ind. Cas. 311.

——Ss. 101 to 104—Special plea.

Where a person claims to be a European British subject, and as such, not liable to be arrested according to S. 7, Extradition Act, the onus of proving the status is on him. A.I.R. 1935 Sind 244 = 29 S.L.R. 60 = 37 Cr.L.J. 312 = 160 Ind. Cas. 115.

——Ss. 101 to 104—Special plea.

An agent, who while acting as an agent, himself deals as a principal without the knowledge of the other party, is acting contrary to the spirit of Ss. 211 to 214, Contract Act. If there be a question upon whom the burden of proof must lie, that burden must be laid upon the party who has to justify an apparent deviation from the ordinary rule by which he ought to be guided. A.I.R. 1935 Sind 38 = 160 Ind. Cas. 6.

——Ss. 101 to 104—Special plea.

Where a covenant in restraint of trade is called in question, the burden of justifying it lies on the party seeking to uphold it. A.I.R. 1934 P.C. 101 = 3 A.W.R. 841 = 39 L.W. 618 = 1934 A.L.J. 457 = 66 M.L.J. 510 = 150 Ind. Cas. 232 (P.C.).

——Ss. 103 and 106—Special plea—Agreement to sell immovable property—Subsequent registered sale—Right of first vendee to specific performance—Burden of proof.

The defendant No. 1 by an agreement dated November 26, 1926, agreed to sell certain immovable property to the plaintiff. The defendant No. 1, on December 22, 1926, sold the property to the respondent, by a registered sale-deed :

Held, in a suit by plaintiff for specific performance of the agreement dated November 26, 1926, though the plaintiffs' agreement for sale did not, of itself, create any interest or change in the property under S. 54, T.P. Act, still he was entitled to enforce that agreement against the subsequent transferee of the property under S. 27 (*b*) of the Specific Relief Act.

That the burden of proof was on the latter transferee to bring himself within the exception of S. 27 (*b*), Specific Relief Act, and to prove payment of money, good faith and absence of notice to him of the original contract. A.I.R. 1934 P.C. 68 = 11 O.W.N. 330 = 39 L.W. 363 = 15 P.L.T. 67 = 1934 M.W.N. 206 = 66 M.L.J. 255 = 38 C.W.N. 393 = 1934 A.L.J. 291 = 36 Bom. L.R. 421 = 59 C.L.J. 139 = 13 Pat. 242 = 3 A.W.R. 410 = 61 I.A. 115 = 147 Ind. Cas. 1134 (P.C.).

——Ss. 101 to 104—Special plea.

According to S. 253 of the Contract Act, partnership is dissolved by the death of a partner in the absence of any contract to the contrary and the latter provision being in the nature of an exception, the burden of proof would be on those who set up such a contract. A.I.R. 1933 Lah. 618 = 144 Ind. Cas. 1.

——S. 101—Special plea.

On an application to set aside an *ex parte* decree, it is incumbent on the applicant to show that the summonses were not duly served, or that he was prevented from appearing, when the case was heard, by some sufficient cause. A.I.R. 1933 Rang. 156 = 145 Ind. Cas. 370.

——Ss. 101 to 103—Special plea—Trustees—Misfeasance—Onus.

It is for those who attack the administration of the trustees to show that there was misfeasance 123 Ind. Cas. 15 = 30 M L.W. 914 = A.I.R. 1930 Mad. 78 = 57 M.L.J. 609.

——Ss. 101 to 104—Special plea—Award attacked—Multifariousness—Applicability to arbitration proceedings—Onus to prove.

It is incumbent on the person opposing an award to establish first that the provisions of the Civil Procedure Code as to multifariousness apply to proceedings before arbitrators and secondly if they do apply that in view of those provisions the award could not be upheld. 121 Ind. Cas. 161 = 24 S.L.R. 145 = A.I.R. 1930 Sind 170.

——Ss. 101 to 104—Special plea—Breach of trust—Action by co-owner—Proof of unlawful advantage taken.

Where a co-owner of property wants to take action against other co-owner for breach of trust under S. 90, Trusts Act, it is incumbent on him to allege and prove as a fact that the other co-owner by availing himself of the position of a co-owner had gained an advantage in derogation of his rights. 118 Ind. Cas. 207 = 23 S.L.R. 461 = A.I.R. 1929 Sind 212.

——Ss. 101 to 104—Special plea—Bar of suit.

The burden of proving that a suit is barred under O. 2, R. 2, Civil P.C. is upon the defendant : 20 Cal. 716, Foll. 102 Ind. Cas. 31 = A.I.R. 1927 Lah. 840.

——**Ss. 101 to 104—Special plea—Objectors to award must prove the grounds of objection.**

Any party wishing to set aside an award on the ground that the arbitrators in arriving at an unfair award either refused to hear somebody or heard the matter without giving notice of the hearing, under takes the burden of satisfying the Court that this is what really happened. 82 Ind. Cas. 16 = 46 All. 686 = 22 A.L.J. 676 = 5 L.R.A. Civ. 465 = A.I.R. 1924 All. 788.

——**Ss. 101 to 104—Special plea—Proof that the apparent is not the real.**

Burden of proof lies upon the person who asserts that the apparent is not the real state of things. 82 Ind. Cas. 934 = 28 C.W.N. 131 = 39 C.L.J. 140 = A.I.R. 1924 Cal. 467.

——**Ss. 101 to 104—Special plea—Mortgage by executor—Onus of proving authority—Not on the mortgagee.**

Where an executor mortgaged the properties of the testator under authority given by the will

Held, that the onus of proving that the executor was acting within his powers is not on the mortgagee. 68 Ind. Cas. 856 = 45 Mad. 867 = 16 M.L.W. 670 = 1922 M.W.N 729 = 1923 M.W.N. 14 = A.I.R. 1923 Mad. 84 = 43 M.L.J. 551.

——**Ss. 101 to 104—Special plea—Immoral debt by Hindu father—Onus on the sons.**

The onus of proving illegality or immorality as affecting the debt incurred by the father is upon the sons, for after the death of their father their liability to pay the father's debt arises under the express text of the *Mitakshara*. 62 Ind. Cas. 905 = 3 P.L.T. 43 = 6 P.L.J. 451 = A.I.R. 1923 Pat. 143.

——**Ss. 101 to 104—Special plea—Trustee—Assertion of private ownership—Onus on the trustee.**

The view, that, where the discoverable origins of property show it to be trust property, the onus of establishing that it must have illegitimately come into the trustee's own right rests upon the beneficiaries, must be entirely dissented from. On the contrary the onus is, and is heavily upon the trustee to show by the clearest and most unimpeachable evidence the legitimacy of his personal acquisition. 45 Mad. 565 = 16 M.L.W. 247 = 31 M.L.T. 1 = 49 I.A. 237 = 24 Bom. L.R. 1214 = 21 A.L.J. 250 = 27 C.W.N. 317 = 36 C.L.J. 524 = 68 Ind. Cas. 1 = A.I.R. 1922 P.C. 325 = 43 M.L.J. 536 (P.C.).

——**Ss. 101 to 104—Special plea—Knowledge of transferee—Onus of proving.**

Burden of proving knowledge of the transferee lies on the person who asserts that a transaction was something different from what, on the face of it purports to be. 67 Ind. Cas. 572 = 9 O.L.J. 173 = 25 O.C. 115 = A.I.R. 1922 Oudh 7.

——**Ss. 101 to 103—Special plea—Special agreement—Redemption suit—Mortgagee setting up special covenant—Onus on him.**

Where in a redemption suit the mortgagees set up an alleged deed of further charge which contained a covenant : "There are two bonds by which the plots are mortgaged. So long as I do not redeem these two bonds then first, I will pay the money due on this bond and then I shall be allowed to redeem the fields," and there was nothing to show what were the mortgage-bonds to which it referred or that it referred to the mortgages in suit.

Held, that the mortgagees were setting up a special covenant entitling them to an additional amount and the burden of proof clearly lay on them. 65 Ind. Cas. 121 = 24 O.C. 319 = A.I.R. 1921 Oudh 257.

——**Ss. 101 to 104—Special plea—Muhammadan Law—Mother's unfitness for custody of son until 7 years—Burden of proof.**

In Mahomedan Law the custody of a boy until, at any rate, the age of seven belongs to the mother. The burden, therefore, of proving that the mother in a particular case is not entitled to be the guardian of her infant son lies heavily on any one who would assert it. 66 Ind. Cas. 888 = 15 S.L.R. 175 = A.I.R. 1921 Sind 45.

——**S. 103—Special plea—Assignment—Equities—Proof that assignment is free from existing right.**

The onus is on the assignee to prove that the assignment is free from an existing right. 18 M.L.T. 533 = (1915) M.W.N. 822 = 2 L.W. 977 = 31 Ind. Cas. 152.

——**S. 102—Special plea—Special agreement—Onus.**

A person setting up an oral agreement admissible under Evidence Act, S. 92, proviso 2, is bound to prove it strictly. 39 Bom. 399 = 17 M.L.T. 402 = 28 M.L.J. 589 = 13 A.L.J. 529 = 19 C.W.N. 713 = 21 C.L.J. 507 = 17 Bom. L.R. 460 = 2 L.W. 524 = (1915) M.W.N. 522 = 42 I.A. 103 = 29 Ind. Cas. 223 (P.C.).

——**Ss. 102 and 103—Special plea—Burden of proof.**

One of two joint executants of a promissory note desiring to escape liability on the ground of his being only a surety must prove that the payee had knowledge of that fact. 8 L.B.R. 168 = 8 Bur. L.T. 1 = 26 Ind. Cas. 253.

——**S. 102—Special plea—Burden of proof.**

If the executant of a document sets up any specific plea to avoid or minimise the effect of a document he must prove it. 13 C.W.N. 181 = 11 Cr.L.J. 11 = 4 Ind. Cas. 577.

——**S. 103—Special plea—Statutory formalities—Compliance with—Expropriating statute.**

The onus of proof of strict compliance with an expropriating statute is on the Government. 36 Cal. 1 = 35 I.A. 195 = 8 C.L.J. 436 = 12 C.W.N. 1095 = 1 Ind. Cas. 182 (P.C.).

——**Ss. 101 to 104—Special plea—Disqualification from inheritance.**

The presumption of Hindu Law is against disqualification and the onus is upon him who seeks to exclude. (1906) 4 C.L.J. 323.

——**Ss. 101 to 104—Special plea—Disqualification from inheritance—Cause of.**

Where it is contended that a person is excluded from inheritance by reason of an incurable disease, the strictest proof of the disease will be required. (1906) 4 C.L.J. 323.

——**Ss. 101 to 104—Special plea—Extension to Burma of T.P. Act—Unregistered sale-deed.**

Where vendee is in possession as owner, the burden of proving that the sale took place after the extension of the Act and that it was invalid for want of registration lies on the person disputing the right. 7 Bur. L.T. 86 = 7 L.B.R. 262 = 24 Ind. Cas. 57.

——**Ss. 101 to 103—Special plea—Suit to set aside deed.**

In a suit to set aside a deed to which the plaintiff has been a party, the onus lies on him to make out a case for setting aside on equitable grounds a deed duly executed for valuable consideration. L.R. 7 A.C. 311, foll. (1906) 8 Bom. L.R. 652 = 31 B. 271.

——**Ss. 101 to 104—Special plea—Onus of proof on him who alleges that it is different—Presumption.**

It is on him who asserts it to prove that the law of the foreign state differs from ours, and in the absence of such proof it must be held that no difference exists possibly so far as the law here rests on the specific Acts of the Legislature. (1906) 8 Bom. L.R. 525 = 30 Bom. 578.

——**Ss. 101 to 104—Special plea—Trust estate—Expenditure—Litigation, civil and criminal—Propriety.**

The onus is on the person who wishes to charge the trust estate to show that the expenditure was proper. (1905) 9 C.W.N. 421 = 32 C. 582.

——**Ss. 101 to 103—Special plea—Suit for accounts—Principal and Agent—C.P. Code, S. 215-A.**

In a suit for accounts once the plaintiff establishes defendant's liability to account, he is entitled to an order under S. 215-A of the Code. The onus does not lie upon him to prove some surplus in the hands of the defendant. The defendant should be ordered to produce his accounts. 1905 A.W.N. 1 = 1 A.L.J. 347. *See also* 1905 A.W.N. 3 = 1 A.L.J. 722 = 27 A. 374.

——**Ss. 101 to 104—Special plea—Husband and wife—Validity of arrangement for future separation—Public policy—Onus of proving that Mahomedan Law is different from English Law.**

The onus of proving that the Mahomedan Law is different from the English Law on the application of any principle of public policy (as in his case that an agreement for future separation between husband and wife is void) is on the party who avers it. (1905) 7 Bom. L.R. 602.

——**Ss. 101 to 104—Special plea—Construction of statutes of taxation.**

The onus is on those who seek to put the most onerous meaning on words used in taxing statutes, to show clearly what meaning was intended. (1903) 27 M. 547 = 14 M.L.J. 410.

50. Title.

——**S. 102—Title.**

In a suit by the Government claiming property by escheat the fact that no relations of the last owner had come forward to claim his estate for six years after his death and the fact that no one had put forward any claim in response to a notice of escheat published in a local *Gazette* at a place to which the last owner did not originally belong are not enough to discharge the *onus probandi* which lies on the Government to prove that the last owner died without heirs. A.I.R. 1943 Mad. 15 = 55 L.W. 578 = (1942) 2 M.L.J. 431 = 208 Ind. Cas. 38.

——**Ss. 101 to 104—Title.**

In a suit for the return of the goods against the purchaser from the finder of the goods, it is for the plaintiff to prove that the goods are his and not for the defendant to show that they were his. A.I.R. 1941 Rang. 166 = 1941 Rang. L.R. 153 = 194 Ind. Cas. 887.

——**Ss. 101 to 104—Title.**

When it is alleged that circumstances exist whereby a transferee has obtained a better title to goods or documents than the transferor possessed, the person or persons relying on such transfer should be in a position to prove the circumstances which validate the transfer. (1938) 67 C.L.J. 276 (F.B.).

——**Ss. 101 to 104—Title.**

When the facts are all set out, it is the duty of the purchaser to assume the burden of finding out from those facts whether or not he could obtain a good title. A.I.R. 1936 Cal. 703 = 168 Ind. Cas. 244.

——**Ss. 101, 106, 114—Title—Suit under S. 53 (2), Patents and Designs Act, for damages and injunction—Onus of proving knowledge of plaintiff's right—S. 106, if applies—Presumption under S. 114.**

In a suit under S. 53 (2), Patents and Designs Act, for damages and for injunction restraining the defendant from infringing the plaintiff's copyright in respect of certain designs, the burden of establishing that the defendant had knowledge of the plaintiff's rights in these registered designs, or that he had applied or caused to be applied such designs to the articles which he had sold is on the plaintiff and S. 106, Evidence Act, has no application ; nor does the presumption under S. 114, Evidence Act, arise in such a case. A.I.R. 1936 Cal. 493 = 40 C.W.N. 938 = 63 Cal. 1146 = 166 Ind. Cas. 535 (2).

——**Ss. 101 to 104—Title.**

In an action for ejectment, the plaintiff must succeed on the strength of his own title and not on the absence of any title in the defendants. A.I.R. 1935 Cal. 646 = 40 C.W.N. 81 = 158 Ind. Cas. 445.

——**S. 101—Title—Person asserting in the negative—Onus of proof.**

The general rule of evidence is that, if, in order to make out a title, it is necessary to prove negative, the party who avers it must prove the title. In some cases, this allegation, negative in form, is made by the plaintiff, in others, by way of defence ; the rule applicable to all such cases is that, where a claim or defence rests upon a negative allegation, the one asserting such claim or defence is not relieved of the *onus probandi* by reason of the form of the allegation or the inconvenience of proving a negative. A.I.R. 1934 Cal. 68 = 37 C.W.N. 1174 = 58 C.L.J. 85 = 60 Cal. 1253 = 149 Ind. Cas. 177.

——**Ss. 102, 114—Title—Defendant setting up a title to a tenancy right.**

Where a defendant, who is in possession, is setting up a title to a tenancy right, he must either show it by contract or by the fact that he has been in possession for the necessary period and the onus is equally upon him to show the date upon which he came into possession and his title began. No presumption against the plaintiff can arise by reason of the non-production of books unless the defendants, who relied upon that presumption, called for them. A.I.R. 1934 Pat. 339 = 149 Ind. Cas. 453 (2).

——**Ss. 101 to 104—Title—Proof of plaintiff's title—Presumption from such proof—Value of.**

In a suit for ejectment, the plaintiff must not only prove his title but also that he has been in possession within twelve years from the date of the institution of the suit ; and if it is found that the evidence produced by both the plaintiff and the defendants as to possession is unworthy of credit, the plaintiff's suit must fail in as much as the presumption which arises upon proof of title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. (1933) 146 Ind. Cas. 448.

——**Ss. 101 to 103—Title—Negative necessary for proving title—Claimant must prove.**

The general rule of evidence is that if in order to make out a title, it is necessary to prove a negative, the party who avers a title cannot be absolved from proving it : 9 W.R. 190 (F.B.), *Foll.* 114 Ind. Cas. 113 = A.I.R. 1929 Oudh 204.

——**S. 103—Title—Goods—Detention without consideration—Unstamped agreement of sale.**

Where a person has delivered goods (in pursuance of an unstamped agreement) and has got nothing in return for it, though he cannot be allowed to prove his unstamped agreement of sale, yet the onus is on the other party to show that he has the right to detain the goods. 33 Ind. Cas. 661 (Mad.).

——**Ss. 101 to 103—Title—Property of deceased person.**

Where the title of a deceased person to certain properties is disputed and it is shown that those properties belonged to the partnership firm, the onus lies on persons claiming through the deceased person to prove that those properties belonged to him at the time of his death. A.I.R. 1929 Sind 182.

——**Ss. 101 to 104—Title—Ejectment suit—Plaintiff's title must be proved.**

In a suit for ejectment even though the defendant has no title, he can still put the plaintiff to the proof of his title and the plaintiff has still to show that the title-deed on which he relies as having given him a title superior to that of the defendant is a valid one. 110 Ind. Cas. 554 = 1928 M.W.N. 336 = 28 M.L.W. 82 = A.I.R. 1928 Mad. 840 = 56 M.L.J. 52.

——**Ss. 101 to 103—Title—Suit for declaration—Defendant's want of title—Not sufficient.**

In a suit for a declaration of title and for possession the plaintiff must prove his title. It is not sufficient for him to say that the defendant has no title. 90 Ind. Cas. 480 = A.I.R. 1926 Cal. 179.

——Ss. 101 to 103—Title—Shamilat land—Sale of proprietary land—Onus lies on purchaser to show that shamilat was included.

The rights of proprietors in the *shamilat* of the village are not a mere accessory to the land separately held by them and the onus lies on the purchaser of the proprietary land to show that the sale to him included also a share of the *shamilat*. 79 Ind. Cas. 84 = A.I.R. 1925 Lah. 99.

——Ss. 101 to 103—Title—Party out of possession—Must prove subsisting title.

The burden of proving a subsisting title to a land lies on the party out of possession and the fact that the party in possession forced to institute a suit under O. 21, R. 103, C.P.Code does not shift the burden of proof on to him. 82 Ind. Cas. 861 = A.I.R. 1925 Sind 201.

——Ss. 101 to 103—Title—Suit by zamindars to eject defendants as trespassers—Burden of proof—Right of zamindars in respect of uncultivated land.

The zamindars of a village sued to recover possession of a certain plot of land, recorded in the village administration papers as land of the zamindars which had been in fact used for many years by the Muhammadans of the village for purposes of worship. *Held*, that in view of the length of possession of the defendants (some forty or fifty years) it lay upon the zamindars to show a title to eject the defendants over and above the mere fact that they were recorded as the zamindar's whilst the defendants could not show in what manner their possession originated. 1904 A.W.N. 71.

——Ss. 101 to 104—Title—Payment of rent—Effect.

Where *A* pays rent to *B* for certain land, the onus is on *A* to prove that the rent was paid by mistake and that the land is his, even though he is a defendant in the suit. (1901) 4 Bom. L.R. 28 = 26 B. 410.

51. Undue influence.

——Ss. 101 to 104—Undue influence.

Creation of *wakf*—Evidence showing no undue influence in creation of *wakf*—Onus is on person challenging document creating *wakf* on ground of undue influence, to prove undue influence. A.I.R. 1939 P.C. 8 = 1938 O.W.N. 1216 = 1938 A.L.J. 1223 = 1938 A.W.R. 206 = 43 C.W.N. 253 = 1939 M.W.N. 15 = 41 Bom. L.R. 668 = I.L.R. (1939) Kar. (P.C.) 54 (Sup.) = 178 Ind Cas. 386 = 5 B.R. 157 (P.C.).

——Ss. 101 to 104—Undue influence.

The burden of proof lies on the party asserting undue influence. A.I.R. 1938 Nag. 391 = I.L.R. (1940) Nag. 149 = 178 Ind. Cas. 825.

——Ss. 101 to 104—Undue influence—Execution of document by illiterate Muhammadan lady—Execution admitted but knowledge of nature of contents denied—Burden of proof.

Where an illiterate Muhammadan lady who is in the habit of conducting her business personally and who is not a *pardanashin* lady, executes a receipt and the execution is admitted by her, burden is on her to prove that she was not aware of the true nature of the contents of the document or that she was misled before affixing her thumb-impression on it. A.I.R. 1938 Oudh 152 = 1938 O.W.N. 531 = 174. Ind. Cas. 843.

——Ss. 101 to 104—Undue influence—Bond by father—Suit against son—Son denying that there was necessity.

Held, in order to put the burden on the creditor to establish that the debt was not borrowed under undue influence, it was essential to show that the lender was in a position to dominate the will of the borrower. A.I.R. 1936 Pat. 78 = 160 Ind. Cas. 1073 = 2 B.R. 278.

——Ss. 101 to 104—Undue influence—Inequality in partition between adult and minor co-owner—Onus is on adult co-owner to show that transaction is not unconscionable.

Where a partition between a minor and an adult co-owner is attacked by the minor as not binding on him and when it is found that at the time of the partition the minor's mother was a young widow, with no near male relations who could give independent advice to her, and when the defendant knows all about the property from the very beginning and a great disparity in extent of the two lands exists and when there is no ostensible reason for the partition except the wish of the defendant, the onus shifts and it is for the defendant to make out that the transaction was a fair one. 73 Ind. Cas. 863 = 1922 M.W.N. 732 = 16 M.L.W. 721 = A.I.R. 1923 Mad. 96.

——S. 103—Undue influence—Proof of.

The onus is on the person alleging it to show that influence was unduly exercised. Mere proof of fiduciary position is not enough. 38 M.L.J. 349 = 18 A.L.J. 344 = 11 L.W. 455 = (1920) M.W.N. 317 = 2 U.P.L.R. (P.C.) 62 = 22 Bom. L.R. 588 = 55 Ind. Cas. 447 (P.C.).

——S. 103—Undue influence—Proprietor—Disqualified.

Where a disqualified proprietor whose estate is under the management of the Court of Wards executes a bond for high rate of interest, the burden of proving undue influence is not on the executant. 31 All. 386 = 6 A.L.J. 707 = 10 C.L.J. 76 = 13 C.W.N. 1069 = 11 Bom. L.R. 864 = 6 M.L.T. 71 = 19 M.L.J. 438 = 12 O.C. 300 = 36 I.A. 96 = 3 Ind. Cas. 385 (P.C.).

——S. 103—Undue influence—Onus.

Where there is nothing on the face of the pronote or on the evidence to indicate that the bargain is unconscionable or to show that the plaintiff was in a position to dominate the will of the defendant the onus lay on the defendants to prove undue influence and immorality. 17 Ind. Cas. 309 (Oudh).

——S. 103—Undue influence—Contract unconscionable—Undue influence.

When the contract is *prima facie* unconscionable it is the duty of the party seeking to enforce it to prove that the contract was not induced by undue influence. 2 Pat. L.J. 663 = (1917) P.H.C.C. 342 = 2 Pat. L.W. 71 = 41 Ind. Cas. 337.

——Ss. 101 to 104—Undue influence—On the party alleging it.

The onus of proving that a Kabuliyat was unfairly obtained lies on the person who alleges it. 8 C.L.J. 135 = 13 C.W.N. 167 = 4 Ind. Cas. 495.

52. Vendor and Purchaser.

——Ss. 101 to 104—Vendor and purchaser—Vendor should disprove shortage—Buyer accepting subject to proper quality—Burden as to shortage not on the vendor.

Where there is no conduct on the part of the buyer amounting to accepting the goods without any question as to the measurement, the burden is on the seller to show that he sent the goods of the proper measurement and there was no shortage.

But where the buyer said " we shall check the invoice and intimate to you ; we shall also send money " and never afterwards even suggested that there was shortage in the goods sent and on the other hand accepted the goods subject to the only condition that they should be of the proper quality,

Held, to throw the burden on the seller, of showing that there was not shortage at the time of despatch, would be improper. 105 Ind. Cas. 613 = 1927 M.W.N. 549 = A.I.R. 1927 Mad. 880.

——Ss. 101 to 104—Vendor and purchaser.

The burden lies heavily on the person alleging it to prove that the vendee of immovable property agreed

to take the property with a defective title. 97 Ind.Cas. 269 = 19 S.L.R. 41 = A.I.R. 1927 Sind 49.

——**Ss. 101 to 104—Vendor and purchaser.**

Where a person enters into an agreement to sell his property to one person but subsequently sells it to another person, it is for the vendee to prove that he is a transferee in good faith and without notice of the original contract. 96 Ind. Cas. 175 = A.I.R. 1926 Lah. 580.

——**Ss. 101 to 104—Vendor and purchaser—Sale on credit—Plea of purchase for cash—Onus on defendant.**

Plaintiff pleaded that he had sold certain cattle on credit. The defendant replied that he had bought them for cash.

Held, that S. 103 is the more specific section more particularly applicable and that the onus was on defendant to prove payment. 82 Ind. Cas. 658 = 2 Rang. 202 = A.I.R. 1924 Rang. 349.

——**S. 103—Vendor and purchaser—Title of vendor—Proof of.**

A person who derives his title through a purchase must prove that his vendor had a title in the property sold. 28 All. 479, *Foll.* 38 P.L.R. 1919 = 51 Ind. Cas. 575.

——**S. 102—Vendor and purchaser—Inclusion of land—Onus.**

Where a land is not specially mentioned in a sale-deed and cannot even be said to be mentioned by implication, the burden of proving that that land was sold to a party lies on that party. 75 P.L.R. 1915 = 250 P.W.R. 1915 = 29 Ind. Cas. 167.

——**Ss. 102 and 103—Vendor and purchaser—Title—Burden of proof—Possession.**

Where a sale-deed has been duly executed by one party to another and duly registered the onus of proving that possession was not given to the vendee in accordance with the sale-deed and that the vendor had acquired a title by prescription lies on the party asserting it. 15 Ind. Cas. 282 (Mad.).

——**S. 102—Vendor and purchaser—Raiyati—Transferability of holding—Doctrine of *caveat emptor*.**

The person alleging transferability of raiyati-holding must show that the custom of transferability exists. The doctrine of *caveat emptor* applies with the greatest force to persons who purchase Raiyati-holding from tenants. 6 Ind. Cas. 761 (Cal.).

53. Will.

——**Ss. 101 to 104—Will.**

The presumption about the execution of a will does not cover the question of disposing mind, the onus of which lies on the persons propounding the will. A.I.R. 1933 Lah. 53 = 145 Ind. Cas. 241.

——**Ss. 101 to 104—Will.**

A party relying on an oral will has to establish it in the same way as if he is propounding it for probate. A.I.R. 1932 Bom. 410 = 34 Bom. L.R. 539 = 142 Ind. Cas. 164 = 57 Bom. 1.

——**S. 102—Will—Probate of will.**

Burden of proof as to the testamentary capacity of testator lies on the propounder. A.I.R. 1932 Cal. 574 = 55 C.L.J. 189 = 139 Ind. Cas. 237.

——**Ss. 101 to 103—Will—Onus on those who attack the will.**

The onus of proving that the will is invalid as the testator was of unsound mind lies upon the persons attacking that document. 109 Ind. Cas. 640 = 29 P.L.R. 217.

——**Ss. 101 to 104—Will—Proof of will—Onus on the propounder how discharged.**

It is not open to doubt that the *onus probandi* lies in every case upon the party propounding the will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. But the onus is in general discharged by the proof of capacity and the fact of execution from which the knowledge of and assent to its contents by the testator will be assumed. 95 Ind. Cas. 1036=7 P.L.T. 203 = A.I.R. 1926 Pat. 269.

——**Ss. 101 to 104—Will—Qualificd admission as to signature—Burden not shifted.**

The qualified admission of a party regarding the signature of a testator does not shift the burden of proving the non-execution of the will to him: 89 Ind. Cas. 468 = 8 N.L.J. 123 = A.I.R. 1925 Nag. 427.

——**Ss. 101 to 104—Will—Soundness of mind and majority—Propounder to prove.**

The onus of proving not only the soundness of the testator's mind but also the fact that the testator was not a minor at the time of the execution of the will rests upon the person who propounds the will. 83 Ind. Cas. 1017 = 5 Lah. 263 = A.I.R. 1924 Lah. 541.

——**S. 101—Will—Burden of proving disposing mind.**

Burden of proving that testator was of a disposing mind is on propounder of a will where testator excluded an heir by a will executed on his death bed. 141 P.L.R. 1911 = 20 P.R. 1912 = 233 P.W.R. 1911 = 10 Ind Cas. 130.

——**Ss. 102 and 103—Will—Revocation—Burden of proof—Document revoking a will.**

The burden lies heavily upon persons, setting up a document as having the effect of revoking a previous will, of proving the fact of its execution and of proving that the executant understood the terms and nature of the deed, especially where there are circumstances exciting suspicion in the mind of the Court. 1 O.L.J. 591 = 26 Ind. Cas. 547.

——**Ss. 102 and 103—Will—Testamentary capacity.**

The burden of proving the testamentary capacity of a testator is on those propounding the will. 38 Cal. 355 = 38 I.A. 13 = 1 P.W.R. 1911 = 15 C.W.N. 177 = 13 C.L.J. 72 = 21 P.L.R. 1911 = 13 Bom. L.R. 59 = 9 M.L.T. 115 = (1911) 1 M.W.N. 86 = 8 A.L.J. 123 = 4 Bur. L.T. 35 = 21 M.L.J. 100 = 21 P.R. 1911 = 9 Ind. Cas. 33 (P.C.).

——**S. 102—Will—Sound disposing mind.**

The burden of proving a sound disposing state of mind on the part of the testator is on the person propounding the will. 32 Mad. 400 = 10 C.L.J. 276 = 11 Bom. L.R. 1206 = 6 M.L.T. 304 = 19 M.L.J. 640 = 36 I.A. 185 = 3 Ind. Cas. 799 (P.C.).

——**S. 102—Will—Onus on propounder.**

The propounder of a will must prove that the testator knew and approved of the contents of the alleged will. Where the executors fail to prove testator's instructions about a particular clause in the will, the will may still be admitted to probate omitting the said clause. 12 Bom. L.R. 569 = 7 Ind. Cas. 657.

——**S. 102—Will—Proof of—Onus.**

In a suit to declare a will as forged, the burden of proof as to forgery lies on the plaintiff. If no evidence be produced the suit must fail. 82 P.L.R. 1909 = 88 P.W.R 1909 = 4 Ind. Cas. 923.

——**S. 102—Will—Proof of—Onus on propounder.**

Whoever puts forward a will as genuine must prove it and cannot throw on the opposite party the burden of proving the negative. 38 M. 166, *foll.* 40 Mad. 672 = 30 M.L.J. 504 = 34 Ind. Cas. 766.

——**Ss. 101 to 104—Will—Application for probate—Plea of unsoundness of mind on the part of the testator.**

Where probate of a will is applied for the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so prounded is the last will of a free and capable testator. If a party writes or prepares

a will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the court, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved the contents of the will ; and it is only where this is done that the onus is thrown upon those who oppose the will to prove the fraud or undue influence or whatever they rely on to displace the case for proving the will. 1901 A.W.N. 145 = 23 A. 472.

——Ss. 101 to 104—Will—Genuineness of.

The burden of proof lies upon the person who sets up a will and not on the person who is prepared to impeach it. (1901) 5 C.W.N. 895 = 3 Bom. L.R. 704 = 23 A. 405 = 28 I.A. 186 (P.C.).

——Ss. 101 to 104—Will—Onus on writer who takes benefit. 10 C.L.J. 276 = 11 Bom. L.R. 1206 = 3 Ind. Cas. 799 = 6 M.L.T. 304 = 32 M. 400 = 19 M.L.J. 640 = 36 I.A. 185 (P.C.).

——Ss. 101 to 104—Will—Suit to declare it a forgery.

In a suit to declare a will as forged the burden of proof in the first instance lies on the plaintiff. If no evidence be produced, the suit must fail. 82 P.L.R. 1909 = 88 P.W.R. 1909 = 4 Ind. Cas. 923.

54. Miscellaneous.

——Ss. 101 to 104—Compromise—Compromise of suit—Conclusive on parties and their descendants.

Where in a partition suit the defendant pleads that plaintiff is not entitled to any share as he is congenitally blind, but the defendant does not proceed with the trial of the issue and enters into an agreement with the plaintiff by which the dispute is settled and one of the conditions of which is the recognition of the plaintiff's title by the defendant, the agreement is binding on the defendant and his descendants and is conclusive of the plaintiff's right to share in the joint property. 86 Ind. Cas. 554 = 23 A.L.J. 141 = 47 All. 327 = A.I.R. 1925 All. 366.

——Ss. 101 to 104—Miscellaneous—*Prima facie* case of damage proved—Not bound to prove how damaged.

Where plaintiff's case was that the article given by him to the defendant for cleaning was damaged by chemicals in the process of cleaning and where he made a *prima facie* case that the article was in good condition at the time it was given to the defendant but was torn at the time it was got back from the defendant.

Held, that he was not bound to prove that the article had been damaged by chemicals in the process of cleaning. 84 Ind. Cas. 274 = 3 Bur. L.J. 203 = A.I.R. 1924 Rang. 356.

——S. 105.

See also (1) EVIDENCE ACT, (i) Ss. 101 to 104—CRIMINAL TRIAL; (ii) S. 114—CRIMINAL TRIAL.
(2) PENAL CODE, Ss. 96-106, 299-300.

——S. 105.

Synopsis.

1. **Applicability.**
2. **Burden of proof.**
3. **Defamation.**
4. **Duty of Court.**
5. **Insanity.**
6. **No plea of exception.**
7. **Private defence.**
8. **Self defence.**
9. **Scope.**
10. **Scope and effect.**
11. **Miscellaneous.**

1. Applicability.

——S. 105—Applicability—Fight between parties—Which party to be blamed and which blameless, doubtful.

Where, in a fight between two parties, it cannot be said which party was to blame, and which party was blameless, it is not possible consistently with justice to convict the members of either party by relying on the provisions of S. 105, Evidence Act. A.I.R. 1943 Oudh 272 = 1943 A.W.R. 36 = 44 Cr.L.J. 625 = 19 Luck. 25 = 207 Ind. Cas. 256.

2. Burden of proof.

(a) Application.
(b) Discharge.
(c) Meaning.

(2-a) Application.

——S. 105—Burden of proof under—Application of the presumption.

Obiter—Per *Dunkley, J.*—When the accused denies *in toto* the act or acts alleged, and it appears from the evidence for the prosecution that there are reasonable grounds for holding that the case falls within an exception, the presumption enacted in the last line of S.105, does not arise at all. The burden is on the prosecution to establish the guilt of the accused beyond reasonable doubt, and if upon a review of all the materials on the record, there appears a reasonable doubt as to whether the case falls, within any exception, the prosecution has failed to discharge that burden, and the accused must be acquitted or convicted only of the minor offence as the case may be. A.I.R. 1937 Rang. 83 = 14 Rang. 666 = 38 Cr.L.J. 524 = 168 Ind. Cas. 193 (F.B.).

——S. 105—Burden of proof under—Application of.

In a criminal trial, the burden of proof is always on the prosecution and it is only when a good *prima facie* case has been made out against the accused sufficient to justify his conviction of that offence, that the burden shifts upon the accused to prove that he is not guilty of any such offence.

The accused, who gave the first information report of the death of one of the dacoits in the scuffle ensuing, was committed to the Court of Session on a charge under S. 302, I.P.C. It was urged by the prosecution that as the accused admitted having attacked deceased, his act amounted to wilful murder unless he could prove the circumstances, which would go to show that it was not culpable homicide amounting to murder :

Held, that this was not the right way of looking towards the facts of the case and this amounted to misapplication of S. 105, Evidence Act.

[Accused was given the benefit of the doubt]. (1936) 165 Ind. Cas. 458 = 1936 O.W.N. 1013 = 37 Cr.L.J. 1130.

——S. 105—Burden of proof—Application of.

Prosecution must make out a case for conviction but the accused must prove that his case comes within exceptions. 105 Ind. Cas. 820 = 28 Cr.L.J. 996 = 9 A.I.Cr.R. 204 = A.I.R. 1928 Nag. 58.

——S. 105—Burden of proof—Application of.

The law requires as laid down in S. 105 that the onus of proving circumstances which give the benefit of the general exception to an accused person lies on him, and in the absence of evidence the presumption is against the accused. But this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record, that the general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception. 71 Ind. Cas. 689 = 24 Cr.L.J. 225 = 45 All. 329 = A.I.R. 1923 All. 327.

(2-b) Discharge of.

——S. 105—Burden of proof—Discharge by accused—Quantum of proof for.

The quantum of proof required under S. 105, Evidence Act, is not proof beyond reasonable doubt. The accused pleading right of private defence need merely make out a *prima facie* case in other words, it is sufficient if he satisfies the Court of the probability of what he is called upon to establish. 27 Pat. 35 = 49 Cr.L.J. 406 = A.I.R. 1948 Pat. 294.

——S. 105—Exceptions—Right of self-defence—Onus on accused—When and how discharged.

According to S. 105, Evidence Act, the burden of proving that the accused had acted in exercise of the right of self-defence, which is in the nature of an exception, is on him. It is true that this burden can be discharged otherwise than by producing defence evidence but in those cases the version of the accused must be proved to have been established or in any case *prima facie* made out either by the prosecution evidence or by circumstances proved on behalf of the prosecution or elicited by the accused in his cross-examination of the witnesses for the prosecution. The accused need not be called upon to establish right of self-defence unless the prosecution has succeeded in proving a case. But in a case where it has succeeded in making out the main facts, the prosecution cannot be thrown out merely because the prosecution evidence is to be regarded as unreliable on a few points. A.I.R. 1944 Lah. 97 = 45 P.L.R. 393 = 45 Cr.L.J. 634 = 212 Ind. Cas. 440.

——S. 105—Case for prosecution itself showing that accused's act fell under exception in Penal Code—Accused is relieved of burden of proof under.

By S. 105, Evidence Act, it is, of course, the duty of the accused to show that his offence falls within any of the exceptions in the I.P.C.; but where it appears from the prosecution evidence itself that the act falls within the exception, the accused will clearly be relieved of that burden. A.I.R. 1938 Mad. 656 = 47 M.L.W. 568 = 1938 M.W.N. 385 = 39 Cr.L.J. 993 = (1938) 1 M.L.J. 670 = I.L.R. (1938) Mad. 805 = 178 Ind. Cas. 67. *See also* I.L.R. (1936) Nag. 85 = A.I.R. 1936 Nag. 119.

——S. 105—Discharge of burden on accused.

If the Court either is satisfied from the examination of the accused and the evidence adduced by him, or from circumstances appearing from the prosecution evidence, that the existence of circumstances bringing the case within the exception or exceptions pleaded has been proved, or upon a review of all the evidence is left in reasonable doubt whether such circumstances do exist or not, the accused, in the case of a general exception, is entitled to be acquitted, or, in the case of a special exception, can be convicted only of the minor offence. A.I.R. 1937 Rang. 83 = 38 Cr.L.J. 524 = 14 Rang. 666 = 168 Ind. Cas. 193 (F.B.).

———.S. 105—Burden on accused—Circumstances in prosecution evidence entitling him to benefit of exceptions—Discharge of burden.

Where it is admitted by the accused that he caused the injuries to the deceased as a result of which he died, ordinarily, the burden of proving the circumstances which entitled him to the benefit of any of the exceptions in the Penal Code, is on him but, if he can establish that such circumstances appear from the prosecution evidence, he would be equally entitled to their benefit. A.I.R. 1933 Lah. 1055 = 35 Cr.L.J. 470 = 147 Ind. Cas. 722.

——S. 105—Burden on accused—Discharge of.

Although under the Indian Evidence Act the burden of proving an exception under the Penal Code is on the accused person, it does not follow that the circumstances together with the accused person's statement cannot be sufficient evidence to establish the exception in his favour. 98 Ind. Cas. 707 = 7 L.R.A. Cr. 187 = 27 Cr.L.J. 1395 = A.I.R. 1927 All. 119.

——S. 105—Discharge of burden.

Where prosecution itself has proved the exception, accused need not prove it. Section 105 says nothing about pleas but merely places burden of proof on the accused. 81 Ind. Cas. 901 = 25 Cr.L.J. 1077 = A.I.R. 1925 Nag. 37.

(2-c) Meaning.

——S. 105—Burden of proof—Meaning of.

Per *Collister, Allsop and Braund, JJ.*—"Burden of proof" may, in some circumstances, mean the burden of introducing or producing evidence but it cannot have this meaning in S. 105, Evidence Act.

Per *Bajpai, J.*—In criminal cases, the burden of establishing a case remains throughout the trial on the prosecution and never shifts. But the burden of proof, as a matter of introducing or adducing evidence, is unstable and may shift constantly throughout the trial according as one scale of evidence preponderates over the other, and it is in this latter sense that the expression is used in Ss. 103 and 105, Evidence Act.

Per *Allsop, J.*—The expressions "burden of proof" and "burden of proving" mean the same thing. A.I.R. 1941 All. 402 = 1941 A.L.J. 619 = 1941 A.W.R. 320 = 43 Cr.L.J. 177 = I.L.R. (1941) All. 843 = 197 Ind. Cas. 525 (F.B.).

——Ss. 105, 106—Burden of proof—Meaning of—Burden, whether shifts.

The phrase "burden of proof" means the burden of establishing a case, and the burden of introducing evidence. In a criminal trial, the burden of proving everything essential to the establishment of the charge against the accused lies upon the prosecution, and that burden never changes. But it would clearly impose an impossible task on the prosecution if the prosecution were required to anticipate every possible defence of the accused and to establish that each such defence could not be made out, and of this task, the prosecution is relieved by the provisions of S. 105, Evidence Act, and its closely allied section, S. 106. In S. 105, the phrase "burden of proof" is clearly used in its second sense, namely, the duty of introducing evidence. The major burden, that of establishing on the whole case the guilt of the accused beyond reasonable doubt, never shifts from the prosecution. The duty of the accused under S. 105 is to introduce such evidence as will displace the presumption of the absence of circumstances bringing the case within an exception, and will suffice to satisfy the Court that such circumstances may have existed. The burden of the issue as to the non-existence of such circumstances is then shifted to the prosecution, which has still to discharge the major burden of proving on the whole case the guilt of the accused beyond reasonable doubt. A.I.R. 1937 Rang. 83 = 38 Cr.L.J. 524 = 14 Rang. 666 = 168 Ind. Cas. 193 (F.B.).

——S. 105—Burden of proof—Shifting of onus to accused, when takes place—Court rejecting theory of defence—Whether proves guilt.

The burden of proof in a criminal trial remains at all times upon the prosecution, and it is only shifted upon the accused in so far as an accused person may set up the existence of circumstances bringing his case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code. The Sessions Judge is at liberty to reject the suggestion of the defence as to how the deceased was killed, but the mere fact that he rejected the theory of the defence will not prove the guilt of the accused in respect of the charges brought against them. A.I.R. 1934 Oudh 485 = 11 O.W.N. 1224 = 35 Cr.L.J. 1489 = 152 Ind. Cas. 85.

3. Defamation.

——S. 105—Defamation—Exemption—Penal Code, Ss. 499, 500—Burden of proof.

In a defamation case, the accused must prove his good faith, public good and truth and legality of his expressions. 2 U.P.L.R. (All.) 182 = 57 Ind. Cas. 84.

——S. 105—Defamation—Privileged occasion.

The onus of proving privilege in an action for libel is on the person pleading it. 39 All. 561 = 15 A.L.J. 629 = 33 M.L.J. 103 = 2 P.L.W. 125 = 21 C.W.N. 1113 = 19 Bom. L.R. 707 = 22 M.L.T. 132 = 26 C.L.J. 282 = 6 L.W. 494 = (1917) M.W.N. 817 = 44 I.A. 192 = 40 Ind. Cas. 641 (P.C.).

——S. 105—Defamation—Exemption—Onus.

The person alleging privilege or exemption to a charge of defamation must prove that he made a statement in good faith to a person who has authority over the person complained against. 17 C.L.J. 381 = 35 Ind. Cas. 813.

——S. 105—Defamation—Good faith.

S. 105 departs from the general rule that it is for the prosecution to establish the charge against the accused. Once the complainant proves that the accused made certain defamatory statements, the accused must prove that they were made in good faith for the public good. 4 P.W.R. 1910 Cr. = 11 Cr.L.J. 205 = 5 Ind. Cas. 714.

——S. 105—Onus—Privilege—Malice.

If the occasion is privileged the burden of proving actual malice is on the plaintiff. 36 Cal. 907 = 13 C.W.N. 1165 = 3 Ind. Cas. 831.

4. Duty of Court.

——S. 105—Exceptions—Onus—Duty of Court.

Section 105, Evidence Act, which lays on accused the burden of proving facts bringing his case within an exception, does not relieve a Judge, even in cases where the accused has not pleaded an exception, from pointing out to the jury such facts in evidence as might justify the jury in taking the view that the case of the accused was covered by any of the exceptions. Even if the counsel of the accused has not based arguments on an exception, still it is the Judge's duty to draw the attention of the jury to the applicability of the exception, if, in his opinion, there is anything in the evidence which might attract the application of the exception. A.I.R. 1944 Bom. 274=46 Bom. L.R. 566 = 46 Cr.L.J. 277 = I.L.R. (1945) Bom. 52 = 217 Ind. Cas. 255 (F.B.).

——S. 105—Exceptions—Burden on accused—Duty of Court.

Though as a general rule it is the duty of the accused to make out a case of self-defence, the Court has to look into the facts and circumstances of each case. A.I.R. 1933 Lah. 232 = 34 Cr.L.J. 318 = 34 P.L.R. 349 = 142 Ind. Cas. 20.

——S. 105—Private defence—No plea—Duty of court.

Though a person does not plead private defence, in a charge of murder against him, the Court must consider his right of self-defence if the evidence proves circumstances requiring him to use that right. 8 M.L.T. 462 = 12 Cr.L.J. 18 = 8 Ind. Cas. 1088.

5. Insanity.

——S. 105, Illus. (a)—Murder case—Plea of insanity by accused.

Burden in cases in which accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon plaintiff or defendant in civil proceedings. 1936 M.W.N. 1248 = 44 M.L.W. 694 (P.C.).

——S. 105—Insanity—Onus.

The burden of proving that an accused person was of unsound mind when he committed the offences, is upon the accused. A.I.R. 1935 Oudh 143 = 36 Cr.L.J. 392 (2) = 1935 O.W.N. 53 = 153 Ind. Cas. 780.

——S. 105—Insanity—Penal Code, S. 84.

Where the evidence as to the insanity of accused is conflicting, the accused should be convicted as on him lies the burden of proving insanity which in the case of conflicting evidence cannot be said to be sufficiently discharged. 77 Ind. Cas. 236 = 21 A.L.J. 776 = 4 L.R.A.Cr. 234 = 25 Cr.L.J. 348 = A.I.R. 1924 All. 186.

——S. 105—Lunacy—Exemption from criminal liability—Unsoundness of mind.

When unsoundness is pleaded as a defence to a criminal charge, the burden of proof rests on the accused. 29 C.L.J. 209 = 23 C.W.N. 621 = 20 Cr.L.J. 383 = 50 Ind. Cas. 991.

6. No plea of exception.

——S. 105—Exceptions—Accused, if can discharge burden by relying on facts brought out in case, even if not expressly relied on by him in his statement.

In a criminal case, the burden is on the accused to prove an exception but he may do so by relying on any of the facts brought out in the case, even when they do not appear in his own statement or defence evidence.

Consequently, where in a prosecution for defamation the occasion of defamatory statements is found to be a privileged one, there should be no conviction even if this exception is not expressly relied on by the accused. A.I.R. 1936 Nag. 119 = 37 Cr.L.J. 1035 = I.L.R. (1936) Nag. 85 = 164 Ind. Cas. 928. *See also* A.I.R. 1944 Bom. 274 = I.L.R. (1945) Bom. 52.

——S. 105—Circumstances showing that right of private defence was legitimately exercised—No specific plea—Consideration.

If the circumstances show that the right of private defence was legitimately exercised, the Court is bound to take it into consideration even though self-defence was not specifically pleaded. A.I.R. 1936 Rang. 1 = 37 Cr.L.J. 293 = 160 Ind. Cas. 463. *See also* 8 Ind. Cas. 1088.

——S. 105—No plea of right of private defence of property.

The court ought not to set up on behalf of persons accused before it a defence that they were acting in the exercise of the right of private defence of property, which defence the accused themselves did not set up. (1904) A.W.N. 113.

7. Private defence.

——S. 105—Private defence—Exception—Onus.

When a right of private defence is set up, the onus is on the party setting up that defence to prove it. A.I.R. 1942 Cal. 435 = 43 Cr.L.J. 412 = 198 Ind. Cas. 629.

——S. 105—Person relying on the plea of private defence must prove that he acted in the exercise of that right. A.I.R. 1941 All. 309 = 42 Cr.L.J. 779 = 1941 A.W.R. 215 = I.L.R. (1941) All. 465 = 1941 A.L.J. 342 = 1941 O.W.N. 839 = 195 Ind. Cas. 720.

——S. 105—Plea of private defence—Burden of proof is on accused. 8 C.W.N. 714.

8. Self-defence.

——S. 105—Self-defence—Plea of accused in murder case.

Where, in a murder case, the accused sets up the plea of self-defence, the burden lies on him under S. 105, Evidence Act to prove it and in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. A.I.R. 1941 Mad. 280 = 42 Cr.L.J. 305 = 1940 M.W.N. 1236 = 52 M.L.W. 884 = (1940) 2 M.L.J. 1018 = 1921 Ind. Cas. 525.

——S. 105—Self-defence.

It lies upon the person bringing the plea of self-defence to establish the circumstances under which each blow that causes an injury to a member of the opposite party is inflicted. 104 Ind. Cas. 454 = 28 Cr.L.J. 838 = A.I.R. 1927 Lah. 786.

9. Scope.

——S. 105—Scope—Burden of proof in criminal cases—Rules—Exception—Duty of accused—Extent of onus.

The general rule in criminal cases, is that the accused must always be presumed to be innocent and that the onus of proving the accused guilty of the charge against him is on the prosecution. S. 105 of the Evidence Act is an important qualification of this rule, and in view of that section the prosecution is not obliged to prove absence of facts which might bring the case of the accused within a special exception which the accused might plead in defence. It is for the accused to offer some explanation of the prosecution evidence, and if this appears to the Court reasonable, even though not beyond doubt, and to be consistent with the innocence of the accused, he should be given the benefit of that doubt. I.L.R. (1948) Nag. 903 = 50 Cr.L.J. 465 = A.I.R. 1949 Nag. 163 = 1948 N.L.J. 565.

——S. 105—Scope—Burden of proof in criminal case—Exception—Extent of onus on accused.

The onus does lie on the prosecution to prove the guilt of an accused person in all circumstances and it is shifted on to him under S. 105, Evidence Act, to prove the circumstances under which he claims the benefit of the exceptions. But even if he fails to prove definitely the existence of those circumstances, he can still claim to be governed by the general principles of the criminal law that an accused is presumed to be innocent unless proved to be guilty, and the benefit of any doubt that exists in the mind of the court must be given to him. The Court, therefore, is at perfect liberty to scrutinize the case for the prosecution in spite of the failure of the accused to prove his own defence. (1946) 48 P.L.R. 342 = 48 Cr.L.J. 126 = A.I.R. 1947 Lah. 244.

——S. 105—Scope—Exceptions—Onus—Presumption under.

The burden of proving the existence of circumstances bringing the case within any of the general exceptions in the I.P.C., such as, right of private defence, is upon the accused person and the Court shall presume absence of such circumstances. A.I.R. 1946 Pat. 84 = 48 Cr.L.J. 63 = 24 Pat. 578.

——S. 105—Scope—If overridden by S. 6, Penal Code and S. 221 (5), Criminal Procedure Code.

Neither S. 6, I.P.C., nor S. 221 (5), Criminal P.C., overrides S. 105, Evidence Act, which deals with the question of burden of proof. A.I.R. 1941 All. 402 = 1941 A.L.J. 619 = 43 Cr.L.J. 177 = 1941 A.W.R. 320 = I.L.R. (1941) All. 843 = 197 Ind. Cas. 525 (F.B.).

——S. 105—Scope—Onus to prove guilt.

'General rule that it always lies on prosecution is subject to exception in S. 105. A.I.R. 1940 Lah. 54 1 Cr.L.J. 447 = 187 Ind. Cas. 15.

——S. 105—Scope—Onus to prove exception—When arises.

Prosecution should first make out the case before accused is called upon to answer :

Held, on evidence, that the prosecution case was unsatisfactory and that there was no necessity for the accused to establish their plea of self-defence. (1937) 171 Ind. Cas. 906 = 39 Cr.L.J. 7 = 40 P.L.R. 17.

——S. 105—Scope of—Burden to prove innocence, if lies on accused.

The decision in *Woolmington* v. *Director of Public Prosecutions*, A.I.R. 1931 Mad. 822, that whilst the prosecution must prove the guilt, there is no such burden laid on the accused to prove his innocence and it is sufficient for him to raise a doubt as regards his guilt, is in no way inconsistent with the law in British India. Indeed the principles there laid down form a valuable guide to the correct interpretation of S. 105, Evidence Act. A.I.R. 1937 Rang. 83 = 14 Rang. 666 = 38 Cr.L.J. 524 = 168 Ind. Cas. 193 (F.B.).

——Ss. 105 and 106—Scope—Burden of proof—Firearm fired while officer is attempting to arrest—Defence of mere intention to frighten Police—Onus.

Under S. 105 the burden of proving the existence of circumstances bringing the case within any of the general exceptions is on the accused, and the Court shall presume the absence of such circumstances. If a man fires off a firearm while an officer is attempting to arrest him, the natural conclusion is that he is attempting to shoot the Police Officer and is guilty under S. 307 of the I.P.C., and if the defence is that he had merely the intention of frightening the Police Officer by firing in the air, then the burden of proving that fact is upon the defence. A.I.R. 1936 Oudh 294 = 37 Cr.L.J. 787 = 1936 OW.N. 553 = 162 Ind. Cas. 844.

——S. 105—Scope—Exceptions pleaded in defence of murder.

The burden of proving the existence of circumstances bringing their case within one of the several exceptions in the I.P.C., or within any special exception of that Code lies upon them and under S. 105, Evidence Act, the Court is bound to presume the absence of such circumstances. (1935) 154 Ind. Cas. 697 = 1935 O.W.N. 311 = 36 Cr.L.J. 534 = 10 Luck. 718.

——S. 105—Scope of—Plea of justifiable homicide—Causing death of burglar—Onus.

Where it appeared that a thief was killed with lathi blows by the inmates of the house when the thief was trying to escape through a hole,

Held, that the burden of proving that the death was justifiable homicide lay upon the persons who were proved to have dealt the blows. 7 O.W.N. 797 = 1930 Cr.C. 948 = A.I.R. 1930 Oudh 408.

——S. 105—Scope of—Exception pleaded in defence—Onus.

Accused must prove that his case came within the Exception 1 to S. 300 of the Penal Code and the Court is bound to presume the absence of any such case. 81 Ind. Cas. 717 = 25 Cr.L.J. 1005 = 6 L.L.J. 575 = A.I.R. 1924 Lah. 733.

——S. 105—Scope—Exception, plea in defence—Onus.

The burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code rests upon the accused, and S. 105 says the Court shall presume the absence of such circumstances. 68 Ind. Cas. 113 = 3 Lah. 144 = 4 L.L.J. 91 = 9 P.W.R. 1922 Cr. = 23 Cr.L.J. 513 = A.I.R. 1922 Lah. 1.

——S. 105—Offence of gambling—Plea, a game of skill—Onus.

The onus of showing that any offence falls within a general exception to Gambling Act, *i.e.*, that it was game of mere skill is on the accused. 15 Cr.L.J. 276 = 23 Ind. Cas. 484 (Cal.).

——S. 105—Scope—Exceptions in Penal Code—Onus.

Burden of proving the existence of circumstances bringing a case within any special exception or proviso contained in the Penal Code is upon the person accused ; the Court shall presume the absence of such circumstances. 11 Cr.L.J. 612 = 8 Ind. Cas. 259 (All.).

10. Scope and effect.

——S. 105—

Scope and effect of Criminal trial—Failure to make out exception. If absolves prosecution from burden as to the proceeding as a whole. *See* CRIMINAL TRIAL—BURDEN OF PROOF. I.L.R. (1947) Kar. 1 = A.I.R. 1948 Sind 40 = 49 Cr.L.J. 72.

——S. 105—Scope and effect—Accused pleading general exception—Proof not affirmative—But reasonable doubt created—Acquittal.

Per *Iqbal Ahmad, C.J., Bajpai, Mohammad Ismail and Mulla, JJ.*—In a case in which any general exception

in the I.P.C., is pleaded by an accused person and evidence is adduced to support such plea, but such evidence fails to satisfy the Court affirmatively of the existence of circumstances bringing the case within the general exception pleaded the accused is entitled to be acquitted, if a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to the benefit of the said exception.

Per *Allsop, Collister and Braund, JJ.*, (*dissenting*),—The burden of proving the facts which would justify the conviction of the accused in the absence of any other facts entitling the accused to the benefit of any exception or proviso is upon the prosecution and the burden of proving the existence of any facts or circumstances which would entitle the accused to claim the benefit of any such exception or proviso is upon the accused, and the non-production of evidence or production of insufficient evidence by him would lead the Court to decide the issue of fact against him. A.I.R. 1941 All. 402 = 1941 A.L.J. 619 = 43 Cr.L.J. 177 = 1941 A.W.R. 320 = I.L.R. (1941) All. 843 = 197 Ind. Cas. 525 (F.B.).

——S. 105—Scope and effect of—Private defence—Plea of accused in a murder case—Duty of prosecution.

Defence of right of private defence raised by accused in murder charge, at the earliest possible moment—Prosecution must show, before the accused can be convicted, that there are no reasonable grounds, on which such a defence could be believed to be true. A.I.R. 1941 Rang. 175 = 42 Cr.L.J. 661 = 195 Ind. Cas. 71.

——S. 105—Scope and effect—Accused failing to prove plea of exception—Offence not proved by prosecution—Acquittal.

Even in a case to which S. 105, Evidence Act, applies, an accused may rely upon an exception in his defence and fail to prove it and yet be entitled to an acquittal, for, the prosecution may have failed to prove all the necessary elements in the offence of which the accused has been charged, or the accused may by his statement, read with the other evidence on record, have raised a reasonable doubt in the mind of the Court and so have entitled himself to an acquittal. A.I.R. 1939 Sind 209 = 41 Cr.L.J. 28 = I.L.R. (1940) Kar. 249 = 184 Ind. Cas. 474.

11. Miscellaneous.

——S. 105—In a case of prosecution under S. 4 (1), U.P. Prevention of Adulteration Act, it is for the defence to establish that the case would come under proviso (*c*) of S. 4 (1) of the Act. A.I.R. 1936 All. 86 = 37 Cr.L.J. 360 = 1936 A.L.J. 311 = 1936 A.W.R. 180 = 160 Ind. Cas. 1026.

——S. 105—The burden of proving that provocation was grave is on the accused. A.I.R. 1936 Sind 31 = 37 Cr.L.J. 483 = 161 Ind. Cas. 414.

——S. 105—Exceptions—Proof of to be strict.

In order to bring a case within the exception, strict compliance with its terms is necessary. It is one of the established canons of interpretation that exceptions are to be taken most strongly against the party for whose benefit they are introduced. 108 Ind. Cas. 189 = 10 L.L.J. 202 = 29 P.L.R. 371 = A.I.R. 1928 Lah. 162.

——S. 105—Infancy—No proof as to—Defence is not barred.

There is this difference between a child and a lunatic that the latter is not able to be tried unless he has regained sanity whereas the child may be tried while he is still a child. If a child commits an offence when he is unable to understand the nature of the offence, it can hardly be supposed that he will be able to understand that he must plead his own lack of understanding when placed upon his trial. He cannot be debarred from the defence allowed to him by S. 83 of the I.P.C., merely because of his ignorance of the Court procedure. Therefore, the question cannot be excluded from consideration by the jury notwithstanding that no proof may have been adduced on the point. 84 Ind. Cas. 454 = 26 Cr.L.J. 310 = 28 O.C. 69 = A.I.R. 1925 Oudh 311.

——S. 105—Onus—Discharge—If question of law.

The question of discharge of an onus is not a question of law and where the whole evidence is let in the question of onus is of little importance. 28 M.L.J. 92 = 26 Ind. Cas. 899.

——S. 105—Offence under—Excise Act (1896), S. 3 (1) (n).

When a person possesses certain quantity of foreign spirit or fermented liquor larger than that specified in S. 3 (1) (*n*) and pleads that he purchased it for his private use, the onus lies on him to prove that he purchased it for private use and not for sale. 5 L.B.R. 52 = 10 Cr.L.J. 80 = 2 Ind. Cas. 543.

——S. 106.

See also EVIDENCE ACT, S. 105.

Synopsis.

1. Applicability and scope.
2. Date of birth and age.
3. Divorce.
4. Facts especially in the knowledge of party.
5. Intention.
6. Landlord and tenant.
7. Maternity.
8. Mense profits, claim for.
9. Mortgage suits.
10. Negligence.
11. Offences.
12. Pedigree
13. Plea of jus tertii.
14. Setting aside sale.
15. Suits against Railways.
16. Miscellaneous.

1. Applicability and scope.

——S. 106—Scope and applicability.

S. 106 of the Evidence Act refers to such cases where the fact is within the knowledge of a person and of nobody else. It cannot be attracted where the fact in question having regard to its nature is such as to be capable of being known not only by such person but also by others if they happen to be present when it took place. 1936 A.L.J. 1124, applied. A.I.R. 1949 Cal. 235 = 3 A.I. Cr.D. 285 = 50 Cr.L.J. 456.

——S. 106—Applicability—Criminal case—Prosecution under S. 291 (2) of Calcutta Municipal Act—Burden of proof.

Although S. 106 of the Evidence Act should be applied with great care and caution in criminal cases, it cannot be said that it has no application to criminal cases. Where the accused is prosecuted for disobeying the provisions of S. 291 (2), Calcutta Municipal Act, on the allegation that he has effected alteration in the water pipe of his house by persons who are not plumbers licensed by the Municipality, it is for the accused to disclose the name of the person he employed or to give some explanation for such non-disclosure. Otherwise, it can be reasonably presumed that he employed somebody who did not possess a licence. 48 Cr.L.J. 999 = A.I.R. 1948 Cal. 58.

——S. 106—Scope and applicability—Criminal cases.

In cases under S. 5, Explosive Substances Act, and S. 19, Arms Act, the onus of proving the guilt of the accused rests on the prosecution as in all other criminal chargea. Section 106, Evidence Act, applies to cases similar to the

two cases given in the illustrations to that section and does not affect the onus of proving the guilt of an accused. Section 106, Evidence Act, cannot be used to strengthen the evidence for the prosecution. The prosecution must stand or fall on the evidence adduced by it and until a *prima facie* case is established by such evidence the onus does not shift on to the accused. A.I.R. 1944 Lah. 339 = I.L.R. (1945) Lah. 137 = 46 Cr.L.J. 1 = 225 Ind. Cas. 161 (F.B.).

——**S. 106—Applicability—Murder if committed—No burden on accused.**

Burden is on prosecution to establish that the act alleged to be constituting murder was really act of person other than the deceased. The burden is not cast on the accused person of proving that no crime has been committed though it has been established that the accused has special knowledge on the point whether a crime was committed or not. A.I.R. 1940 Mad. 1 = 1939 M.W.N. 883 = 50 M.L.W. 452 = 41 Cr.L.J. 369 = 186 Ind. Cas. 704.

——**Ss. 106, 105—Scope of S. 106—Whether intended to be used to place upon accused burden of proving his innocence.**

Section 106, Evidence Act, is not intended to be used to place upon the accused the burden of proving their innocence. Section 106, is not a proviso to the rule that the burden of proving the guilt of the accused is upon the prosecution but on the contrary, the section is subject to that rule. The burden of proving a particular fact or a particular defence is a different matter. Section 106 does not enable the Judge to say to the jury that the accused must explain this or that. A.I.R. 1939 Sind 209 = I.L.R. (1940) Kar. 249 = 41 Cr.L.J. 28 = 184 Ind. Cas. 474.

——**S. 106—Scope of—Application in criminal cases.**

Section 106 refers to cases where the defence of the accused depends on his proving a certain fact, that is, cases where his guilt is established on the evidence produced by the prosecution unless he is able to prove some other facts specially within his knowledge which would render the evidence for the prosecution nugatory. A.I.R. 1936 All. 833 = 1936 A.L.J. 1124 = 1936 A.W.R. 927 = 38 Cr.L.J. 205 = 166 Ind. Cas. 430.

——**S. 106—Scope and applicability—Facts within special knowledge of accused—Facts capable of being known to others as well—Duty of prosecution.**

Section 106, Evidence Act, contemplates facts which in their nature, are such as to be within the knowledge of the accused and of nobody else. It has no application to cases where the fact in question, having regard to its nature, is such as to be capable of being known not only by the accused but also by others if they happened to be present when it took place. The section cannot be invoked to make up for the liability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. A.I.R. 1936 All. 833 = 1936 A.L.J. 1124 = 1936 A.W.R. 927 = 38 Cr.L.J. 205 = 166 Ind. Cas. 430.

——**S. 106—Suit under S. 53 (2)—Patents and Designs Act—Applicability of section 106.**

Suit under S. 53 (2), Patents and Designs Act for damages and injunction—Onus of proving that defendants had knowledge of plaintiff's rights in the designs is on the plaintiff ; S. 106, Evidence Act, has no application. A.I.R. 1936 Cal. 493 = 40 C.W.N. 938 = 63 Cal. 1146 = 166 Ind. Cas. 535 (2).

——**S. 106—Scope—Application only to parties.**

Section 106, Evidence Act, which lays down that the onus of proving a fact within the special knowledge of a person lies upon him, only applies to the parties to the suit. A.I.R. 1933 P.C. 87 = 37 M.L.W. 521 = 64 M.L.J. 413 = 1933 M.W.N. 357 = 57 C.L.J. 222 = 37 C.W.N. 657 = 35 Bom. L.R. 500 = 142 Ind. Cas. 220 (2).

——**S. 106—Prosecution for offence under S. 199—Facts sworn to, if false—Burden not on the accused.**

The burden of proof in a charge under S. 199, I.P.C., is on the prosecution to show that at the time of making the affidavit, the accused either knew or believed it to be false, or did not believe it to be true. A.I.R. 1933 Pat. 513 = 34 Cr.L.J. 912 = 14 P.L.T. 679 = 144 Ind. Cas. 857.

——**S. 106—Applicability—Association declared unlawful—Prosecution of erstwhile members.**

The burden lies on the prosecution to prove that a person who was a member of an association while it was lawful continued as a member of the same after it was declared unlawful by the Government under the Criminal Law Amendment Act of 1908. 33 Bom. L.R. 90 = 55 Bom. 484 = 32 Cr.L.J. 472 = 130 Ind. Cas. 27 = A.I.R. 1931 Bom. 129.

——**S. 106—Applicability—Presumption applies only in absence of clear or sufficient evidence.**

In a case where all the facts are proved by ample evidence and the Court is in a position exactly to say what happened, no importance need be attached to the rule as regards burden of proof. It is only in cases where evidence is meagre and the Court is not in a position definitely to know what happened that the technical rule as to burden of proof is to be observed. 30 M.L.W. 966 = 1929 M.W.N. 752 = A.I.R. 1930 Mad. 251 = 124 Ind. Cas. 277.

——**S. 106—Scope—Applicability—Representatives of parties.**

Representatives of parties to transaction cannot take advantage of the section. 30 M.L.W. 966 = 124 Ind. Cas. 277 = 1929 M.W.N. 752 = A.I.R. 1930 Mad. 251.

——**S. 106—Scope of—Shifting of burden.**

Where it is proved that thefts occurred at quite different dates the presumption is that the stolen property passed from the hands of the thief to the receiver at different dates also. The burden is then shifted from the Crown to the accused to prove that that he received it at one time only in a case where the accused is charged separately of offences of receiving stolen property. 96 Ind. Cas. 120 = 27 Cr.L.J. 872 (Sind).

——**S. 106—Scope of—Criminal trial—Defence.**

The presumption under S. 106 is very weak as compared to the presumption of innocence when the trial is one for murder. If an accused after a case has been proved against him withholds evidence in disproof, inferences unfavourable to him may be drawn. 21 C.W.N. 1152 = 19 Cr.L.J. 81 = 43 Ind. Cas. 241.

——**S. 106—Scope of—Requisites for the application of the section.**

For the application of S. 106 (as regards burden of proving matters within the special knowledge of a party) there must be something peculiar in the knowledge and the rule of burden of proof makes no distinction between individuals and corporations. 1 Pat. L.J. 168 = 37 Ind. Cas. 269.

——**S. 106—Scope of—Burden of proof.**

A party who has special means of knowledge of a fact is under the obligation of proving that fact. 38 All. 540 = 14 A.L.J. 834 = 36 Ind. Cas. 452.

2. Date of birth and age.

——**S. 106—Date of birth—Suit to set aside mortgage by mother—Age of plaintiff.**

In a suit to set aside a mortgage effected by the plaintiff's mother on his behalf during his minority the onus of proof that he was under 21 when he instituted the suit is on the plaintiff. 148 P.W.R. 1917 = 42 Ind. Cas. 76.

——**S. 106—Limitation—Exemption—Plaintiff to prove affirmatively, that his age was under 21 for purposes of limitation.**

For purposes of limitation, it is for the plaintiff to establish affirmatively and clearly that he was under 21 years when he filed the suit and proof of a possibility that he might be under that age is not enough. 167 P.L.R. 1914 = 78 P.W.R. 1914 = 23 Ind. Cas. 462.

3. Divorce.

——**S. 106—Suit by Muslim lady for dower**—Husband pleading divorce and its communication to wife—Burden to prove it is on him. A.I.R. 1943 Lah. 215 = I.L.R. (1944) Lah. 186 = 45 P.L.R. 231 = 209 Ind. Cas. 157.

4. Facts especially within the knowledge of party.

——**S. 106—Knowledge of facts—Burden of proof.**

Where it is within the knowledge of the defendant as to what proportion of the intermingled property is the property of the plaintiff and what proportion is the property of the defendant, the defendant being a wrong-doer, the burden of proving what proportion belonged to the plaintiff lies upon him and if that burden is not discharged, it must be presumed as against the defendant that the whole of the property belonged to the plaintiff and it must be taken as the measure of the plaintiff's loss. A.I.R. 1934 Pat. 492 = 15 P.L.T. 702 = 13 Pat. 762 = 151 Ind. Cas. 942.

——**S. 106—Knowledge of facts.**

Assistant Manager of a Press cannot be presumed to have knowledge of every job printing done in the press—Especially where consequences of the knowledge are grave, stricter proof than assumption is necessary. 117 Ind. Cas. 49 = 30 Cr.L.J. 707 = A.I.R. 1928 Rang. 276.

——**S. 106—Zamindar—Knowledge of facts.**

The Zamindar only appoints Karnams under S. 9 of Regulation XXIX of 1882. The Zamindar is not bound to see that the Karnam keeps a register of the service inams for their localization or to keep one himself; in the absence of which, the presumption of special knowledge within the meaning of S. 106 on the part of the Zamindar or his predecessor cannot be raised. 24 M.L.J. 530 = (1913) M.W.N. 478 = 19 Ind. Cas. 667.

——**S. 106—Date of birth—Father's knowledge—If falls under.**

Per *Chamier, J.*—Death and birth of a child is not specially within the father's knowledge. It is within any one's who was present at the occurrence. 11 Ind. Cas. 202 (All.).

5. Intention.

——**S. 106—Illus. (a)—Intention, how proved—Where it can be assumed.**

Inference from the individual facts is in no way conclusive but the intention underlying the conduct of any individual is seldom a matter which can be conclusively established; it is indeed only known to the person in whose mind the intention is conceived. But if the prosecution has established that the character and circumstances of an act suggest that it was done with a particular intention, then, under S. 106, Illus. (*a*), Evidence Act, it may be assumed that he has that intention unless he proves the contrary. A.I.R. 1943 Pat. 82 = 9 B.R. 185 = 21 Pat. 667 = 44 Cr.L.J. 337 = 205 Ind. Cas. 69.

——**S. 106—Girl of marriageable age abducted by young man.**

Natural presumption is that he has done so with intention to have sexual intercourse with her. If he has any intention other than that which is suggested by the natural circumstances of the case, the burden lies upon him under S. 106, Evidence Act to prove that intention. A.I.R. 1938 Lah. 474 = 40 P.L.R. 730 = 39 Cr.L.J. 844 = 177 Ind. Cas. 97.

——**S. 106—Intention different from natural inference of circumstances and facts—Burden of proof.**

Under S. 106, Evidence Act, when a person does an act with some intention other than which the character and circumstances of the act suggest, the burden of proving that intention is upon him. Consequently, if a person wants to plead that he fired at the Police in order that he might be able to escape arrest, then it is for him to state that in his examination either before the Committing Magistrate or in the Court of Session and to adduce evidence in support of that statement. The fact that the shots whizzed past over the heads of the Policemen and did not cause hurt to any one will not go to prove that the accused did not commit the offence under S. 307 of the I.P.C. A.I.R. 1936 Oudh 294 = 37 Cr.L.J. 787 = 1936 O.W.N. 553 = 162 Ind. Cas. 844.

——**S. 106—Intention—Burden of proof.**

Where in a charge under S. 373, I.P.C., the intention to supply as prostitute a girl when physically ready, is proved, burden lies upon accused to prove intention to wait until age of majority. 71 Ind. Cas. 232 = 35 C.L.J. 451 = 24 Cr.L.J. 104 = A.I.R. 1922 Cal. 539.

——**S. 106—House trespass by night—Intention to annoy.**

Where a person accused of lurking house trespass by night pleads in defence that he had a specific intention in entering the house, *i.e.*, to carry on a love intrigue in secret and not to intimidate, insult or annoy the onus of proof is on him. 40 All. 221 = 16 A.L.J. 153 = 20 Cr.L.J. 119 = 49 Ind. Cas. 103.

——**S. 106—Honest intention—Lurking house trespass.**

Where an accused is *prima facie* guilty of lurking house trespass the onus of proving an honest intention is on him as it is within his knowledge. 37 All. 395 = 16 Cr.L.J. 435 = 13 A.L.J. 625 = 29 Ind. Cas. 67.

——**S. 106—Bona fide purchase without notice—Onus.**

The burden of proving that the defendant is a *bona fide* purchaser without notice of a charge is on him. 42 Cal. 751 = 19 C.W.N. 48 = 20 C.L.J. 548 = 27 Ind. Cas. 271. [**Also** 36 Bom. 446 = 14 Bom. L.R. 634 = 16 Ind. Cas. 680].

6. Landlord and tenant.

——**Ss. 106, 103—Fact within the special knowledge of tenant—Onus on him.**

The onus is upon the tenants under Ss. 103 and 106, Evidence Act, to prove that they were entitled to any reduction of the *falkar* rent by reason of the fact that any of the trees on which the assessment had originally been made, had ceased to exist or that any of the trees in respect of which it was sought to recover *falkar* had been planted by the tenants themselves. A.I.R. 1937 Cal. 51 = 41 C.W.N. 88 = I.L.R. (1937) 1 Cal. 491 = 167 Ind. Cas. 461.

——**S. 106—Rent suit.**

Claim for rent based on produce—Tenant preventing landlord from estimating crops—Onus is on tenant to prove actual produce. 85 Ind. Cas. 566 = 6 P.L.T. 419 = A.I.R. 1925 Pat. 505.

——**S. 106—Landlord and tenant—Repudiation of authority of agent by landlord.**

Where a landlord repudiates the authority of a gumastha to give a receipt which recognises the sub-division of a tenure or holding, the onus of proof is on the landlord as the relations between himself and his servant are a matter primarily within his knowledge. (1918) P.H.C.C. 210 = 4 Pat. L.W. 316 = 45 Ind. Cas. 294.

——**S. 106—Landlord and tenant—Defendant (tenant) claiming land as part of his jote.**

Wherein a suit for possession by the Zamindar the defendant (tenant) admitted the plaintiff's title but claimed the land as part of the *jote*, held the onus lay on the defendant to prove it. 18 Ind. Cas. 393 (Cal.).

——S. 106—Landlord and tenant—Burden of proof of patwari's authority.

It is on the landlord first to prove what powers his patwari had as the matter is peculiarly within his knowledge. 15 C.W.N. 953 = 10 Ind. Cas. 456.

7. Maternity.

——Ss. 106, 112—Birth of child—Maternity in dispute.

In a suit by a plaintiff for possession of property by rule of survivorship, where the defendant contends he is the posthumus son of the last holder by his widow, the provisions of S. 106 of the Evidence Act require that as the facts relating to the pregnancy of the widow and of the defendant's birth are within her knowledge, the burden is on her to prove them. It is not incumbent on the plaintiff to disprove the defendant's case and his failure to support his own theory does not prove the truth of his :

Held, that the defendant failed to discharge the burden. A.I.R. 1940 P.C. 93 = 1940 A.W.R. 101 = 6 B.R. 636 = 21 P.L.T. 519 = 52 L.W. 57 = 72 C.L.J. 263 = 1940 M.W.N. 922 = I.L.R. (1940) Kar. (P.C.) 235 (Sup.)= 188 Ind. Cas. 1 (P.C.).

8. Mesne profits, claim for.

——S. 106—Suit for mesne profits—Burden of proof.

In a suit for mesne profits, the burden of proof depends on the nature of the claim made by the plaintiff. If the plaintiff limits his claim to the actual profits which the defendant is said to have received, obviously, in such a case, as the defendant is the person who had special knowledge of the actual receipt of profits received by him, the burden would lie on him to prove the actual receipts made by him by virtue of the provisions of S. 106 of the Evidence Act. If, on the other hand, the plaintiff wants to make the defendant liable for the profits which the defendant ought to have received by the use of ordinary diligence it cannot be said that that is a matter within the special knowledge of the defendant and the burden of proof would rest on the plaintiff to prove the probable receipts in respect of the disputed property. 47 M. 800, 21 P. 735 and 75 C.L.J. 479, foll. 54 C.W.N. 355 = A.I.R. 1950 Cal. 87.

——Ss. 106 and 103—Mesne profits—Burden of proof.

Although under S. 106, Evidence Act the burden of proving the amount of mesne profits actually received is on the person receiving them, yet as regards the amount of profits that might, with ordinary diligence have been received by the person in occupation the burden of proving is on the person claiming it. A.I.R. 1943 Pat. 69 = 21 Pat. 735 = 9 B.R. 220 = 205 Ind. Cas. 294.

——Ss. 106 and 103—Suit for mesne profits—Onus—Absence of evidence on both sides.

If a certain amount is claimed by the plaintiff as mesne profits on the footing that that amount the defendant could get from the property with due diligence, the onus is upon the plaintiff to prove what amount the defendant could have got from this property with due diligence, but where both the parties adduce no evidence, it is impossible for the Court to determine the amount of mesne profits and the claim for mesne profits must, therefore, fail for want of evidence. A.I.R. 1939 Cal. 387 = I.L. R. (1938) 2 Cal. 492 = 182 Ind. Cas. 852.

——S. 106—Suit for mesne profits.

Although in a suit for mesne profits the person out of possession has to prove what profits the man in possession made out of the property, yet as soon as the plaintiff gives some evidence proving *prima facie* that the profits were somewhere about the sum alleged, the burden of proving that they were less shifts to the shoulders of the defendant. 15 N.L.R. 85, foll. 75 Ind. Cas. 826 = 20 N.L.R. 52 = A.I.R. 1924 Nag. 117.

9. Mortgage suits.

——S. 106—Applicability—Mortgagor denying debt was contracted for payment of ancestral debts.

Plaintiff mortgagee alleging that debt was borrowed to pay off ancestral debt of defendants. Defendants denying but not producing account book though maintained by them, to substantiate their claim. Section 106 applies and burden is on defendant to show that debts were not contracted for paying off ancestral debts. Presumption under S. 114 can be raised against defendants from non-production of account books. A.I.R. 1942 Nag. 39 = 1942 N.L.J. 121 = I.L.R. (1942) Nag. 543 = 200 Ind. Cas. 166.

——S. 106—Acknowledgment—Proof of—Onus on mortgagee in possession of deed.

The plaintiff suing for redemption, having pleaded the mortgage was within time, it was not necessary to plead that the acknowledgments saved the operation of limitation. The mortgagees being in possession of the mortgage-deed the date of the mortgage was within their peculiar knowledge and not that of the plaintiff and in the circumstances of the case the acknowledgments must be presumed to have been made before the expiration of the sixty years from the date of the mortgage. 17 A.L.J. 330 = 51 Ind. Cas. 283.

——S. 106—Date of transaction of mortgage.

The burden of proving the exact date of a mortgage transaction entered into orally being not peculiarly within his knowledge, does not lie on the mortgagee. 115 Ind. Cas. 451 = A.I.R. 1929 All. 209.

——Ss. 106, 102—Mortgage—Consideration—Contest by stranger.

When a suit on a mortgage is contested by a stranger, who denies that the bond was executed and also asserts that the mortgage was devoid of consideration, the onus is on the plaintiff to prove his case. 6 C.L.J. 659, foll. 35 Ind. Cas. 455 (Mad.).

10. Negligence.

——Ss. 106, 103—Suit for negligence against public body—Burden of proof.

Though when dealing with cases against public bodies for negligence, the burden of proving negligence lies on the plaintiff, yet the provisions of S. 106, Evidence Act, must be borne in mind. The fact that the burden of proving negligence may be on the plaintiff does not necessarily preclude the burden of proving any particular fact being upon the defendant. A.I.R. 1940 Sind 254 = 192 Ind. Cas. 494.

——S. 106—Person hiring instrument in exclusive possession of it—Instrument damaged—Case of ordinary wear and tear.

Where an instrument hired by a person was, for all practical purposes, in his exclusive possession it is for him to explain how it came to be damaged. It is for him to show that it was a case of ordinary wear and tear and not of carelessness or negligence in any degree. A.I.R. 1939 Sind 245 = 184 Ind. Cas. 36.

——Ss. 106 and 102—Negligence—Suit against bailee for loss—Onus—Distinction between loss of goods and of animals—Maxim '*res ipsa locquitor*' applicability.

The person who alleges negligence must prove it. There is no general exception to this rule. In an action against a bailee for loss of property bailed to him, the reason why the burden is thrown on him is that the fact of the loss is itself *prima facie* evidence of negligence ; and it is incumbent on the bailee to rebut that presumption of negligence, under S. 106, Evidence Act. It throws a duty on the bailee to give the reasonable explanation of how the accident occurred. It would clearly be inequitable to call upon the bailor, who could have had no personal knowledge of how the accident happened, to prove a positive case of negligence when

the bailee has failed to set forth the circumstances that led to the accident.

In the application of maxim *res ipsa locquitor*, there is a difference between animals and goods. This distinction must be borne in mind when the Court is called upon to presume that the death of an animal must be the result of negligence on the part of the bailee. For animals, like men, are heirs to a thousand diseases, and it would be most unreasonable to conclude from the mere fact of death whatever the age of the animal might be, that it was due to some form of negligence. If the manner of death is known, it is possible for a Court to say whether or no it would lead to a *prima facie* inference that the animal died of negligence. A.I.R. 1937 Mad. 411 = 45 M.L.W. 158 = 1937 M.W.N. 150 = (1937) 2 M.L.J. 329 = 171 Ind. Cas. 21.

——S. 106—Bailment—Loss—Negligence—Proof of.

In a suit against a bailee for loss of goods, though the bailee must call all the witnesses who were on the spot in proof of his having acted without negligence that does not discharge the plaintiff from establishing from proving negligence on the part of the bailee or his servants. 20 Bom. L.R. 735 = 27 C.L.J. 615 = 8 L.W. 4 = 23 M.L.T. 376 = (1918) M.W.N. 435 = 46 Ind. Cas. 319 (P.C.).

——S. 106—Carrier—Loss of goods—Negligence.

The onus of proving absence of the negligence is on the common carrier for the loss or the damage to goods in cases of *prima facie* proof of negligence. 21 C.L.J. 565 = 29 Ind. Cas. 260.

11. Offences.

——S. 106—Offences—Misappropriation by servant.

It is settled law that where property is entrusted to a servant, it is the duty of the servant to give a true account of what he does with the property so entrusted to him. If such a servant fails to return the property or to account or gives an account which is shown to be false and incredible, it is ordinarily a reasonable inference that he had criminally misappropriated the property so entrusted to him and dishonestly converted to his own use. 84 Ind. Cas. 331 = 2 Rang. 476 = 26 Cr.L.J. 267 = A.I.R. 1925 Rang. 47.

——Ss. 106, 105 and 114—Offence—Exception—Proof—Special knowledge.

Held, that the words 'shall presume in the absence of such circumstances' require the Court to regard such absence as proved unless and until it is disproved. Circumstances which bring the case within a general exception are within the special knowledge of the accused and the burden of proof must lie upon him. 32 All. 451 = 7 A.L.J. 438 = 11 Cr.L.J. 374 = 6 Ind. Cas. 589.

——S. 106—Offence—Absence of explanation from accused—Presumption.

An accused person is always entitled to hold his tongue; but when the only alternative theory to his guilt is a remote possibility, which, if correct, he is in a position to explain, the absence of any explanation must be considered in determining whether the possibility should be disregarded or taken into account. 19 Cr.L.J. 189 = 43 Ind. Cas. 605.

——S. 106—Offence—Import of cocaine.

The burden of proving facts specially within the knowledge of any person, *i.e.*, that a parcel of cocaine was believed to be one of toys, is on that person. 6 Bur. L.T. 129 = 14 Cr.L.J. 440 = 20 Ind. Cas. 600.

——Ss. 106 and 114—Offence—Burden of proof.

The fact as to how the accused got into possession of bomb materials which were found to have exploded after 10 days is one especially 'within his knowledge' and the onus of proof lay on the accused. The Court is justified in drawing an inference against him according to S. 114. (1910) M.W.N. 77 = 7 M.L.T. 314 = 11 Cr.L.J. 222 = 20 M.L.J. 657 = 6 Ind. Cas. 51.

12. Puberty.

——S. 106—Option of puberty—Knowledge of—Burden on the (Muhammadan) woman.

Under Muhammadan Law, the woman has the right of repudiating marriage within reasonable time of her knowledge of the fact that she has the power to repudiate the same. But the fact that she has such knowledge is a fact specially within her knowledge and therefore, the burden of proving such fact is on her. A.I.R. 1940 All. 63 = 1939 A.W.R. 811 = 185 Ind. Cas. 837.

——S. 106—Majority—Age of puberty.

The fact that a Mohemedan girl below the age of 15 years has attained puberty is a fact within her special knowledge and the burden of proving the fact lies on her. 53 Ind. Cas. 94 (Cal.).

13. Pedigree.

——Ss. 106 and 103—Pedigree.

Plaintiff relying on pedigree—Pedigree showing number of persons higher than plaintiff—Plaintiff must prove death of all these persons. 61 Ind. Cas. 144 = 24 O.C. 1 = A.I.R. 1921 Oudh 104.

14. Plea of jus tertii.

——Ss. 106 and 103—Plea of jus tertii.

Where a defence of *jus tertii* is set up, it is for the defendants to establish that the persons, in whom they allege the right to the plots to exist, have a title superior to that of the plaintiff. 61 Ind. Cas. 871 = 24 O.C. 77 = 8 O.L.J. 160 = A.I.R. 1921 Oudh 88.

——S. 106—Tenant of third party.

Onus of proving that a certain person is a certain other person's tenant lies on the person setting up the plea. 84 Ind. Cas. 1009 = 2 Rang. 549 = A.I.R. 1925 Rang. 143.

15. Setting aside sale.

——S. 106—Setting aside sale—Suit for.

Suit to set aside sale by Collector on the ground of absence of arrears—Plaintiff must prove absence of arrears and not the purchaser. 90 Ind. Cas. 456 = 29 C.W.N. 1027 = A.I.R. 1926 Cal. 243.

16. Suits against Railways.

——S. 106—Under S. 106, Evidence Act, a bailee Railway Company will be bound to place all material witnesses but this does not discharge the plaintiff from proving the want of due diligence or the negligence of the defendant or his servants. A.I.R. 1934 Cal. 151 = 37 C.W.N. 1109 = 58 C.L.J. 98 = 150 Ind. Cas. 189.

——S. 106—Risk-notes A and B—Deviation from ordinary route—Loss—Onus.

Held, that the onus of proving that damage accrued before actual deviation was on the Railway Company. A.I.R. 1952 All. 584 = 1932 A.L.J. 788 = 139 Ind. Cas. 381.

——S. 106—Suit for damages against Railway Company—Loss of goods sent at ordinary railway parcel rate.

Held, that the onus to prove that the parcel did not contain excepted articles was upon the plaintiff and not on the defendant Railway Company. A.I.R. 1932 Cal. 3 = 58 Cal. 989 = 35 C.W.N. 453 = 134 Ind. Cas. 886.

——S. 106—Suit against Railways—Damages caused by sparks from engine.

In a suit against railway of damages caused by sparks coming out of engine, the onus is initially on railway to prove that precaution had been taken by them to protect adjoining property from fire. 100 Ind.

Cas. 640 = 49 All. 559 = 25 A.L.J. 336 = A.I.R. 1927. All. 349.

——S. 106—Railways—Articles specified in Railways Act, Sch. 2 included in consignment—Loss—Onus.

Where articles specified in Sch. 2, Railways Act and requiring a special declaration under S. 75 are included in a consignment, the burden of proof as to what articles are contained in each specific parcel and that the value of such special articles in each package was less than Rs. 100, rests on the consignee as the contents of each parcel is a special matter of knowledge to the consignee. But onus to prove the loss of packages rests on the railway company. 103 Ind. Cas. 756 = A.I.R. 1927 Nag. 328.

——S. 106—If applies—Risk-note H—Liability—Onus is on consignor.

Where goods are consigned under Risk-note H, the onus of proving the facts necessary to bring the company within the terms of the contract will be on the consignor. Section 106 of the Evidence Act does not apply and if in all cases of loss, of destruction or deterioration of goods consigned the onus will be on the company to prove how it came about, the special contract will be useless. 68 Ind. Cas. 269 = 1922 M.W.N. 328 = 16 M.L.W. 667 = 31 M.L.T. 470 = A.I.R. 1922 Mad. 231 = 43 M.L.J. 90.

17. Miscellaneous.

——S. 106 and R. 39 (2) of D.I. Rules—Contrasted as to burden of proof—Change due to war conditions.

During the emergency brought about by war conditions, drastic measures were thought necessary, and the burden of proof which could not be thrown on the accused under S. 106, Evidence Act, has been expressly thrown upon them by R. 39 (2) of Defence of India Rules. A.I.R. 1945 Bom. 333 = 47 Bom. L.R. 79 = I.L.R. (1945) Bom. 302.

——Ss. 106 and 103—Burden of proof—Existence of movable property of judgment-debtor (S. 151, Oudh Rent Act).

Under S. 151, Oudh Rent Act, it is for the decree-holder to prove that decree cannot be satisfied against movable property of the judgment-debtor. But whether a judgment-debtor has or has not movable property from which a decree may be satisfied is a matter specially within the knowledge of the judgment-debtor and if the decree-holder shows that there is reason to think that the judgment-debtor has no such property, and files an affidavit to this effect, it is for the judgment-debtor to prove that he has such property. A.I.R. 1941 Oudh 374 = 1941 O.W.N. 638 = 1941 R.D. 352 = 16 Luck. 573 = 194 Ind. Cas. 437.

——S. 106—Creditor's accounts—Erasures—Burden on creditor suing.

Suit for recovery of debt—Erasure in *bahi* belonging to creditor supporting debtor's plea—Burden is on creditor to show how the erasure came about. A.I.R. 1940 Lah. 228 = 42 P.L.R. 154 = 189 Ind. Cas. 85.

——S. 106—Authority to sue—Minute of meeting—Sufficiency to discharge burden under—Question of notice of meeting, if can be raised for the first time in appeal before P.C.

Minute of meeting is sufficient to discharge the burden of proof on the plaintiff under S. 106, Evidence Act, of proving due authority to institute suit. The defendants, if they want to raise the plea of due notice of meeting, are bound to give notice in their pleading and get the issue framed on it, and where such point is not raised nor issue framed, it cannot be raised in appeal. A.I.R. 1938 P.C. 73 = 1938 A.W.R. 74 = 1938 A.L.J. 194 = 47 M.L.W. 239 = 1938 O.W.N. 245 = 4 B.R. 317 = 40 P.L.R. 247 = I.L.R (1938) Lah. 63 = (1938) 1 M.L.J. 359 = 66 C.L.J. 524 = 1938 M.W.N. 621 = 42 C.W.N. 938 = 40 Bom. L.R. 724 = 32 S.L.R. 350 = 65 I.A. 106 = 172 Ind. Cas. 993 (P.C.).

——S. 106—Question whether or not transfer is fraudulent—Vendee should personally be examined.

The true object to be achieved by a Court of justice in finding out whether or not a transfer is fraudulent can only be furthered with propriety by the testimony of the vendee who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination. It is an error to rely on the abstract doctrine of burden of proof. A.I.R. 1930 Mad. 665 = 126 Ind. Cas. 604.

——S. 106—Validity of decree.

Decree against executor impeached on the ground that he had ceased to represent estate before suit—Party impeaching decree must prove his allegations. 91 Ind. Cas. 416 (Cal.).

——S. 106—Vendor and purchaser—Colourable sale.

Where an ostensible vendee has paid out of his pocket sums towards the amounts due by his vendor and which the vendee has undertaken to pay, the burden of proving that the transaction was intended to be a colourable one lies very heavily on the vendor. 29 Ind.Cas. 970, foll. (1917) M.W.N. 674=6 L.W. 703=42 Ind. Cas. 827.

——S. 106—Special knowledge—Assets of deceased.

Once it is admitted or proved that a person is in possession of the assets of the deceased it is on him to satisfy the Court as to the extent of the assets received by him and to account for them. 21 M.L.J. 1096 = 10 M.L.T. 272 = (1911) 2 M.W.N. 271 = 12 Ind. Cas. 253.

——S. 107—Applicability to divorce cases.

Section 107 does not apply to a petition for a declaration of nullity of marriage under the Divorce Act by reasons of Ss. 7 and 19 (4) of the Divorce Act. Proceedings are governed by Divorce Act and in face of S. 19 (4) of the Divorce Act, S. 107 would not apply. I.L.R. (1946) M. 416 = A.I.R. 1946 Mad. 65 = 58 M.L.W. 529 = (1945) 2 M.L.J. 389 = 1945 M.W.N. 651.

——S. 107—Applicability—Question of date of death.

S. 107 does not apply when the question is not merely one of death but of death at a particular day, no presumption as to the time of death can be drawn. The party concerned to make out death on a particular date must prove it. 13 N.L.R. 16 = 39 Ind. Cas. 21.

——S. 107—Muhammadan Law of missing persons—If applies after Evidence Act.

The Rule of Muhammadan Law about missing persons is purely one of evidentiary presumption and is not applicable in the face of Evidence Act. 7 All. 297 (F.B.), *foll.* 63 Ind. Cas. 286 = 43 All. 673 = 19 A.L.J. 713 = A.I.R. 1921 All. 175.

——S. 107—Minor (person) not heard for some months—Presumption he is alive—Appointment of guardian.

Where an application was put in by a mother for being appointed as guardian of the property of her minor son and was opposed on the ground that the minor was not heard of for some months it was held, that the mother was entitled to be the guardian inasmuch as the minor's death cannot be presumed. 1 Ind. Cas. 465 (All.).

——Ss. 107, 108—Presumption under—Alive or dead.

Sections 107 and 108 only relate to the date when the suit was brought, that is to say, as to whether a man is alive or dead as the case may be at the date of the suit, and not at some particular period anterior to the suit. The decisions also establish that there is no presumption as to whether a particular person was dead at any time within the period in question. 82 Ind. Cas. 27 = A.I.R. 1923 Bom. 208.

——**S. 107—No presumption as to the precise time of death.**

The only presumption enacted by S. 107 (sic) of the Indian Evidence Act is that the party is dead at the time of suit, but there is no presumption as to the precise time of his death. (1910) 11 C.L.J. 580 = 6 Ind. Cas. 244.

——**Ss. 107, 108—Presumption of death.**

Where a person has not been heard of for about 40 years, there is a presumption that he is dead and the onus of proving that he is alive is on the person who alleges it. A.I.R. 1931 Oudh 40 = 6 Luck. 407 = 7 O.W.N. 1120 = 14 R.D. 672 = 130 Ind. Cas. 124.

——**Ss. 107, 108—Time of death—No presumption as to.**

There is no presumption about the time of death. Time must be proved by party concerned. 100 Ind. Cas. 446 = 22 N.L.R. 175 = 10 N.L.J. 5 = A.I.R. 1927 Nag. 104.

——**Ss. 107 and 108—Presumption under.**

There is no presumption that a man was alive until the expiration of seven years from the date he was last heard of. Ss. 107 and 108 deal with the procedure to be followed when a question is raised before a Court as to whether a person is alive or dead. The sections do not lay down any presumption as to how long a man was alive or at what time he died. Whether a Court would or would not make a presumption that a person last heard of within seven years is alive depends upon the circumstances of each case assuming that a Court may make such presumption. 37 Mad. 440 = 23 M.L.J. 443 = 16 Ind. Cas. 43.

——**S. 108.**

Synopsis.

1. Construction.
2. Death, presumption of.
3. Death, time of.
4. Hindu and Muhammadan Law Rules.
5. Inheritance and presumption.
6. Limitation and presumption.
7. Persons who would have heard of.
8. Miscellaneous.

1. Construction.

——**S. 108—Construction—A person not heard of for seven years—True rule.**

It is constantly assumed that, where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years may be presumed to have taken place at its close. This is not correct. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if instead of speaking of a person who had not been heard of for seven years, it described the period of disapperance as one " of not less than seven years." 93 Ind. Cas. 280 = 5 Pat. 312 = 53 I.A. 24 = 24 A.L.J. 105 = 1926 M.W.N. 203 = 7 P.L.T. 168 = 3 O.W.N. 335 = 43 C.L.J. 249 = 28 Bom. L.R. 855 = 30 C.W.N. 721 = A.I.R. 1926 P.C. 9 = 50 M.L.J. 289 (P.C.).

2. Death, presumption of.

——**S. 108—Presumption—Scope of—Dead on the date of dispute.**

While there is a presumption that a person who is proved not to have been heard of for seven years by those who would be likely to hear of him if living, is dead, there is no presumption that he died after the expiry of seven years from the time when he was last heard of. The presumption only is that he is dead at the time when the dispute arises. 115 Ind. Cas. 626 (All.).

——**S. 108—Scope—Presumption of death.**

Section 108 of the Evidence Act provides that in certain circumstances a rebuttable presumption of law arises as to death. It does not follow that if those circumstances do not exist there cannot be a presumption or inference of fact, as to death. 103 Ind. Cas. 328 = A.I.R. 1927 All. 687.

——**S. 108—Presumption as to factum of death—No presumption as to time.**

The question for which provision is made in S. 108 is whether a man is alive or dead at the time the question is raised ; in other words, the presumption of the continuance of life ceases at the expiration of seven years from the period when the person in question was last heard of. 1 Lah. 554, Rel. on.

There is no presumption, however, as to the time of his death, and if any one seeks to establish the precise period at which such person died, he must do so by actual evidence. 97 Ind. Cas. 247 = 54 Cal. 186 = 43 C.L.J. 578 = A.I.R. 1926 Cal. 1056.

——**S. 108**—Person not heard of for 7 years by near relatives—Presumption under section of fact of death must be drawn. 79 Ind. Cas. 500 = A.I.R. 1923 Lah. 174.

——**S. 108—Person not heard of for seven years—Presumption of death.**

Where there can be no doubt whatever that though the property is endowed property in the sense that its income has to be appropriated to the purposes of the endowment, still the title is in the successive Mahants, time is to run from the date of the death of alienor who alienated the properties in dispute. If the alienor has not been heard of for 7 years by those who would naturally have heard of him, if he had been alive, it can be presumed that he is dead. The suits are not barred as the time begins to run from the date of the presumption. 67 Ind. Cas. 401 = 3 Pat. L.T. 352 = 1 Pat. 475 = A.I.R. 1922 Pat. 243.

——**S. 108—Presumption of death arises after lapse of seven years.**

In a case where the point of time to which the death has to be referred, may be placed indifferently either during the seven years or after the lapse of the seven years (it not being necessary to show that the person lived during the seven years), there is a presumption after the lapse of the seven years in favour of the death and it is for the other side to displace the presumption and the party relying on the presumption is entitled to succeed if no evidence is offered by the other side. 69 Ind. Cas. 835 = 14 M.L.W. 315 = 1921 M.W.N. 610 = A.I.R. 1921 Mad. 285 = 41 M.L.J. 295.

——**S. 108—Scope of.**

There is a presumption in favour of continuance of life and it is for the person asserting death to prove it. The death of a person cannot be presumed to have taken place more than 7 years before the date of suit calling the question into controversy. 22 Bom. L.R. 771 ; 1 Lah. 554, Foll. 64 Ind. Cas. 468 (Lah.).

——**Ss. 108 and 107—Date of death—Person not heard of for seven years—Presumption of death.**

A man is presumed to be alive until he is dead. A person ascertaining that a particular man is dead has to prove it. If he could show that a man has not been heard of for seven years then the Court will presume his death. But the earliest date on which the death can be presumed can only be the date when the suit was filed. It cannot have a further retrospective effect. 22 Bom. L.R. 771 = 57 Ind. Cas. 525.

——S. 108—Scope—Time of death—Presumption of.

S. 108 raises a presumption of death at the end of continuous absence of seven years and not at the time when the question is raised or the suit is instituted. The burden of proving the life of the absentee cannot be got rid of by a party admitting the absentee's death at some subsequent time. 8 Ind. Cas. 55 (All.).

——S. 108—Date of death—Missing person—Presumption, nature of.

S. 108 of the Evidence Act lays down that a person missing for seven years is dead ; there is no presumption therein as to the date of death. 34 All. 36 = 8 A.L.J. 1052 = 11 Ind. Cas. 474.

——S. 108—Time of death—Presumption.

If a man is not heard of for seven years, the presumption is that he is dead at the time the question is raised but not at some antecedent date. 32 I.A. 177, Foll. 37 Cal. 103 =11 C.L.J. 138 =14 C.W.N. 341 = 5 Ind. Cas. 709.

3. Death, time of.

—— S. 108—Scope of presumption—Time of death——Burden of proof.

If a person has not been heard of for seven years there is a presumption under S. 108 of the Evidence Act that he is dead. But at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. 51 P.L.R. 1 = A.I.R. 1949 E.P. 267.

——S. 108—Presumption under—Scope of—Failing proof of actual date, death on date of suit.

The question as to the date of death of a person from who his relations have not heard for more than seven years, shall be proved by the person who alleges a particular date affirmatively, but if no one can prove any specific date, a presumption that he was dead on the date of the institution of the suit shall be drawn. A.I.R. 1944 Pesh. 29 = 214 Ind. Cas. 149.

——S. 108—No presumption as to death on any particular date within the period.

When the Court has to determine the date of the death of a person who has not been heard of for a period of more than seven years, there is no presumption that he died at the end of the first seven years, or at any particular date. A.I.R. 1938 Bom. 228 = 40 Bom. L.R. 147 = I.L.R. (1938) Bom. 155 = 175 Ind. Cas. 190.

——S. 108—Presumption of death under—Nature of—Time of death—Question of proof—Onus.

Under S. 108, it is not permissible for a Court to raise a presumption that a certain person died at a particular time anterior to the proceedings in which the question of his death was in issue. If a person has not been heard of for seven years, there is a presumption of law that he is dead ; but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claimed a right to the establishment of which that fact is essential. A.I.R. 1935 Oudh 448 = 1935 O.W.N. 977 = 157 Ind. Cas. 954.

——S. 108—Presumption—Scope of—Death at a particular time—Affirmative evidence, requisite for relief.

Where a person has not been heard of for a period of more than seven years by persons who are likely to hear of him, a presumption arises as to the death of the person, but there is no presumption that he was dead at a particular time. Therefore, where in order to succeed in a suit, it is necessary for a person to establish that a particular person was dead at a particular time, he has to prove the factum of his death at the said time by affirmative evidence whether direct or circumstantial. A.I.R. 1932 All. 365 = 1932 A.L.J. 175 = 140 Ind. Cas. 12.

——S. 108—Presumption is as to factum—Not to time of death—Time, one for proof.

The presumption raised by S. 108 is confined to the factum of death and not the exact time when death may have occurred. Where a party affirms that a certain person died on or before a particular date, that fact has to be established by positive evidence. 123 Ind. Cas. 759 = 11 L.R.A. Rev. 121 = 1930 A.L.J. 469 = A.I.R. 1930 All. 427.

——S. 108—Presumption—Date of death.

The presumption is only that the person in question is dead ; there is no presumption that he died at any particular time. 124 Ind. Cas. 25.

——S. 108—Presumption under—None as to time of death.

When the Court has to determine the point whether a particular person ought to be presumed as dead on the ground that he has not been heard of for more than seven years, there can be no presumption that he was dead at a particular time. The utmost that can be considered is that he was dead at the time when the suit was brought. A.I.R. 1926 P.C. 9, Foll. 106 Ind. Cas. 489 = 4 O.W.N. 1077 = A.I.R. 1928 Oudh 13.

——S. 108—No presumption as to date.

Person not heard of for seven years—That he died on any particular date cannot be presumed. A.I.R. 1926 P.C. 9, Foll. 100 Ind. Cas. 833 = A.I.R. 1927 Lah. 284.

——S. 108—No presumption as to time.

What the Court may presume under S. 108 is confined to the *factum* of death ; it cannot presume that because the person has not been heard of he died at any particular moment, or in any particular way, or from any particular cause. 34 All. 36 (F.B.), Foll.

Ryves, J.—It does not follow that merely because a person has not been heard of for 7 years, where there is no positive or reliable evidence, that he is in fact alive, the Court must find that he was dead at the date of suit, much less that he was dead at any given particular date. 74 Ind. Cas. 656 = 21 A.L.J. 393 = 45 All. 466 = 4 L.R.A. Civ. 532 = A.I.R. 1923 All. 495.

——S. 108—No presumption as to date of death.

The presumption under S. 108, relates only to the fact of death, and has no reference whatever to the date of the death.

That fact must be proved like any other fact by the party who is interested in establishing that he died on or before a particular date. 81 Ind. Cas. 449 = 25 Bom. L.R. 134 = 47 Bom. 451 = A.I.R. 1923 Bom. 163.

——Ss. 108, 101 and 107—Continuance of life—Presumption of.

The presumption is in favour of continuance of life and the onus of proving the death of a person before a particular date lies on the party who asserts it. 2 L.L.J. 481 = 1 Lah. 554 = 114 P.L.R. 1920 = 56 Ind. Cas. 742.

——S. 108—Date of death—Presumption—Nature of.

No presumption can be drawn under S. 108 as to the date of death of a person. 21 O.C. 143 = 5 O.L.J. 475 = 46 Ind. Cas. 808.

——S. 108—No presumption as to date of death—Affirmative proof by person relying—Necessity.

The presumption under S. 108 is a presumption of the fact of death and not of the date of death. If

a person seeks to establish the precise date of death he must do so by actual evidence. 38 P.R. 1918 = 68 P.W.R. 1918 = 123 P.L.R. 1918 = 45 Ind. Cas. 70.

——S. 108—Presumption of death—Onus as to date of death.

It is for the party who wants the Court to presume the death of a person at any particular time to prove it affirmatively by evidence. 6 L.W. 633 = 33 M.L.J. 295 = (1917) M.W.N. 722 = 42 Ind. Cas. 241.

——S. 108—Presumption as to death—Onus as to date of death.

S. 108 of the Evidence Act makes provision for the question whether a man is alive or dead. The law raises no presumption as to the time of his death, and the presumption that may in certain circumstances be raised is a presumption that the man is dead when the question is raised and not a presumption that he was dead at some antecedent date. It is on the person who alleges that the person was dead at some antecedent time to prove that fact by evidence. (1907) 11 C.W.N. 883 = 5 C.L.J. 649 = 35 C. 25.

——S. 108—Date of death—No presumption under—Party alleging, to prove.

Burden of proving the date of death of a person, who is not heard of for fifteen years, lies on the person who alleges that he was alive on a particular date. 6 M.L.T. 153 = 19 M.L.J. 502 = 2 Ind. Cas. 977.

——S. 108—Scope of—No presumption as to date of death.

Widow last heard of 12 years before suit—Onus as to proof of date of death—Reversioners' suit for possession. *See* LIMITATION ACT, ART. 141. 14 M.L.J. 464.

4. Hindu and Muhammadan Laws Rules.

——S. 108—Hindu Law Rule as to missing persons—12 year's rule—Inapplicable after the Act.

The Rule of Hindu Law that at least 12 years should elapse before a man unheard of should be treated as dead is only a rule of evidence and is not applicable after the passing of the Evidence Act. 1 All. 53, Foll. 71 Ind. Cas. 305 = 16 M.L.W. 976 = 1923 M.W.N. 49 = 32 M.L.T. 6 = A.I.R. 1923 Mad. 182 = 43 M.L.J. 725.

——S. 108—Overrides Muhammadan Law of presumption of death as to missing persons.

The Rules of Muhammadan Law with respect to the presumptions arising in cases of missing persons must be deemed to have been abrogated by the provisions of S. 108, Evidence Act. A.I.R. 1934 Oudh 41 = 10 O.W.N. 1254 = 9 Luck. 401 = 147 Ind. Cas. 973.

——Ss. 108 and 2—Muhammadan Law—If applies after the Act—Presumption of death—No presumption as to time.

S. 2 of the Evidence Act has abrogated all rules of evidence laid down by the Muhammadan Law and therefore S. 108 will govern the case of a Muhammadan missing for more than seven years. 7 A. 297, Foll. A rule of presumption as to death is a rule of evidence and not of succession. A person missing for more than seven years is presumed to be dead but there is no presumption as to the time of his death. 11 A.L.J. 355 = 18 Ind. Cas. 920.

5. Inheritance and presumption.

——S. 108—Suit for declaration that plaintiff is sole owner, his brother being dead—Duty to prove date of death for inheritance.

Under S. 108 of the Evidence Act, when the Court has to determine the date of the death of a person who has not been heard of for a period of not less than seven years, there is no presumption that he died at the end of the first seven years, or at any particular date. The date of death will have to be proved. Where one of two brothers files a suit for a declaration that he was the sole owner, his brother being dead, it is the duty of the plaintiff to prove the date of the brother's death. 165 Ind. Cas. 586 = 38 P.L.R. 1126.

——S. 108—No presumption as to date of death—Onus as to date—Plaintiff to prove allegation for relief (Ss. 102 and 103).

If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. The plaintiff could not succeed in establishing his claim as reversioner to a person not heard of for seven years unless he proved by oral and documentary evidence at what particular time that person died, when succession opened out and whether, at that particular time, when succession opened out to him he (the plaintiff) was the nearest reversioner. A.I.R. 1934 Oudh 298 = 18 R.D. 399 = 11 O.W.N. 793 = 10 Luck. 92 = 149 Ind. Cas. 632 (F.B.).

——S. 108—Muhammadan father missing and not heard of—Son claiming share of grandfather's estate—Proof requisite and onus.

Where the father left his place of residence in 1870 and was last heard of in 1886 or 1887, the burden under S. 108 of the Evidence Act would be on the grandson to show that his father survived the latter's father. (1905) 2 A.L.J. 798 = 15 M.L.J. 317 = 7 Bom. L.R. 892 = 10 C.W.N. 33 = 2 C.L.J. 236 = 33 C. 173 = 32 I.A. 177 (P.C.).

6. Limitation and presumption.

——S. 108—Date of death—No presumption—Onus—Plaintiff (reversioner) to prove death within limitation.

Held, that it was incumbent on the plaintiffs to prove that the soldier had died within 12 years of date of suit and as they had failed to do so, the suit was time-barred. A.I.R. 1932 Lah. 45 = 33 P.L.R. 237 = 134 Ind. Cas. 97.

——S. 108—Presumption—Death on date of suit—Death within period of limitation—Matter of proof—Onus on plaintiff.

Section 108 only raises a presumption that on the date of the suit the person concerned was dead and does not raise any presumption as to the date of his death, that, like any other fact, being a matter of proof. Therefore, where a person has not been heard of for seven years and his reversioners institute a suit for possession of his property it is incumbent on them to prove that that person had died within three years of the date of the suit. The burden is not on the defendants to prove that he had died more than three years before the date of suit. A.I.R. 1931 Lah. 582 = 32 P.L.R. 704 = 12 Lah. 718 = 133 Ind. Cas. 889 (F.B.).

[**Overrules** A.I.R. 1920 Lah. 191 = 1 Lah. 554 = 56 Ind. Cas. 742].

——S. 108—Onus of affirmative proof—Not discharged by presumption under.

The onus that lies on a reversioner to show affirmatively that his action is within twelve years of the actual death of the widow is in no way removed by any presumption under S. 108. 40 Bom. 239 = 18 Bom. L.R. 14 = 33 Ind. Cas. 484.

7. Persons who would have heard of.

——S. 108—Persons who would naturally have heard of—Revenue officers—Documents in revenue courts in regard to the disappearance of the person—Admissibility of.

Where a question arises as to whether a person can be presumed to be dead under S. 108 of the Evidence Act, the documents in proceedings in revenue Courts which have to be entered and maintained by the Revenue Officers in such matter as part of their official acts would be admissible in evidence. 22 Luck. 164 = 230 Ind. Cas. 50 = 1947 A.W.R. (C.C.) 23 = 1947 O.A. (C.C.) 23 = 1947 O.W.N. 59 = A.I.R. 1947 Oudh 174.

——S. 108—Wife living apart.

Wife leaving her husband and being in another's keeping is not one who would naturally hear from him if he were alive. 117 Ind. Cas. 209 = 12 N.L.J. 51 = A.I.R. 1929 Nag. 127.

8. Miscellaneous.

——S. 108—Joint brothers dying in a fire—Presumption of younger having survived elder, whether arises.

Where two brothers died in a fire and the widow of one of them claimed to succeed to the joint family property belonging to the brothers, on the ground that her husband being the younger of the two must be deemed to have survived the elder brother :

Held, that there was no presumption of survivorship or of contemporaneous death and that the onus of proof of death of the plaintiff's husband after death of his brother lay on her, she being the person to whose title that fact was essential. A.I.R. 1934 Oudh 101 = 11 O.W.N. 267 = 9 Luck. 461 = 148 Ind. Cas. 781.

——S. 109.

Synopsis.

1. Landlord and tenant.
2. Partners.
3. Principal and agent.
4. Miscellaneous.

1. Landlord and tenant.

——S. 109—Landlord and tenant—Tenant-at-will admitting tenancy—Presumption as to relationship.

Where a tenant-at-will admits the tenancy, S. 109 comes into operation. In such a case, there is a presumption against him that he continues as a tenant till he proves that the relationship of tenant and landlord has ceased to exist. A.I.R. 1938 Sind 16 = 173 Ind. Cas. 222.

——S. 109—Landlord and tenant—Relationship—Decree of rent, whether creates—Burden of proof of termination.

A decree for rent obtained by a person against another is sufficient to establish the relationship of landlord and tenant between the parties and if the relationship is once established, it continues as between the parties to t hat decree and their representatives in title until it is proved to have ceased. A.I.R. 1935 Mad. 268 = 40 M.L.W. 810 = 154 Ind. Cas. 753.

——S. 109—Landlord and tenants—Nafargats—Extent of presumption.

The Nafargats only prove a chain of cultivators in succession, but they do not in themselves prove whether each successor came upon the land under a derivative title or independently of the landlord. So long as each cultivator held the land, there might arise a presumption under S. 109 of the Evidence Act that his tenancy had a continuance, but there is no presumption that his successor is necessarily a transferee from him. 98 Ind. Cas. 674 = A.I.R. 1927 Nag. 99.

——S. 109 and T.P. Act, S. 116—Landlord and tenant—Tenancy for a year—Holding over—Presumption.

Where a tenant continue to work on the holding after expiry of the lease for one year he must be presumed to have renewed the lease for another year under S. 109 of the Evidence Act and S. 116 of the Transfer of Property Act. 39 Ind. Cas. 125 (L.B.).

——S. 109—Tenancy.

In a suit for possession, where the defendant admits tenancy but resists the suit on the ground of subsequent sale in his favour, the burden of proving the sale, is shifted on to him to rebut the presumption that he is still a tenant. 8 Bur. L.T. 292 = 33 Ind. Cas. 600.

——S. 109—Landlord and tenant—Land once held under lease—Presumption of continuance.

There is a strong presumption that land once shown to be held under a written instrument of lease continues to be held under it as long as it is occupied by the same tenant in the absence of cogent evidence to the contrary. 16 Bom. L.R. 723 (Note) = 27 Ind. Cas. 512.

——S. 109—Lessor and lessee—Presumption—Burden of proving discontinuancy.

When the existence of a relationship of lessor and lessee is proved, its continuance is presumed under S. 109 and the burden of proving the contrary lies upon the person who denies it. 28 M.L.J. 361 = 27 Ind. Cas. 804.

——S. 109—Ejectment suit—Onus—When shifts.

Where the defendant in an ejectment suit admits plaintiff's title and possession within 12 years before suit, but pleads his own title by virtue of a transfer from the plaintiff, the defendant must prove the alleged transfer and cannot rely on his possession as raising a presumption in favour of his title. 6 N.L.R. 160 = 8 Ind. Cas. 1123.

2. Partners.

——S. 109—Scope—Question whether a person is partner.

When the question is whether, persons are partners, landlord and tenant or principal and agent and it has been shown that they have been acting as such, the burden of proving that they do not stand or have ceased to stand to each other in these relationships respectively is on the person who affirms it :

Held, after considering the facts and evidence that in the first instance it was for the Company to prove either (1) that the respondents were partners in the said firm, or (2) that the respondents had been acting as such but the Company did not discharge the onus which lay upon them in respect of either of the said issues. A.I.R. 1935 P.C. 175 = 1935 O.W.N. 863 = 37 Bom. L.R. 826 = 69 M.L.J. 433 = 1 B.R. 771 = 1935 M.W.N. 1182 = 157 Ind. Cas. 4 (P.C.).

——S. 109—Partners—Co-judgment debtors—Suit for contribution—Defendant may plead and he must prove his non-liability to contribute.

Where on the decree as passed several defendants were made jointly and severally liable, in the subsequent suit for contribution by one of them, it was for any defendant, who contended that he was not liable to pay the full share, to plead and prove it. The mere fact that he was a sleeping partner did not shift the onus from where it primarily lay. 95 Ind. Cas. 1007 = A.I.R. 1926 Lah. 553.

3. Principal and agent.

——S. 109—Relationship of principal and agent admitted—Onus of proving that it has ceased.

Where the relationship of principal and agent is admitted, under S. 109, the burden of proving that they had ceased to stand to each other in this relationship is clearly on the person who affirms it. A.I.R. 1935 Lah. 49 = 157 Ind. Cas. 815.

4. Miscellaneous.

——Ss. 109 and 114—Mortgage (Kanom)—Proof of.

Where the title of the plaintiff is admitted and the defendants are shown to have come into possession as mortgagees under the plaintiff, Courts will not demand such strict proof of the mortgage sued on, as where the title is denied and possession is not shown to have been under the owners. 29 M.L.J. 772 = 2 L.W. 509 = 29 Ind. Cas. 386.

——S. 110.

Synopsis.

1. Applicability.
2. Burden of proof.
3. Possession falling within the scope of.
4. Possession following title.
5. Presumption under (ownership).
6. Suits for possession or injunction.
7. Miscellaneous.

1. Applicability.

——S. 110—Applicability of the rule—Long possession—If can avail against Government.

Long possession of land by a person would under S. 110 of the Evidence Act constitute *prima facie* proof of title and the burden would shift on the other side to displace that presumption. This presumption avails even against the Government. A.I.R. 1951 M.B. 114.

——S. 110—Applicability—Statutory presumption in favour of Government.

The presumption under S. 110, Evidence Act would apply only if two conditions are satisfied, *viz.*, that the possession of the plaintiff is not *prima facie* wrongful, and, secondly, the title of the defendant is not proved. In the absence of proof by the plaintiffs that the land was of their ownership and in absence of proof that it was of anybody else's ownership, the only alternative is that the land must belong to the Government where there is a statutory presumption in favour of Government under S. 37 of the Land Revenue Code. A.I.R. 1942 Bom. 161 = 44 Bom. L.R. 295 = 15 R.D. 76 = I.L.R. (1942) Bom. 357 = 201 Ind. Cas. 420.

—S. 110—Applicability and scope—Statutory title in favour of Government—Long possession, as evidence of grant by original owner.

Section 110, no doubt enacts that title is to be presumed from lawful possession. This is a rebuttable presumption and like all rebuttable presumptions, must yield to proof. Where, therefore, title is proved or assumed, the presumption created by S. 110 can no longer apply. Madras Land Encroachment Act, S. 2, declares, subject to a saving clause, that the Government is the owner of certain kinds of property, including the beds of tanks. There is no conflict between the section of the Evidence Act and this provision. The title of the Government being statutorily declared, the rule of presumption enacted by S. 110 is not brought into play. But there is nothing to prevent long possession being relied upon as evidence of a grant made by the original owner. A.I.R. 1938 Mad. 193 = 47 M.L.W. 438 = 1938 M.W.N. 244 = (1938) 2 M.L.J. 434 = 181 Ind. Cas. 688.

—S. 110—Applicability—Government a party to suit—Berar Land Revenue Code, 1896, S. 41 (1).

The provisions of S. 110 are equally applicable in a case to which the Government is a party and S. 41 (1) of the Berar Land Revenue Code is not meant to lay down a rule regarding the burden of proof at variance with the provisions of S. 110; it is open for the defendant to rely on the provisions of S. 41 (1) of the Berar Land Revenue Code in proving his title to the and in dispute by showing, in the first instance, that it formed part of a public road within the last 60 years and it will then be for the plaintiff to show either that his title was founded on a lost grant or that he had acquired a title by adverse possession for over 60 years. A.I.R. 1935 Nag. 163 = 31 N.L.R. 232 = 18 N.L.J. 201 = 155 Ind. Cas. 264.

——S. 110—Applicability—Dispute with Government.

Plaintiff in possession of land—Government showing that under general law it is owner—Plaintiff must prove better title or adverse possession for 60 years. 61 Ind. Cas. 440 = 45 Bom. 789 = 23 Bom. L.R. 238 = A.I.R. 1921 Bom. 177.

——S. 110—Applicability—Evidence of possession unreliable.

Where evidence of possession is equally strong on both sides and apparently equally balanced, preference should be given to the evidence on the side of the party with whom title is found. But where the evidence is equally unworthy of reliance on both sides, no presumption can be made. 20 W.R. 25, *Foll.* 21 C.L.J. 480 = 28 Ind. Cas. 477.

2. Burden of proof.

——S. 110—Burden of proof—Possession proved—Dharmashala handed over to Fund Committee by Government prior to 1869—Ownership.

Held, that the onus was on Government to prove that they were the owners of the property. The Government had discharged the onus laid on them by S. 110, Evidence Act, by showing that the possession enjoyed by the Board rested on a basis inconsistent with a right of property. A.I.R. 1938 P.C. 87 = 1938 O.W.N. 90 = 4 B.R. 295 = 32 S.L.R. 340 = 172 Ind. Cas. 981 (P.C.).

——S. 110—Possession—If encroachment—Burden of proof.

Where it appears a person owns a house attached to which there is a *chabutra* and when he has been in possession of the house and *chabutra* for a time, the burden of proving encroachment is primarily upon him who alleges it and proceeds to remove it. (1936) 19 N.L.J. 285.

——S. 110—Burden of proof—Ownership.

Where plaintiff is in possession of property of which he says he is the owner the onus of proving that he is not the owner lies on the defendant. 103 Ind. Cas. 36 = A.I.R. 1927 Lah. 841.

——S. 110—Vendor in possession—Plea of bogus transaction—Burden of proof on vendee.

Although under ordinary circumstances the party to a sale-deed duly executed and registered who alleges non-payment of consideration and unreal nature of the transaction is bound to prove his allegation, the fact, that the plaintiff had silently submitted to the withholding of possession for a period of nearly twelve years combined with the continuous possession of the vendor, favoured the allegation of the latter and raised such a counter presumption as to make it incumbent on the plaintiff to give evidence that the sale was real. 79 Ind. Cas. 596 = 20 N.L.R. 154 = A.I.R. 1924 Nag. 173.

——S. 110—Long possession—Ownership denied—Burden of proof.

Where a person was in possession for over 30 years and he transferred the property (abadi), anybody alleging he was not the owner and also setting up the custom it was not transferable has to prove the same. 58 Ind. Cas. 192 (Nag.).

——S. 110—Burden of proof—Defendant in possession.

In a suit for possession when the boundaries are in dispute if the defendant is in actual possession of the land sued for, the burden of proof will be on plaintiff

to establish his title. 27 C.L.J. 599=23 C.W.N. 593= 45 Ind. Cas. 408.

——S. 110—Ownership—Person in possession—Burden of proof.

The burden of proving that a person in possession is not the owner lies in the person asserting it. 6 Bur. L.T. 185 = 21 Ind. Cas. 333.

——S. 110—Vacant site—Possession proved for thirty years—Onus of proving he is not the owner.

In a suit against the Secretary of State for India in Council for a declaration of the plaintiff's title to a certain vacant site, the plaintiff proved his possession for over 30 years. The burden of proving that the plaintiff was not the owner lay on the defendant, and the classification of the land as village site by the Government was merely an assertion of title. 33 Mad. 173 = 6 M.L.T. 306 = 20 M.L.J. 71 = 4 Ind. Cas. 1070.

——S. 110—Burden of proof—Onus.

Juridical possession is enough to shift the onus of proof on the other side. The section can be relied upon in a suit for ejectment, though the person dispossessed did not bring a suit under S. 9, Specific Relief Act, within the time limited by law. 2 P.L.J. 61 = 3 P.L.W. 258 = 38 Ind. Cas. 797.

——S. 110—Onus on the party out of possession—Shifting of onus.

The defendant was sued in ejectment from a house, which had been in his possession for five years without interruption on the ground that he first entered the premises temporarily with the permission of the plaintiff's father; the defendant in reply alleged a sale. *Held*, that the plaintiff must prove permissive occupation and the burden of proof should not be shifted unless the plaintiff had made out a *prima facie* case. 4 Bur. L.T. 159 = 11 Ind. Cas. 777.

3. Possession falling within scope of.

——S. 110—Possession coming within scope of—Use by temple of adjoining Government land.

Possession to come within the scope of S. 110 of the Evidence Act must be possession founded on a *prima facie* right, which means that the possession must be of such a character as leads to a presumption of title.

Where a temple has been using open Government land on its sides by allowing its cattle to run over a part of them for lifting water from a well and visitors to the temple used to go upon the open Government land to worship a pipal tree and tulsi plant thereon, it cannot be said that the user is such as to amount to possession of a character as would lead to a presumption of title, with the result the presumption under S. 110 cannot be relied on. A.I.R. 1951 M.B. 80.

——S. 100—Possession coming under the scope of.

Possession, to come within the scope of S. 110, must be possession founded on a *prima facie* right.

In a suit for declaration and injunction oral evidence was let in to show that the plaintiff had been using a large part of the land for tethering cattle and storing grass and had an *otli* there for a number of years. He also proved that he had erected hedges to the south and west of the land:

Held, that this evidence could not establish anything beyond undisturbed user for a certain period. The evidence did not suffice to prove such possession by the plaintiff as would justify an inference of title and was not enough to throw the burden of proof on to the Government under S. 110, Evidence Act. Nor was the plaintiff's case strengthened by any weakness of the defendant's case. A.I.R. 1937 Bom. 193 = 39 Bom. L.R. 216 = 169 Ind. Cas. 327.

——S. 110—Possession—Lawful—Presumption of ownership—Dispossession—Right to decree.

Wherever S. 110, can be called in aid by the plaintiff the Courts can give effect to it, that is to say, wherever the plaintiff's original entry had an ostensible lawful basis, the plaintiff is entitled to a decree without being called upon to negative the alleged defect in his title. A.I.R. 1936 Pat. 602 = 18 P.L.T. 63 = 3 B.R. 151 = 166 Ind. Cas. 305.

——S. 110—Possession, when evidence of title.

In case of waste lands, the Court would seize upon the slightest evidence of occupation for proof of title, but the occupation or the acts of user must be such as to indicate the intention to hold for oneself, for without such intent there is no possession. 8 S.L.R. 331 = 29 Ind. Cas. 51.

——S. 110—Possession—Presumption of ownership—When arises.

When neither side can show title, the possession which attracts the presumption of ownership must be a possession founded on a *prima facie* right. Even if mere wrongful possession is taken to be sufficient to shift the burden of proof, circumstances may show that such wrongful possession was merely that of a licensee and not of an owner. 6 S.L.R. 210 = 19 Ind. Cas. 565.

4. Possession following title.

——S. 110—Possession following title.

The presumption, that the plaintiff having the title, also has possession can properly be made in the case of the jungle or waste land, where there is no proof or very little proof of acts of ownership having been exercised on either side, or in cases where the evidence as to such acts of such ownership is very nearly equal. Though the S. 110 recognised a presumption that the person in possession also has a good title there is no corresponding section saying that the person with the title should be presumed to be in possession. This presumption is one that can only come under S. 114 of the Evidence Act. 77 Ind. Cas. 506 = A.I.R. 1923 Bom. 361.

——S. 110—Possession follows title.

The ordinary presumption is that possession goes with title. That presumption of course does not avail if there is clear evidence to the contrary. Where there is no evidence of possession on either side or where the evidence is unsatisfactory on both sides the presumption will prevail. 4 Pat. L.J. 463 = (1919) P.H.C.C. 298 = 51 Ind. Cas. 801.

——S. 110—Forest land—Possession—Determining title.

Where the defendants are shown to be in possession of certain forest land, the plaintiff in order to establish his claim to it must prove definite acts of ownership exercised by him on the land from time to time. 29 Ind. Cas. 729 (Mad.).

——S. 110—Possession—Following title—Presumption—Trespasser.

Proof of possession varies with the nature of the property in respect of which possession is questioned. If actual possession is not possible or undetermined possession in law follows the right to possess, in other words possession follows title. No presumption of possession can be raised in favour of a trespasser during periods the property is not capable of actual possession. 2 O.L.J. 346 = 18 O.C. 43 = 28 Ind. Cas. 855.

——S. 110—Possession—Waste land.

In the case of waste covering a very small area, possession may be presumed to follow the title. 16 Ind. Cas. 623 (Cal.).

——S. 110—Jungle land—Possession—Title.

Possession of jungle lands must be presumed to have been all along with the party who has title to them. 15 C.W.N. 887 = (1911) 2 M.W.N. 101 = 10 M.L.T.

157 = 13 Bom. L.R. 806 = 14 C.L.J. 319 = 8 A.L.J. 1176 = 11 Ind. Cas. 542 (P.C.).

5. Presumption under (ownership).

——S. 110—Defendant in possession—Plaintiff claiming it to be on his behalf—Failure to prove—Possession held as rightful.

Where a plaintiff not in possession sues for possession and sets up a case of possession by the defendant on his behalf but fails to discharge the onus on him, then it is open to a court to presume the defendant's possession must be rightful. A.I.R. 1950 Kut. 50.

——S. 110—Presumption under—Rule of.

A person in possession is presumed to be the owner of the property until the contrary is proved. (1939) 41 P.L.R. 123.

——S. 110—Presumption under.

Attachment of cattle in possession of judgment-debtor—Claim proceedings by son of judgment-debtor that cattle belonged to him, succeeding—Suit by decree-holder under O. 21, R. 63 : *Held*, cattle should be presumed under S. 110, Evidence Act to belong to judgment-debtor in whose possession they were found. A.I.R. 1937 Rang. 362 = 172 Ind. Cas. 572.

——S. 110—Possession—Well—Presumption of ownership—Mere user by public—If sufficient to rebut.

Where the defendants who are in possession of a well have, from time to time, asserted their claim to the property as owners, the mere user of the well by the public is not sufficient to rebut the presumption of ownership, or to raise a further presumption that they are trustees of the said property. It is true that user is evidence of dedication to the public, but the question whether such evidence is sufficient or not must depend upon the particular facts of each case, and where user is equally consistent with the defendants being owners of the property and such user bring in the nature of an easement, the ordinary presumption which arises under S. 110, Evidence Act, cannot be said to have been rebutted by the evidence of user. A.I.R. 1935 Sind 133 = 156 Ind. Cas. 892.

—S. 110—Presumption of ownership from long possession—Rent claimed from possessor—Whether defeats presumption.

Under S. 110, the long possession of the plaintiff affords an initial presumption of his ownership. The mere fact that the defendant claimed rent cannot defeat the presumption in plaintiff's favour on account of his long possession at the time of suit. A.I.R. 1934 Lah. 324 = 36 P.L.R. 64 = 150 Ind. Cas. 17.

——S. 110—Possession—Person tethering cattle for four months in year—Presumption of title.

Where a person is in possession of property and he uses it for four months of every year for tethering his cattle, such possession is *prima facie* evidence of title, but Court should not say that the person's ownership is established. 119 Ind. Cas. 701 = A.I.R. 1929 Nag. 318.

——S. 110—Possession as evidence of title.

Prior peaceful possession is *prima facie* evidence of ownership under S. 110 of the Evidence Act and is a good title against all persons except the true owner and can be relied on in successfully maintaining a suit for ejectment or for injunction against another who has no title to the land in dispute. (1929) 118 Ind. Cas. 680.

——S. 110—Presumption under—Purchaser.

The absence of any plea that the apparent purchaser was out of possession entitles the purchaser to the law's presumption under S. 110, that he was in possession as an owner. 90 Ind. Cas. 196 = A.I.R. 1926 Nag. 197.

——S. 110—Presumption under—Person in possession.

Where nothing else is known the person in possession is deemed to be the owner. 45 Ind. Cas. 217 (Nag.).

——S. 110—Presumption—Person in possession—When can be ousted.

Person already in possession of property can be ousted only by a person who can prove a better title in him. 1 P.L.W. 319 = 38 Ind. Cas. 483.

——S. 110—Possession—Presumption of title.

Lawful possession however short is presumptive evidence of title as owner and of the title to possession. (1914) M.W.N. 728 = 25 Ind. Cas. 109.

——S. 110—Presumption under—Long possession and enjoyment—Ownership.

Where the question was whether certain lands of which a zemindar was in possession, were included within the limits of his settled estate *held*, that proof of possession and enjoyment of the lands in question as part of the settled estate, for a sufficient length of time afforded evidence of title. 36 Cal. 1 = 35 I.A. 195 = 8 C.L.J. 436 = 12 C.W.N. 1095 = 1 Ind. Cas. 182 (P.C.).

——S. 110—Possession in Cantonment area—No presumption.

Possession of property in a Cantonment area is not *prima facie* title in fee simple. 38 I.A. 204 = 36 Bom. 1 = 13 Bom. L.R. 788 = 15 C.W.N. 909 = 14 C.L.J. 268 = 8 A.L.J. 1219 = 21 M.L.J. 1100 = (1911) 2 M.W.N. 23 = 21 Ind. Cas. 117 (P.C.).

6. Suits for possession or injunction.

——S. 110—Prior possession—Sufficiency of, to prove title—Person who lost possession suing to recover it.

Possession, by itself may, in some cases be sufficient to relieve the person who is or has been in possession from the necessity of proving his title and the doctrine applies to suits in ejectment though, however, only in a limited and occasional operation.

When a person who has lost possession sues to recover it, he cannot rest upon his prior possession alone unless it was such as to amount *prima facie*, evidence of title. For both title and possession have to be proved in such a case. Moreover, although the presumption that title goes with possession, (S. 110, Evidence Act) may come to the assistance of a person who has had possession but has lost it, it must be open to the defendant who is in possession at the date of the suit to disprove the plaintiff's title. If the plaintiff's title is disproved, he cannot succeed on the basis of his possession only. A.I.R. 1936 Bom. 201 = 38 Bom. L.R. 175 = 163 Ind. Cas. 632.

——S. 110—Suit for possession—Nature of proof—Prima facie case by defendant—Defendant proving no title.

In a suit for possession on the basis of title, the plaintiff must recover possession on the strength of his own case and he cannot rely on the weakness of the defendants' title to get it. But where he makes out a *prima facie* case, it becomes necessary to look at the title of the defendants and when their title is examined, it is clear that they never had any title at all, the plaintiff's claim must be decreed. A.I.R. 1936 Rang. 314 = 164 Ind. Cas. 418.

——S. 110—Suit for injunction—Prior possession—Value of.

N brought a suit claiming injunction against *K* restraining him from building a wall on a site of land. Although the site did not belong to *N*, his prior possession was established.

Held, that the suit of *N* could not be dismissed for want of title and that he could be allowed to succeed on the ground of prior possession as such possession is *prima facie* evidence of ownership. 10 N.L.R. 188 ;

11 N.L.R. 231 and A.I.R. 1917 Rang. 203, *foll.* 118 Ind. Cas. 680 (Nag.).

——S. 110—Suit for possession—Defendant in possession.

Where a person brings a suit for possession and it is proved that possession was with the defendants and title was not clearly established in favour of either party, the plaintiffs' suit must fail. 116 Ind. Cas. 546 = 10 L.L.J. 488.

——S. 110—Suit for possession—Dispossession by defendant—What the plaintiff must prove.

In a suit for possession based upon plaintiff's dispossession by the defendant, the burden of proof is on the plaintiff to prove his possession at some time within 12 years preceding the suit, and it is not enough to show merely an anterior title, without proof of possession within 12 years to shift the burden of proof on to the defendants to show that they were entitled to retain possession. 93 Ind. Cas. 1006 (Lah.).

——S. 110—Suit for possession by benamidar.

Where in a suit for possession of land in possession of the defendant he claims to be the owner and the plaintiff his benamidar, the plaintiff must prove that defendant is not the owner. 57 Ind. Cas. 972 (Cal.).

——S. 110—Suit by benamidar.

In a suit for possession by benamidar plaintiff, he must prove that he is not benamidar. 24 Ind. Cas. 801 (Cal.).

7. Miscellaneous.

——S. 110—Onus of proof.

A Probate Court granted Probate to *A* deciding that she was the widow of the deceased; *A* was in possession of properties. *B* brought a suit for possession of the property, alleging that she was the adopted daughter of the deceased and that *A* was nobody. *Held*, that *B* must prove that *A* was not a widow of the deceased under S. 110. (1910) 1 U.B.R. 61 = 10 Ind. Cas. 987.

——S. 110—Transferee in possession—Vendor claiming it as mortgage by conditional sale—Onus.

The burden of proof is on the plaintiff to prove a covenant to repurchase or that the deed is a mortgage by conditional sale. 4 Bur. L.T. 40 = 9 Ind. Cas. 770.

——S. 110—Possession of wrong-doers.

Evidence of acts of ownership over lands in the vicinity or parts of the entire plot, is evidence of *de facto* possession in the case of rightful owners, but hardly in the case of wrong-doers. 6 M.L.T. 139 = 2 Ind. Cas. 931.

——S. 111.

See also (1) CONTRACT ACT, S. 16; (2) PARDANASHIN LADY.

Synopsis.

1. Active confidence.
2. Applicability and scope.
3. Creditor and debtor.
4. Good faith.
5. Husband and wife.
6. Pardanashin, deeds by.
7. Pleader and client.
8. Undue influence.
9. Miscellaneous.

1. Active confidence.

——S. 111—Active confidence—' Unfair advantage.'

The mortgagor mortgaged the property to the son of his Pleader who was engaged by him to conduct the execution proceedings. The money was advanced by the son as his own property :

Held, that the rule embodied in S. 111, Evidence Act would not apply unless it was shown that the Pleader's son ever stood in a position of active confidence to the mortgagor.

Held, also that merely by insertion of a clause in the deed that in addition to the interest, the mortgagor should pay annually Rs. 10,000 in the month of June and a like sum in the month of December with a view to the liquidation of the debt, no unfair advantage could be said to have been taken by the Pleader. A.I.R. 1940 P.C. 204 = I.L.R. (1940) Kar. (P.C.) 419 (Supp.)=67 I.A. 431=1941 O.W.N. 513=1941 A.L.J. 316 = 43 Bom. L.R. 465 = 73 C.L.J. 121 = 52 M.L.W. 777 = 7 B.R. 218 = 1941 M.W.N. 1 = 1940 A.W.R. 158 = 191 Ind. Cas. 94 (P.C.).

——S. 111—Active confidence—Relationship of mistress and paramour.

In a Court of Equity, when a person obtains any benefit from another, whether under a contract or as a gift, by exerting his influence which, in the opinion of the Court, prevents the grantor from exercising an independent judgment in the matter in question, the latter can set aside the contract or recover the gift. The rule must apply to all variety of relations in which the Court is satisfied that the possibility of exercise of dominion and influence exists ; that is, the relation of active confidence justifying the raising of the presumption of undue influence. The relation of paramour and mistress may be included in such cases if the party obtaining the benefit is in a position to dominate and influence the will of the other. A.I.R. 1938 Bom. 304 = 40 Bom. L.R. 132 = 176 Ind. Cas. 187.

——S. 111—" Active confidence " interpretation of.

The words " active confidence " in S. 111, indicate that the relationship between the parties must be such that the one is bound to protect the interests of the other. But the words should, in order that the law may be really protective, receive a wider interpretation. A.I.R. 1935 Cal. 671 = 62 C.L.J. 99 = 40 C.W.N. 45 = 159 Ind. Cas. 133. *See also* A.I.R. 1939 Oudh 67.

——S. 111—Deed in favour of person in active confidence—Onus of proof.

In the case of a deed executed by a *pardanashin* in favour of a person who stands in a position of active confidence to her, burden lies heavily on him to prove that the transaction was free from all attempt at undue influence. A.I.R. 1931 Oudh 103 = 5 Luck. 526 = 8 O.W.N. 55 = 130 Ind. Cas. 861.

——S. 111—Active confidence—Fiduciary relation—Effect of.

Whenever a person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instrument as to require some proof varying in amount according to circumstances, of the absence of anything approaching to imposition, over-reaching, undue influence, or unconscionable advantage. 69 Ind. Cas. 476 = 34 C.L.J. 563 = 26 C.W.N. 517 = A.I.R. 1921 Cal. 131.

——S. 111—Position of active confidence.

Where the affairs of an inexperienced young man who has just come into possession, are being managed by an experienced Muktiyar, the latter stands in a position of active confidence. 8 N.L.R. 150 = 17 Ind. Cas. 363.

2. Applicability and scope.

——S. 111—Applicability and scope.

Section 111 has no application except as between parties to the transaction itself. Where there is a transaction between two persons and one of the parties is in a position of advantage over the other, who puts trust in him, he must, if the other contracting party challenges the good faith of the transaction, prove that

he has not abused that trust. But that does not mean that when a question arises which is entirely outside one of good faith as between the contracting parties, and the transaction is impugned from another angle altogether, merely because a sale takes place between solicitor and client or between persons who have not that special relationship but some other analogous relationship, the method of impugning it should be different or the things to prove should, in any way, be varied. A.I.R. 1938 Rang. 412 = 178 Ind. Cas. 772.

——S. 111—Applicability to wills.

Section 111 applies to the case of a will and burden of proving the good faith of the transaction lies on the propounder. A.I.R. 1936 Cal. 15 = 61 C.L.J. 304 = 160 Ind. Cas. 71.

——S. 111—Applicability—Transferee in active confidence—No question of transferor being pardanashin.

Where a widow makes a gift in favour of her principal *muktiyar* and his brothers, under S. 111, it is for the donees to establish the good faith of the deeds of gift in their favour.

When it is established that a transferee is in the active confidence of the transferor, S. 111, applies whatever the condition of the transferor may be. It is not necessary that the transferor should be a *pardanashin*. A.I.R. 1931 Nag. 69 = 134 Ind. Cas. 259.

——S. 111—Applicability.

Where the vendor had been living separately and was not under the vendee's influence S. 111 does not apply. 85 Ind. Cas. 293 = 6 L.L.J. 408 = A.I.R. 1925 Lah. 123.

——S. 111—Applicability—Good faith under Trust Act, S. 96.

S. 111 of the Evidence Act applies to the question of good faith arising under S. 96 of the Trust Act. (1907) 9 Bom. L.R. 606.

3. Creditor and debtor.

——S. 111—Joint family—Loan—Necessity—Rate of interest—Onus.

In the case of legal necessity, where a joint family is concerned, it is upon the lender to establish that there was legal necessity for the interest agreed upon. But when the borrower is *sui juris* ; the onus is upon him to establish that the bargain into which he entered was vitiated by fraud, undue influence, coercion or things of a similar nature :

Held, on facts and evidence that the plaintiff was not in a position to dominate the will of the defendant or his father. A.I.R. 1939 Pat. 552 = 20 P.L.T. 427 = 181 Ind. Cas. 638.

——S. 111—Expectant heir—Pressure of debts—Onus.

In the case of the expectant heir or of persons under pressure without adequate protection, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract. A.I.R. 1937 P.C. 14 = (1937) 2 M.L.J. 87 = 46 L.W. 291 = 166 Ind. Cas. 834 (P.C.).

——S. 111—Creditor—Domination by—Plea and proof, necessary.

In a suit instituted against the son on a bond executed by his father he expressly denied in his statement that his father was under any necessity to take the loan at the time of the execution of the bond :

Held, that in order to establish that the debt was borrowed under undue influence, it was essential in the first instance to show as a fact that the lender was in a position to dominate the will of the borrower. A.I.R. 1936 Pat. 78 = 2 B.R. 278 = 160 Ind. Cas. 1073.

——S. 111—Creditor and debtor.

Plaintiff, a malguzar money-lender—Suit against tenants—Written statement pleading illiteracy and terrorising influence of plaintiff amounts to plea of undue influence though not raised in words—Burden of proof is on plaintiff. 112 Ind. Cas. 893 = A.I.R. 1928 Nag. 322.

4. Good faith.

——S. 111—Good faith—Burden of proof—Pardanashin lady—Gift by.

A *pardanashin* lady just after attaining majority executed a gift deed in favour of her father who was acting as her guardian. She sued to set aside the deed alleging that the deed was given under a misconception as to its nature and effect :

Held that, it was for the father to prove that the transaction had been entered into in good faith. 1946 O.A. (C.C.) 230.

——S. 111—Contract Act, S. 16 (3)—Burden of proving good faith.

Under S. 111, whenever the good faith of a transaction between persons, one of whom stands to the other in a position of active confidence is in question, there is a presumption against the deed, and the burden of proving good faith is on the person who holds that position of active confidence, but under S. 16 (3) of the Contract Act, the burden of proof is thrown on the person who is in a dominating position only when the transaction appears on the face of it, or on the evidence adduced, to be unconscionable. A.I.R. 1937 Oudh 87 = 1936 O.W.N. 1033 = 12 Luck. 435 = 164 Ind. Cas. 945. *See also* A.I.R. 1937 P.C. 50.

——S. 111—Donee in fiduciary relationship to donor—Good faith—Onus.

Where a gift is executed to a person standing in a fiduciary relationship to the donor, the donee, on the principle enunciated in S. 111, Evidence Act, is bound to establish the good faith of the transaction. The donee may prove that the donor had independent advice or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever. A.I.R. 1935 Cal. 671 = 62 C.L.J. 99 = 40 C.W.N. 45 = 159 Ind. Cas. 133.

——S. 111—Good faith—Gift by invalid to the exclusion of heir.

When people who are nursing an elderly invalid, get a transfer of practically the whole of his remaining property in their favour to the complete exclusion of his heir, the transaction being made without the knowledge of his heir, it is for them to prove the *bona fides* of the transfer. A.I.R. 1933 Rang. 90 = 144 Ind. Cas. 673.

——S. 111—Inexperienced person just attained majority—Dealings with—Good faith—Onus.

When any person deals with one who had just attained majority and is inexperienced, the burden of proving that the contract was made in good faith and for adequate consideration lies on the person who takes benefit of the contract. A.I.R. 1931 Nag. 63 = 27 Nag. L.R. 19 = 132 Ind. Cas. 452.

——S. 111—Subsequent purchaser—Good faith of—Onus.

Where *A* buys property from *B* after *B* has agreed to sell the same to *C*, the onus will be on *A* to show that he bought it in ignorance of the previous contract and in good faith. Where the consideration is paid in full and the vendees are ignorant of the original contract, good faith must be presumed in the absence of evidence to the contrary. 67 Ind. Cas. 888 = 5 L.L.J. 150 = A.I.R. 1923 Lah. 108.

——S. 111—Transaction with person in active confidence—Latter must prove good faith.

The burden of proving the good faith of the transaction is on the party who is in a position of active confidence. It is an elementary principle that, whenever any person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the

Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to anything approaching to imposition, overreaching, undue influence or unconscionable advantage. 68 Ind. Cas. 577 = 26 C.W.N. 177 = 34 C.L.J. 529 = A.I.R. 1922 Cal. 203.

5. Husband and wife.

——S. 111—Mortgage by wife—The burden of proving absence of undue influence is on the party asserting it.

Where a pardanashin lady was possessed of considerable property which she inherited from her father but which was entirely managed by her husband who used to receive and spend the entire income without reaching the lady's hands and whom she used to obey implicitly.

Held, her husband should be deemed to have stood in a position of active confidence to her. The provisions of S. 111 applied to the case and the burden of proving good faith lay on the party stating that the transaction into which she had been led by her husband was free from undue influence. 78 Ind. Cas. 850 = 11 O.L.J. 219 = A.I.R. 1925 Oudh 16.

6. Pardanashin, deeds by.

——S. 111—Deed by pardanashin lady—Stranger and persons in position of confidence.

The cases regarding *pardanashin* ladies fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence ; and secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted ; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. A.I.R. 1939 All. 348 = 1939 A.L.J. 642 = 1939 A.W.R. 889 = 182 Ind. Cas. 801 (2).

——S. 111—Deeds by pardanashin ladies—Rule.

Rule that in case of deeds and powers executed by *pardanashin* ladies, it is essential that those who rely on them should satisfy Court that they have been explained to and understood by the executants, will apply with greater force where the lady is illiterate, young and unexperienced and is liable to be influenced and imposed upon by near relations like her brother or son who are alleged to be men of weak character and immoral habits. A.I.R. 1936 Cal. 721 = 168 Ind. Cas. 137.

——S. 111—Illiterate pardanashin lady—Document by.

In the case of deeds and powers executed by a *pardanashin* lady, it is required that those who rely on them should satisfy the Court that they had, at the time of the execution, been explained to and understood by the executant. It is the duty of every Court to see that defenceless and helpless *pardanashin* ladies should get the same amount of protection as is extended to the weak and the infirm. This principle applies where a guardian sets up a case that on attaining majority, the properties were made over to the ward, a *pardanashin* and illiterate lady who gave a receipt under her thumb-impression. A.I.R. 1934 Cal. 520 = 38 C.W.N. 438 = 152 Ind. Cas. 1073.

——S. 111—Deed by pardanashin lady as guardian—Personal liability clause—Onus.

Where, the guardian, a *pardanashin* lady of a minor, sells property of her ward with the permission of the Court, and there is a clause in the sale-deed implying her personal liability for damages, the clause cannot be enforced against her in the absence of evidence that it was explained to her and she understood that its effect was what was later said to be. A.I.R. 1934 All. 645 = 1934 A.L.J. 350 = 3 A.W.R. 706 = 56 All. 997 = 151 Ind. Cas. 820.

——S. 111—Deeds by pardanashin ladies—Requisites for validity.

The Court, when called upon to deal with a deed executed by a *pardanashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or some person duly authorized by her with a full understanding of what she was about to do ; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered ; and thirdly that she had independent and disinterested advice in the matter. A.I.R. 1933 Pat. 306 = 14 P.L.T. 1 (Supp.) = 12 Pat. 359 = 145 Ind. Cas. 1.

——S. 111—Pardanashin, deeds by.

Execution of power-of-attorney by *pardanashin* lady—Power-of-attorney giving power to mortgage or sell the properties—Mortgage by attorney for necessities—Lady subsequently executing another deed providing for due payment of interest on mortgage and admitting the execution of deed in another document executed by her—Suit by mortgagee to enforce mortgage :

Held, in the circumstances of case, there was *prima facie* evidence that lady had consented to the terms of power-of-attorney and also that mortgage was binding on her and the properties. A.I.R. 1932 P.C. 134 = 62 M.L.J. 649 = 36 C.W.N. 597 = 55 C.L.J. 323 = 34 Bom. L.R. 890 = 35 M.L.W. 783 = 13 P.L.T. 561 = 9 O.W.N. 915 = 140 Ind. Cas. 547 (P.C.).

——S. 111—Pardanashin lady—Deed by—Onus.

Party relying on a deed executed by a *pardanashin* lady must prove that it was the free and intelligent act of the lady, and that she adopted it with full knowledge and comprehension. A.I.R. 1925 P.C. 204, *Foll.* 95 Ind. Cas. 506 = A.I.R. 1926 Nag. 414.

——S. 111—Pardanashin lady—Burden of proof—Plea of undue influence to set aside a deed.

Where the plaintiff is a *pardanashin* lady seeking to set aside a document as being wrought from her by undue influence, the burden of proving that undue influence was not exercised is on the defendants. 72 P.W.R. 1917 = 90 P.R. 1917 = 39 Ind. Cas. 798.

——S. 111—Pardanashin lady—Gift by lady left on mercy of donee—Burden of proof of validity of gift.

Where a Muslim lady gifted away all her property leaving herself for the future at the mercy of the donee, the burden is on the latter to show that she understood the nature of the transaction. 36 All. 333 = 12 A.L.J. 452 = 24 Ind. Cas. 34.

——S. 111—Illiterate woman—Burden of proof.

The mere fact that a woman executing a document is illiterate, does not displace the onus which lay upon her of proving that she did not know the nature of the transaction she was entering into. 2 Ind. Cas. 810 (Mad.).

——S. 111—Pardanashin, deed by—Rule as to—Scope of.

The Court when called upon to deal with a deed alleged to have been executed by a *pardanashin* lady, must before it gives effect to it, satisfy itself upon the evidence, first that the deed was actually executed by her or by some person duly authorized by her with a full understanding of what she was about to do ; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered ; and thirdly, that she had independent and disinterested advice in the matter. This doctrine applies only to the case of execution of a document by a *pardanashin* lady properly so called. If a lady is not a *pardanashin*, or though pardanashin, is literate and of considerable intellectual capacity, the Court will not be inclined to interfere with a deed which has been *prima facie* properly executed by her, or to interfere

with transactions to which her consent has been deliberately given. (1910) 12 C.L.J. 357 = 7 Ind. Cas. 166.

——S. 111—Notice—Notice of document is not notice of contents—Adoption—Onus.

The fact that a person (a *pardanashin* lady) executed certain documents containing collateral recitals which were registered and acted upon does not raise any presumption that the lady was aware of the existence of the recitals in the instruments acted upon. (1908) 9 C.L.J. 172 = 19 M.L.J. 186 = 11 Bom. L.R. 196 = 13 C. W. N. 370 = 36 I.A. 9 = 1 Ind. Cas. 128 = 5 M.L.T. 58 = 31 A. 116 (P.C.).

——S. 111—Privilege—Scope.

The protection given under the Privy Council decisions to *pardanashin* ladies is given to people who are really kept in seclusion and have little or no commerce with the outer world. It is the protection offered to weakness and ignorance. The test is whether the lady understands what she is doing and whether she has had competent and independent legal advice. (1907) 9 C.L.J. 19 = 1 Ind. Cas. 573.

——S. 111—Pardanashin, deeds by.

In the case of deeds executed by *pardanashin* ladies it is requisite that those who rely on them should satisfy the court that they had been explained to and understood by those who executed them. 8 I.A. 39 and 29 C. 749, *foll.* (1906) 8 Bom. L.R. 781 = 31 B. 165.

——S. 111—Deeds and powers by pardanashin ladies —Requisites for enforcement.

In the case of deeds and powers executed by *pardanashin* ladies it is requisite that those who rely on them should satisfy the court that they had been explained to and understood by those who execute them. 8 I.A. 39 at 43, *foll.* (1902) 4 Bom. L.R. 444 = 6 C.W.N. 682 = 29 C. 749 = 29 I.A. 127 (P.C.). [*Also* (1901) 3 Bom. L.R. 658. *Also* 5 C.W.N. 489 = 3 Bom. L.R. 386 = 11 M.L.J. 164 = 28 C. 546 = 28 I.A. 71 (P.C.).]

——S. 111 and C.P.Code, S. 132—Deed by pardanishin.

Law applicable to—Finding that the lady is a *pardanashin*, necessity for. (1902) 4 Bom. L.R. 146.

——S. 111—Deed by pardanashin lady—Onus—Presumption.

When dealing with the case of a will or a deed executed by a *pardanashin* lady a particular and peculiar onus rests upon those who come forward to support the document to show that the executant thoroughly understood what she was doing and was thoroughly and fully acquainted with the terms of the document she was executing. The presumptions as to the knowledge of the executant of the contents of the document she is executing do not equally apply in the case of a *pardanashin* lady as in the case of other persons. (1903) 5 C.W.N. 505 (F.B.).

——S. 111—Independent advice—Nature of liability not understood—Receipt of consideration by lady—Creditor entitled to simple money decree—Simple interest.

Where the evidence showed that a *pardanashin* lady who had executed a mortgage deed (1) did not receive any independent advice and (2) did not fully understand the liability she was incurring (3) but that the money borrowed was made over to her, the High Court (*Knox* and *Aikman, JJ.*) passed a simple money decree with simple interest at the rate of 9 per cent though the bond provided for compound interest with six monthly rests. (1905) 2 A.L.J. 436.

7. Pleader and Client.

——S. 111—Pleader and Client.

Pleader appearing in one or two cases of his client. Pleader's father purchasing property from the client. Pleader and father constituting joint Hindu family. Pleader cannot be said to be permanent pleader and does not stand in a position of active confidence so as to justify the throwing on the Pleader burden of proving good faith of the transaction. Father is not bound to prove *bona fides* of the transaction. 114 Ind. Cas. 806 = 4 Luck. 270 = 5 O.W.N. 1062 = 10 L.R.A. Rev. 230 = A.I.R. 1929 Oudh 67. [*See also* A.I.R. 1931 Nag. 69 = 8 N.L.R. 150 = A.I.R. 1940 P.C. 204.].

8. Undue influence.

——S. 111—Undue influence—Proof—Onus.

The party who pleads undue influence has, in the first instance to prove only that the other by reason of the relationship was in a position to dominate and the transaction appears on the face of it or on the evidence adduced to be unconscionable and then the onus of proving the absence of the use of the position to such a purpose lies on the dominant party. A.I.R. 1938 Nag. 470 = I.L.R. (1938) Nag. 535 = 179 Ind. Cas. 285.

——S. 111—Undue influence—Relationship at the time of transaction raising presumption of.

Where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor, the Court will set aside the voluntary gift unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled the donor to exercise an independent will and which would justify the Court in holding that the gift was the result of a free exercise of the donor's will. (1937) 172 Ind. Cas. 527=1937 A.L.J. 1027 = 47 M.L.W. 99 = 1937 A.W.R. 1155 (P.C.).

——S. 111—Undue influence—Agent and relative—Onus.

The onus of proving undue influence ordinarily rests on the party who sets up the plea. But where a person, as the agent and relative of the parties executing a promissory note in his favour stands to them in a position of active confidence, the burden of proving good faith of the transaction is on the party who is in a position of active confidence. When he fails to discharge the onus, the claim on the promissory note will also fail. A.I.R. 1937 P.C. 50 = 45 M.L.W. 355 = 1937 O.W.N. 319 = 41 C.W.N. 677 = 163 Ind. Cas. 5 = 1937 A.L.J. 575 = 1937 A.W.R. 332 = 39 Bom. L.R. 720 = 65 C.L.J. 295 = 39 P.L.R. 245=1937 M.W. N. 615 = 3 B.R. 335 = (1937) 1 M.L.J. 719 (P.C.).

——S. 111—Unconscionable transaction—Onus of proving undue influence.

If a transaction appears on the face of it or the evidence adduced, to be unconscionable, the burden of proving that such transaction was not induced by undue influence lies upon a person in a position to dominate the will of the other. A.I.R. 1937 Cal. 492 = 174 Ind. Cas. 134.

——S. 111—Undue influence—Stranger—Burden of proof.

Where a third party stands in no confidential relation to the promissor or grantor, the onus does not, in the first instance, lie on the former, to show that no undue influence was used. A.I.R. 1935 Mad. 726 = 41 M.L.W. 228 = 1935 M.W.N. 146 = 58 Mad. 454 = 69 M.L.J. 104 = 158 Ind. Cas. 485.

——S. 111—Undue influence—Onus.

Where there is no serious dispute as to the fact of undue influence, the onus is on him who denies it, to prove that no undue influence was exercised and that the transaction was made in good faith. A.I.R. 1934 All. 507 = 1934 A.L.J. 817 = 3 A.W.R. 302 = 152 Ind. Cas. 146.

——S. 111—Undue influence—Position to dominate the will—Necessity of proof.

Until it has been established that the party against whom undue influence is pleaded was in a position to dominate the will of the other party, no assistance on the issue of undue influence will be available to the latter under S. 16 (3) Contract Act. The burden of proof in such a case remains on the latter. A.I.R. 1932 P.C. 202 = 63 M.L.J. 54 = 33 P.L.R. 611 = 36 C.W.N 994 = 34 Bom. L.R. 1194 = 36 M.L.W. 210 = 56 C.L.J. 55 = 9 O.W.N. 771 = 15 N.L.J. 74 = 137 Ind. Cas. 893 (P.C.).

——S. 111—Undue influence—Plea of—Initial burden.—Shifting of burden.

A document executed under undue influence is not void but only voidable and the onus is in the first instance on the person who raises that plea. Before the onus can shift on the other party to prove that the contract was not induced by undue influence, he has to prove not only that the other party was in a position to dominate his will but that the transaction appeared on the face of it, or on the evidence adduced, unconscionable. A.I.R 1931 Sind 78 = 136 Ind. Cas. 525.

——S. 111—Position to dominate—Manager and Junior member of Hindu joint family of weak intellect.

The plaintiff, who was a person of weak intellect executed in 1914, a deed purporting to be a deed of gift in favour of the defendant, his elder brother, conveying to the defendant his half share in the family property. The defendant agreed to give a cash allowance to the plaintiff, while he was living with the defendant. The plaintiff left the defendant's house in 1923 and instituted a suit to set aside the deed.

Held, that the defendant who was the elder brother and manager of the family, stood in a fiduciary relation to the plaintiff and was in a position to dominate the will of the weak-witted plaintiff and the burden of proving absence was on the defendant. A.I.R. 1931 Oudh 34 = 7 O.W.N. 1129 = 130 Ind. Cas. 119.

——S. 111—Undue influence—Necessary elements—Position of dominating the will and actual unfair advantage are both necessary.

To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it, is erroneous. That merely proves influence. It must be further established that a person in a position of domination has used the position to obtain unfair advantage for himself and thereby caused injury. A.I.R. 1920 P.C. 64, *foll.* 116 Ind. Cas. 899 = 10 Lah. 761 = 30 P.L.R. 288 = A.I.R. 1929 Lah. 309.

——S. 111—Undue influence—Necessary elements.

For establishing undue influence it must be proved that one person was in a position to dominate the will of and exercise his influence over another and secondly that the former did influence the latter. 83 Ind. Cas. 616 = 26 Bom. L.R. 622 = A.I.R. 1924 Bom. 457.

——S. 111—Contract Act, S. 16—Unconscionable bargain—Undue influence—Onus.

Where a transaction entered into under undue influence appears to be unconscionable, the person who is in aposition to dominate the will of another, must prove the want of undue influence. 3 O.L.J. 762 = 38 Ind. Cas. 471.

——S. 111—Undue influence—Onus.

The onus of proving that a Kabuliyat was unfairly obtained lies on the person who alleges it. 8 C.L.J. 135 = 13 C.W.N. 167 = 4 Ind. Cas. 495.

9. Miscellaneous.

——S. 111—Gift—Old lady under influence of donee dying within 24 hours.

Where the donor, a lady aged 72 years, is under the influence of the donee and his father, is suffering from a serious disease and dies within 24 hours of the execution of the deed of gift then it cannot be said that she was in possession of full senses and had a disposing mind at a time when the gift is said to have been made and registered. I.L.R. (1944) Lah. 203 = A.I.R. 1940 Lah. 515 = 42 P.L.R. 644 = 192 Ind. Cas. 739.

——S. 111—Good faith—Stranger purchasing minors' property from guardian—Burden of proof.

A stranger purchasing from a guardian acting under authority from the District Judge, would be entitled to every protection from Courts so long as it is not shown that he acted in a fraudulent or collusive manner, knowing that the debts for the liquidation of which the purchase-money would be applied, were not debts lawfully binding on the minor. The burden of proof would, in such a case, lie heavily on any one seeking to set aside such an alienation. But where the purchasers were themselves the creditors of the family whose debts it was the objects of the alienations to liquidate, the burden of proof is shifted on their shoulders as soon as the plaintiff has established a *prima facie* case. A.I R. 1935 Pat. 74 = 15 P.L.T. 787 = 1 B.R. 381 = 155 Ind. Cas. 81.

——S. 111—Good faith—Onus.

The Court of Chancery always throws upon the purchaser, when the transaction is found to have been effected in circumstances of poverty and ignorance of the vendor and absence of independent advice, the onus of proving that the purchase was fair, just and reasonable. (1935) 158 Ind. Cas. 973 = 18 N.L.J. 67.

——S. 111—Gift by pardanashins—Proof of intelligent execution—Independent advice—Onus.

In the case of a deed executed by a *pardanashin*, the question is not whether she knew what she was doing, has done, or proposed to do, but how her intention to act was produced. Onus is on the person relying on the disposition to establish that the transaction is one which the disponent thoroughly comprehended and deliberately and of her own free will carried out.

There is no absolute rule of law that a deed of gift by a *pardanashin* woman is invalid in the absence of proof that she had independent advice, but the absence of independent advice is a fact to be taken into consideration on the aforesaid issue. A.I.R. 1931 Oudh 146 = 8 O.W.N. 194 = 6 Luck. 619 = 132 Ind. Cas. 337.

——S. 111—Contract Act, S. 19—Registration—Effect of.

Where a person signs a deed and it is registered the burden of proving existence of fraud or misrepresentation lies on him. 1 P.L.W. 466 = 39 Ind. Cas. 500.

——S. 111—Plea of ignorance of the nature of the transaction.

The plea that a *pardanashin*, did not understand the nature of the transaction deprecated as frivolous and as one which is raised almost as a matter of course in any case in which a Hindu lady is concerned. (1903) 8 C.W.N. 362.

——S. 111—Quasi-pardanashin, position of.

A quasi-pardanashin woman, *i.e.*, a woman who, not being of the *pardanashin*, class, is yet close to them in kinship and habits secluded from ordinary social intercourse, is not entitled to the same amount of protection which the law gives to *pardanashins*. Outside the latter class it must depend in each case on the character and position of the individual woman. (1900) 5 C.W.N. 1 = 23 A. 137 = 2 Bom. L.R. 971 = 10 M.L.J. 279 = 27 I.A. 168 (P.C.).

——S. 112.

Synopsis.

1. 'Access' and 'Non-access.'
2. Applicability and scope.
3. Birth during continuance of marriage.
4. Death of husband or divorce.
5. Non-access.
6. Presumption under.
7. Proof.
8. Miscellaneous.

1. 'Access' and 'Non-access.'

——S. 112—"Access."

"Access" does not mean actual sexual intercourse—Presumption can be displaced by proof that the parties to the marriage had no opportunity for intercourse at any time when the child could have been begotten. Husband is competent to give evidence of non-access to his wife. A.I.R. 1944 Mad. 376 = I.L.R. (1945) Mad. 53 = 57 M.L.W. 232 = (1944) 1 M.L.J. 285 = 1944 M.W.N. 487.

——S. 112—"Access" meaning of.

The word "access" in the section means opportunity for sexual intercourse and not actual cohabitation. A.I.R. 1943 Mad. 632 = 56 M.L.W. 383 = (1943) 2 M.L.J. 108 = 1943 M.W.N. 778 = 212 Ind. Cas. 382.

——S. 112—"Access" meaning of.

The word "access" in S. 112, Evidence Act, means no more than opportunity of intercourse. It does not mean actual intercourse. A.I.R. 1942 Nag. 96 = 1942 N.L.J. 254 = 43 Cr.L.J. 717 = I.L.R. (1942) Nag. 383 = 200 Ind. Cas. 766.

——S. 112—"Access"—Meaning of.

The word "access" in S. 112, means actual sexual intercourse. A.I.R. 1935 Lah. 628 = 160 Ind. Cas. 751. [*See also* A.I.R. 1934 M. 310 = 66 M.L.J. 279 = A.I.R. 1932 M. 39 = 61 M.L.J. 878.]

——S. 112—"Access"—"Non-access"—Meaning of.

The word "access" in S. 112, mean effective access, as it is shown by the use of the words "when he could have been begotten," and physical incapacity to procreate, if established amounts to non-access within the meaning of S. 112. A.I.R. 1935 P.C. 199 = 1935 O.W.N. 1261 = 2 B.R. 120 = 69 M.L.J. 868 = 1936 M.W.N. 15 = 43 M.L.W. 7 = 38 Bom. L.R. 1 = 38 P.L.R. 177 = 40 C.W.N. 360 = 1935 A.W.R. 1395 = 159 Ind. Cas. 325 (P.C.).

——S. 112—"Access."

The word "access" means no more than opportunity of intercourse. A.I.R. 1934 P.C. 49 = 11 O.W.N. 229 = 39 M.L.W. 244 = 1934 M.W.N. 199 = 66 M.L.J. 288 = 38 C.W.N. 427 = 1934 A.L.J. 250 = 36 Bom. L.R. 394 = 59 C.L.J. 126 = 3 A.W.R. 319 = 12 Rang. 243 = 147 Ind. Cas. 891 (P.C.).

2. Applicability and scope.

——S. 112—Applicability and scope—Presumption under—If can be drawn by all Courts.

Subject to proof of impossibility of access, the presumption under S. 112 of the Evidence Act shall be drawn by all Courts, Civil, Criminal and Revenue, governed by the Indian Evidence Act. 1950 M.W.N. 341 = 51 Cr.L.J. 931 = A.I.R. 1950 Mad. 394 = 63 L.W. 77 = (1950) 1 M.L.J. 158.

——S. 112—Applicability—Requisite of valid marriage—Valid marriage must be established first.

Where the plaintiff claims to recover property as the son of a person by his lawfully married wife and the defendant denies it, the onus is upon the plaintiff the marriage before invoking the presumption in S. 112. There is no presumption in favour of legitimacy without laying the foundation for it under S. 112, namely, that a valid marriage took place between the parents. A.I.R. 1944 Oudh 162 = 20 Luck. 108 = 1944 O.W.N. 83 = 1944 A.W.R. (C.C.) 27.

——S. 112—Applicability—Dispute as to maternity.

Section 112, Evidence Act, has no application where the maternity of a person is in dispute and not his paternity. A.I.R. 1940 P.C. 93 = 6 B.R. 636 = 21 P.L.T. 519 = 1940 A.W.R. 101 = 52 M.L.W. 57 = 1940 M.W.N. 922 = I.L.R. (1940) Kar. (P.C.) 235 (Supp.) = 72 C.L.J. 263 = 188 Ind. Cas. 1 (P.C.).

——S. 112—Applicability—Presumption under.

The presumption under S. 112, Evidence Act, applies quite irrespective of the fact whether the mother was married or not at the time of the conception. A.I.R. 1937 Lah. 784 = 174 Ind. Cas. 933.

——S. 112—Applicability—Muhammadans.

Section 112, applies by its terms to all classes of persons in British India and no exception is made in favour of Muhammadans. A.I.R. 1936 All. 528 = 1936 A.W.R. 687 = 1936 A.L.J. 911 = 164 Ind. Cas. 290. *See also* under PRESUMPTION A.I.R. 1943 Mad. 632 = (1943) 2 M.L.J. 108.

——S. 112—Muhammadan Law—Rule regarding gestation—Superceded by Evidence Act.

The Rule of Muhammadan Law regarding gestation is a rule of evidence and the Courts are not bound by the Rule of Muhammadan Law in this respect. To such case S. 112 applies. 76 P.R. 1891 and A.I.R. 1923 All. 570, *Rel. on.* 120 Ind. Cas. 495 = A.I.R. 1930 Lah. 97.

——S. 112—Applicability—Scope.

There is no reason for extending the presumption which exists in favour of a marriage and against concubinage, and in favour of legitimacy and against bastardy, to a case in which the validity of the marriage and the legitimacy of the offspring are admitted and where the only point is as to whether the marriage was conducted in such a way as to confer a particular status and precedence upon the offspring of the union. 111 Ind. Cas. 193 = 28 M.L.W. 744 = 5 O.W.N. 1142 = A.I.R. 1928 P.C. 276 (P.C.).

——S. 112—Applicability—Muhammadans.

Where a Muhammadan child was born during the continuance of a valid marriage between its parents, but its birth was within six months of the date of its parents' marriage.

Held, that S. 112 applied and the child was legitimate. 96 Ind. Cas. 582 = 48 All. 625 = 24 A.L.J. 723 = A.I.R. 1926 All. 589.

——S. 112—Scope—If opposed to Hindu Law (Gudaga sons).

Section 112 is not opposed to the personal law of such parties who are allowed to re-marry and divorce according to their personal law. 93 Ind. Cas. 317 = 49 Mad. 553 = 24 M.L.W. 142 = A.I.R. 1926 Mad. 628 = 50 M.L.J. 453.

——S. 112—Applicability—"Fasid", irregular marriages among (Muhammadans).

S. 112 is based on a division of marriages merely into two categories, valid and invalid. If S. 112 is to be held applicable the word "valid" in the section must be construed as "flawless" so that the presumption would not apply to *fasid* marriages. 92 Ind. Cas. 82 = 1 Luck. 71 = 3 O.W.N. 114 = A.I.R. 1926 Oudh 231.

——S. 112—Applicability.

Section applies to Muhammadans. 73 Ind. Cas. 983 = A.I.R. 1923 All. 570.

——S. 112—Applicability—Proof of marriage, necessary.

Presumption of legitimacy arises only on proof of marriage which itself can be inferred from living together or recognition as husband and wife. 79 Ind. Cas. 623 = A I.R. 1925 Mad. 426.

——S. 112—Scope.

Section 112 refers to the point of time of the birth of the child as the deciding factor and not to the time of the conception of that child. The point of time of the conception of the child has to be considered only to see whether the husband had not access to the mother. 81 Ind. Cas. 456 = 20 M.L.W. 69 = 1924 M.W.N. 502 = 47 Mad. 706 = A.I.R. 1924 Mad. 677 = 47 M.L.J. 155.

——S. 112—Applicability—Paternity.

Where the question of paternity, is one of evidence only, the case is governed by S. 112 of the Act and not by the personal law of the parties.

The presumption of legitimacy created by S. 112 can be rebutted only by proof of non-access leaving no room for doubt. If the husband has had access, the wife's adultery will not justify a finding of illegitimacy. Proof of impotence would be equivalent to proof of non-access. (1914) 11 U.B.R. 23 = 16 Cr.L.J. 84 = 26 Ind. Cas. 996.

——S. 112—Applicability—Requisite—Valid marriage.

The legal presumption as to paternity raised by S. 112, Evidence Act, is applicable only to the offspring of a married couple. (1903) 27 M. 32.

3. Birth during continuance of marriage.

——S. 112—Child born in wedlock—Legitimate.

Marriage admitted—Paternity is presumed unless contrary is proved by husband—Onus is on husband and not on wife. (1936) M.W.N. 1130.

——S. 112—Child born in lawful wedlock—Legitimacy—Presumption.

Validity of marriage established—Legitimacy of child is presumed. 100 Ind. Cas. 123 = 38 M.L.T. 39 = 25 M.L.W. 151 = 28 Cr.L.J. 251 = 7 A.I.Cr.R. 351 = A.I.R. 1927 Mad. 361 = 52 M.L.J. 118.

——S. 112—Child of woman in wedlock—Deciding factor.

Section 112 refers to the point of time of the birth of the child as the deciding factor and not to the time of conception of that child. A.I.R. 1924 Mad. 677, *foll.* 98 Ind. Cas. 366 = 7 Lah. 368 = 27 P.L.R. 531 = 8 L.L.J. 447 = A.I.R. 1926 Lah. 529.

——S. 112—Defendant born five and half months after marriage—Legitimate.

Defendant's father was married to the defendant's mother on 2nd August, 1889 and the defendant was born on 23rd January, 1890.

Held, that the defendant being born during the continuance of the marriage between his parents is his father's legitimate son unless it is shown that his parents had no access to each other at any time when he could have been begotten. It is immaterial how soon after the marriage the defendant was born : 79 P.R. 1907, *foll.* 90 Ind. Cas. 123 = 7 L.L.J. 184 = 26 P.L.R. 509 = A.I.R. 1925 Lah. 414.

——S. 112—Child born in wedlock—Second marriage and non-access.

A child born in wedlock should be treated as the child of the father, who was then the husband of the mother, unless it is shown that he had no access to the mother at the time of conception, quite irrespective of the question whether the mother was a married woman or not. Where the mother was married again after dissolution of the first marriage before the child was born, the child is the legitimate son of the second husband. 81 Ind. Cas. 456 = 20 M.L.W. 69 = 1924 M.W.N. 502 = 47 Mad. 706 = A.I.R. 1924 Mad. 677 = 47 M.L.J. 155.

——S. 112—Birth to parents in lawful wedlock—Legitimacy.

When a boy was born about seven months after his father and mother were married and it was not disputed that they had opportunity of access at a time when he could have been begotten by them. *Held*, that the boy was the legitimate son of his parents. 255 P.W.R. 1915 = 26 Ind. Cas. 969.

4. Death of husband or divorce before birth.

——S. 112—Birth of child after husband's death—970 days later.

A child born to a woman 970 days after her husband's death must be held to be illegitimate. A.I.R. 1944 Bom. 40 = 45 Bom. L.R. 992 = I.L.R. (1943) Bom. 706 = 212 Ind. Cas. 232.

——S. 112—Birth after father's death—Child born nine months after death of his father—Legitimate.

The case of the brother of the deceased was that the deceased's widow never had been pregnant at all, and that the story about the birth of a child involved the introduction of a suppositious heir nine months after the death of the husband to a woman who had never been pregnant by her husband or anybody else.

Held, on a consideration of evidence that the child must be taken to be the son of the deceased husband. 123 Ind. Cas. 550 = 32 Bom. L.R. 871 = 32 M.L.W. 8 = A.I.R. 1930 P.C. 139 = 58 M.L.J. 708 (P.C.).

——S. 112—Birth after death of husband—Child born 419 days after.

A son was born to a Mahomedan wife after 419 days after her husband's death.

Held, that the period of gestation is so extraordinarily unusual as to be suspiciously improbable and rebuts all assertions of mother's chastity. 120 Ind. Cas. 495 = A.I.R. 1930 Lah. 97.

——S. 112—Birth after void divorce.

Where divorce in the sense of a legal dissolution of the marriage, has not taken place, a child born must be taken to be born during the continuance of a valid marriage between a woman and her husband. 1930 Cr.C. 88 = 1929 M.W.N. 696 = 126 Ind. Cas. 613 = 2 M.Cr.C. 275 = A.I.R. 1930 Mad. 194.

——S. 112—Divorce and second marriage—Birth of child.

Where a woman is divorced by her first husband and she marries a second husband and a child is born during the subsistence of the second marriage, the child is the legitimate son of the second husband, although he might have been conceived during the first marriage. The date of birth and not that of conception is the test. 93 Ind. Cas. 317 = 49 Mad. 553 = 24 M.L.W. 142 = A.I.R. 1926 Mad. 628 = 50 M.L.J. 453.

——S. 112—Birth within 230 days of father's death.

A child born within 230 days of its father's death, the mother not having re-married in the interval, is presumed to be the legitimate child of the deceased and the onus of proving that the deceased had no access to his wife at or about the time when the child could have been begotten, is on the person who alleges it. 3 O.L.J. 741 = 38 Ind. Cas. 449.

——S. 112—Birth 11 months after cessation of marital intercourse.

A child born 11 months after the marital intercourse between the parents had ceased, is illegitimate. 38 Mad. 466 = (1913) M.W.N. 983 = 25 M.L.J. 594 = 14 M.L.T. 447 = 21 Ind. Cas. 645.

——S. 112—Birth more than 280 days after divorce and after re-marriage.

A child, born more than 280 days after the divorce by her first husband or his death, but within six months of her re-marriage is to be considered legitimate under S. 112 of the Act. 107 P.W.R. 1910 = 78 P.R. 1910 = 146 P.L.R. 1910 = 7 Ind. Cas. 1022.

——**S. 112—Presumption of legitimacy.**

Where a child is born to the widow within 280 days of the husband's death, the mother remaining unmarried during that time, the presumption that the child is the legitimate child of the deceased man is conclusive, unless that presumption is rebutted by clear proof of non-access. (1903) 7 C.W.N. 617 = 5 Bom. L.R. 474 = 25 A. 403 = 30 I.A. 152 (P.C.).

——**S. 112—Person not born but was '*en ventre sa mere*'.**

The onus of proving that a person not born at the time of the testator's death was *en ventre sa mere* at the time lies upon him who avers it. (1903) 6 Bom. L.R. 601 = 29 B. 133.

——**S. 112—Posthumous child, legitimacy of—Birth within 280 days after death of father.**

In cases where the legitimacy of a posthumous child is in question, the child or those claiming under him must prove that he was born within 280 days after death of the father, and those disputing the legitimacy must prove non-access. 4 Bom. L.R. 243 = 29 C. 111 = 6 C.W.N. 146 = 29 I.A. 17 (P.C.).

——**S. 112—Posthumous child—Legitimacy—Period of gestation.**

Where a child born some 365 days after the last period at which he could have been begotten by the husband of his mother was set up as legitimate, it was held that, although such a period of gestation was perhaps not absolutely beyond the bounds of possibility yet their being evidence that the mother had been married to husband for ten years without having had any children by him, and also evidence which pointed strongly to the conclusion of immorality on the part of the mother, the only reasonable finding was against tne legitimacy of the child. 1902 A.W.N. 119 = 24 A. 445.

5. Non-access.

(*a*) Evidence of parent.

(*b*) Onus.

(*c*) Proof.

(*d*) Question of.

5. (*a*) Evidence of parent.

——**S. 112—Evidence of non-access by the wife or the husband—Admissibility.**

There is nothing in S. 112 to show that the husband or the wife is precluded from giving evidence to show that they had no access to each other at any time when the child could have been begotten. In proceedings under S. 488, by a married woman, claiming maintenance for an illegitimate child from its putative father, the evidence of the husband and the wife on the point can be admitted. I.L.R. (1947) 1 Cal. 9 = 226 Ind. Cas. 271 = 50 C.W.N. 916 = 47 Cr. L. J. 870 = A.I.R. 1947 Cal. 183 = 81 C.L.J. 320.

——**Ss. 112 and 118—Husband and wife—If competent witnesses.**

According to S. 112 of the Evidence Act it could be shown that the parties to the marriage had no access to each other at any time which could have led to the conception. This could be established by the statements of husbands and wives who are under S. 118 of that Act competent to testify to any relevant fact. 49 P.L.R. 321.

——**S. 112—Non-access—Husband's evidence to prove illegitimacy of child.**

Quære.—Whether a husband is competent to give evidence to show that a child born to his wife during the continuance of a valid marriage is illegitimate, in suit in which his child's legitimacy is challenged. A.I.R. 1937 Lah. 266 = 174 Ind. Cas. 557.

——**S. 112—Non-access—Applicability of rule in Russell *v.* Russell—Evidence of husband.**

The wording of S. 112, Evidence Act, in no way conflicts with the rule of law in Russell *v.* Russell because it neither says in terms, nor even suggests that it would be open to a husband petitioner himself to give evidence tending to show that he neither had nor could have had access to his wife at the time when the child was conceived. The words "unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten", mean no more than that evidence to that effect may be given but only if such evidence is not otherwise inadmissible. (1936) 163 Ind. Cas. 749 = 62 Cal. 1080 = 39 C.W.N. 1047 (F.B.).

But *see* I.L.R. (1945) Mad. 53; A.I.R. 1949 Mad. 881 = (1949) 1 M.L.J. 426.

——**S. 112—Evidence of parents—Rule does not apply to India.**

The rule of English Law that the declarations of a father or mother cannot be admitted to bastardise the issue born after the marriage is not applicable in India as it is excluded by the terms of the Aet. 95 Ind. Cas. 834 = 28 Bom. L.R. 607 = A.I.R. 1926 Bom. 348.

(*b*) Onus.

——**S. 112—Defence of non-access and physical incapacity—Onus.**

Where the son is born after his mother's marriage to *A*, the onus of establishing, non-access and of *A's* physical incapacity to procreate, lies on those who dispute the son's legitimacy. A.I.R. 1935 P.C. 199 = 1935 O.W.N. 1261 = 1935 A.W.R. 1395 = 2 B.R. 120 = 69 M.L.J. 868 = 1936 M.W.N. 15 = 43 M.L.W. 7 = 38 Bom. L.R. 1 = 38 P.L.R. 177 = 40 C.W.N. 360 = 159 Ind. Cas. 325 (P.C.).

——**S. 112—Non-access—Onus—Access, test of legitimacy.**

Where the marriage between two persons is admitted the only question in deciding the legitimacy of a person alleging to be the son of the marriage is to see whether the husband and wife had access to each other at any time when the son could have been begotten. The burden of showing this is upon those who challenge the legitimacy of the son. Where non-access is not proved at the time the son could have been begotten, the legitimacy of the son cannot be doubted. A.I.R. 1934 P.C. 49 = 11 O.W.N. 229 = 39 M.L.W. 244 = = 1934 M.W.N. 199 = 3 A.W.R. 319 = 66 M.L.J. 288 = 38 C.W.N. 427 = 1934 A.L.J. 250 = 36 Bom. L.R. 394 = 59 C.L.J. 126 = 12 Rang. 243 = 147 Ind. Cas. 891 (P.C.).

——**S. 112—Non-access—Onus—Nature of proof.**

Section 112 lays down the burden of non-access on the person who alleges it, but proof of non-access is not different from any other species of proof under the Evidence Act. It is not necessary to prove non-access by positive evidence as it is a negative fact; it is enough if the evidence is such as to make the Court believe that there was non-access or to consider its existence so probable that a prudent man ought in the circumstances of the particular case, to act upon the supposition that there was no access.

The mother of a child had been driven from her husband's house and had been living apart from him with another person for many years and the husband had married again.

Held, that under the circumstances, the husband had discharged the onus of proving non-access and the onus was on the party alleging legitimacy of the child to prove access. A.I.R. 1932 Mad. 44 = 34 M.L.W. 884 = 1931 M.W.N. 1278 = 61 M.L.J. 874 = 55 Mad. 292 = 135 Ind. Cas. 580.

——S. 112—Proof of non-access—Onus on father.

In a suit for partition, *B* disowned his son *A*, alleging that *A's* mother was living apart from him and that he had no access to her. It was proved that there were counter suits for maintenance and restitution of conjugal rights and that there was a subsequent reconciliation and acknowledgment of legitimacy. *Held*, that the onus of proving non-access lay on the father *B*. (1911) 1 M.W.N. 312 = 10 Ind. Cas. 389.

(*c*) Proof.

——S. 112—Non-access—Proof of—What would amount to—Evidence of husband—Admissibility.

It cannot be said that if a husband proves "non-access" in the sense that he never had intercourse with his wife, he should prove further that he had no opportunity of having intercourse with her. Though a husband might have had an opportunity of intercourse with his wife, if he proves to the satisfaction of the Court that notwithstanding such opportunity he had no actual cohabitation with his wife, he establishes "non-access" within the meaning of S. 112 of the Evidence Act.

The rule that the evidence of the husband is not admissible in bastardy proceedings does not apply to India and hence the evidence of the husband cannot be ruled out. (1944) 1 M.L.J. 285 = I.L.R. (1945) Mad. 53, relied on = 1949 M.W.N. 197 = A.I.R. 1949 Mad. 881 = (1949) 1 M.L.J. 426.

——S. 112—Non-access—Merely living with paramour 4 is no proof.

The presumption of legitimacy can only be rebutted by evidence of non-access. Proof *per se* that the woman was living with the paramour is not evidence of non-access by her husband. A.I.R. 1946 Bom. 110 = 47 Bom. L.R. 832. = I.L.R. (1945) Bom. 871.

——S. 112—Non-access—Proof, mode of.

Since every assumption is to be made in favour of legitimacy of a child who is found to have been born in lawful wedlock, the onus of proving non-access or that of illegitimacy is on the party who alleges the same. The law requires, in such cases, the positive proof of a negative fact, that is, non-access as between the parties to the marriage and the mere fact that they are living separately in two different houses is insufficient to establish non-access. The non-cacess has to be proved like any other physical fact and may be established both by direct and circumstantial evidence of an unambiguous character but unless such evidence is forthcoming, it will not be possible for a Court "to believe it to be probable that there was no access." The fact that the father took no interest in the child by itself is not of much value in establishing illegitimacy nor can the fact whether the father did or did not perform the funeral obsequies of his wife be of much assistance either. A.I.R. 1942 Mad. 129 = 54 M.L.W. 411 = 201 Ind. Cas. 39.

——S. 112—Non-access—Proof of—What amounts to.

To establish illegitimacy of a child under S. 112, it must be shown that the husband had no access to his wife during the period in which the child could be begotten. A statement by the husband merely containing an assertion that the child born to his wife during the valid marriage between the parties is not his, is not sufficient. Similarly a finding merely showing that the husband remained outside the village for long periods, that on his return from one of these periods of absence, he found cause to be dissatisfied with the conduct of his wife and denied paternity of the child is not sufficient to meet the requirements of S. 112. In order to fulfil the requirements of S. 112, it is necessary for the witnesses to make definite statements that during the interval there was no occassion for the wife to meet her husband, in other words that the wife did not go with her husband or that he did not return to the village in the meantime. A.I.R. 1937 Lah. 266 = 174 Ind. Cas. 557.

——S. 112—Physical incapacity—Non-access—Method of proof—Nature of proof.

To establish physical incapacity of the husband, it would be necessary in the first place to prove the precise age of the husband at the date of conception, and in the second place to negative the possibility of premature virility at that age owing to precocious development. A.I.R. 1935 P.C. 199 = 1935 O.W.N. 1261 = 2 B.R. 120 = 69 M.L.J. 868 = 1936 M.W.N. 15 = 43 M.L.W. 7 = 38 Bom. L.R. 1 = 38 P.L.R. 177 = 40 C.W.N, 360 = 1935 A.W.R. 1395 = 159 Ind. Cas. 325 (P.C.).

——S. 112—Non-access—Physical incapacity—Inference from standard in other countries.

On the finding that the husband was 13 at the date of conception, in the absence of proof on non-access, the Court will hesitate to safely infer incapacity to procreate at that age from a standard accepted in other countries. A.I.R. 1935 P.C. 199 = 1935 O.W.N. 1261 = 2 B.R. 120 = 69 M.L.J. 868 = 1936 M.W.N. 15 = 43 M.L.W. 7 = 38 Bom. L.R. 1 = 38 P.L.R. 177 = 40 C.W.N. 360 = 1935 A.W.R. 1395 = 159 Ind. Cas. 325 (P.C.).

——S. 112—Non-access—Method of proof—Consideration of customs and usages.

In dealing with the question of non-access in a case of child marriage among Hindus, much depends on the question whether the case presented on either side is reconcilable with the established customs and usages of Hindus as regards these child marriages :

Held, that the defendants had sufficiently discharged the onus of proving non-access and that the plaintiff was an illegitimate son. A.I.R. 1935 P.C. 199 = 1935 O.W.N. 1261 = 1935 A.W.R. 1395 = 2 B.R. 120 = 69 M.L.J. 868 = 1936 M.W.N. 15 = 43 M.L.W. 7 = 38 Bom. L R. 1 = 38 P.L.R. 177= 40 C.W.N. 360 = 159 Ind. Cas. 325 (P.C.).

(*d*) Question of.

——S. 112—Non-access—Finding on the question—Finding of fact.

Section 112, merely requires proof to the satisfaction of the Court that the parties had no access to each other ; not that there was no possibility of access. Where the Court is satisfied from the evidence that there was no access, it is a pure finding of fact. A.I.R. 1934 Nag. 124 = 150 Ind. Cas. 306.

——S. 112—Non-access—Question of fact—Matter for proof.

In cases of non-access under S. 112 there is no legal presumption, but evidence must be let in to show that the husband could not have connection with his wife at any time she was living with him. (1901) 6 C.W.N. 146 = 4 Bom. L.R. 243 = 29 C. 111 = 29 I.A. 17 (P.C.).

6. Presumption under.

(*a*) Conclusive.

(*b*) Rebuttal.

(*c*) When arises.

6. (*a*) Conclusive.

——S. 112—Presumption under—Conclusiveness—Husband and wife living apart—Wife unchaste.

It is absurd to say that S. 112, has no application to marriages under the Hindu law. There is a presumption

of legitimacy in favour of a child born in lawful wedlock and this presumption is conclusive unless it can be shown that the husband and wife had no access to each other at any time when the child could have been begotten. In the absence of such evidence, the child must be deemed to be legitimate even though the wife was living apart and leading an unchaste life. A.I.R. 1943 Mad. 632 = 56 M.L.W. 383 = (1943) 2 M.L.J. 108 = 1943 M.W.N. 778 = 212 Ind. Cas. 382.

——S. 112—Presumption under—Conclusive for evidence of non-access.

In view of the clear wording of S. 112 if the complainant under S. 488, Criminal P.C. against putative father fails to prove that she and her husband had no access at the time when the child could have been begotten. A.I.R. 1942 Mad. 251 = 43 Cr. L.J. 383 = 1941 M.W.N. 1037 = (1941) 2 M.L.J. 693 = 197 Ind. Cas. 883.

——S. 112—Presumption of legitimacy—Married woman—Conclusive but for proof of non-access—Distinction in cases of widow or spinster and paramour.

If the access of the husband is established, the law does not permit evidence to prove the paternity of the child being other than the husband of its mother. The case of a married woman stands on a different footing from that of a spinster or a widow who may be living as a mistress with somebody. For a mistress, it may be open to prove that the real father of the child born during the period of her concubinage is different from her paramour. In such a case, the presumption which would naturally arise in respect of paternity of the child in favour of the paramour is capable of being rebutted. But the presumption of legitimacy arising in favour of a child born during the continuance of a valid marriage, when the parties to the marriage could have access to each other at any time when the child could have been begotten cannot be rebutted as laid down in S. 112. A.I.R. 1942 Nag. 96 = 1942 N.L.J. 254 = 43 Cr. L.J. 717 = I.L.R. (1942) Nag. 383 = 200 Ind. Cas. 766.

——S. 112—Presumption under—Child of a married woman—Claim for maintenance from putative father.

A married woman claiming maintenance for her children from *P* on ground of his being their putative father—No evidence that her husband had no access to her—Order of maintenance cannot be maintained in the absence of evidence to rebut presumption under S. 112. 1932 M.W.N. 1217.

——S. 112—Presumption under—Conclusiveness—Access, meaning of.

Under S. 112, Evidence Act, when a child is born during lawful wedlock, there is a presumption to start with in favour of legitimacy ; in other words, that the husband had intercourse with the wife at the time when the child must have been conceived. That presumption is a rebuttable one and may be rebutted by showing non-access ; but once access of, or intercourse by, the husband is proved, no evidence will be allowed to show that the child is not the child of the husband.

The word 'access' in S. 112 means sexual intercourse, not mere opportunity of access. A.I.R. 1932 Mad. 39 = 34 M.L.W. 424 = 1931 M.W.N. 755 = 61 M.L.J. 878 = 55 Mad. 243 = 136 Ind. Cas. 36.

——S. 112—Legitimacy—Presumption, conclusive.

Presumption of legitimacy of a person born in lawful wedlock is conclusive unless rebutted by cogent proof of non-access. 56 P.W.R. 1917 = 39 Ind. Cas. 29.

(*b*) Rebuttal.

——S. 112—Presumption under, conclusive—Rebuttal—Onus and proof of non-access.

The mere fact that a woman is immoral or is living in a house separate from that of her husband is having relations with other men is not sufficient to rebut the conclusive presumption of legitimacy which is raised by S. 112 of the Evidence Act, unless it is proved that the husband and wife had no access to each other during the period indicated in the section. The burden of proving such non-access is upon him who asserts it. 1947 A.L.J. 569.

——S. 112—Presumption, conclusive—Rebuttal—Conduct of parents throwing doubt—Birth taking place before *rukhsati* of mother.

The fact that a person's birth took place during the continuance of a valid marriage between his mother and a man is a conclusive proof under S. 112, Evidence Act that he is the legitimate son of that man unless it can be shown that the parties had no access to each other at any time when he could have been begotten. The fact that the birth of the person took place before the *rukhsati* of the mother, the parties being Muhammadans, and the fact that the conduct of his parents threw great doubt on his legitimacy, are not sufficient to rebut the presumption of legitimacy arising under the section. A.I.R. 1942 Oudh 143 = 1941 O.W.N. 1285 = 1941 A.W.R.C.C. 366 = 17 Luck. 416 = 197 Ind. Cas. 560.

——S. 112—Presumption of legitimacy—Rebuttal of.

Where a husband, soon after his marriage, left for another city, and returning back after a month refused to go to the house of his wife and live with her and after more than 280 days from the marriage but during the continuance of the marriage, a child was born to her :

Held, that on the evidence it was clear that the husband did not get access to the wife during the time when the child could have been begotten and consequently the presumption that the child is the child of the husband was rebutted ; the wife was also held not entitled to maintenance. A.I.R. 1937 Rang. 67 = 38 Cr. L.J. 646 = 168 Ind. Cas. 825.

——S. 112—Presumption of legitimacy—Rebuttal.

A presumption under S. 112 is not displaced by any rule of Muhammadan Law. Nor can any evidence that the wife has been leading an improper life suffice to rebut that presumption. Nor again is a statement by the husband that the child then in the womb was not his child and must have been begotten by some one else entitled to any weight. 1937 M.W.N. 957.

——S. 112—Presumption of legitimacy—Rebuttal of.

The marriage took place in 1897. Three months after, the wife deserted and lived with a paramour near her husband's village. It was shown that all through she had been living with her paramour and there had been no access to her husband :

Held, that in the circumstances, the presumption as to the legitimacy of a son born in 1901 was rebutted. A.I.R. 1934 Mad. 318 = 66 M.L.J. 283 = 149 Ind. Cas. 953.

——S. 112—Presumption under—Rebuttal—'Access,' meaning of.

The fact that the husband had opportunity of access to his wife does not lead to an irrebuttable presumption that the husband was the father of a child born to his wife, and it is open to a party who disputes the legitimacy of a child born during lawful wedlock to prove that, in point of fact, such access did not take place between them as by the laws of nature is necessary for the man to be in fact the father of the child.

With regard to legitimacy, there are two presumptions, the presumption in favour of the legitimacy of a child born during lawful wedlock and the presumption of legitimacy arising from access to, that is, actual sexual intercourse with the wife. The former presumption is rebuttable but the latter is not.

In S. 112, Evidence Act, the word 'access' means sexual intercourse and not mere opportunity of access.

A.I.R. 1934 Mad. 310 = 66 M.L.J. 279 = 149 Ind. Cas. 100.

——S. 112—Rebuttal of presumption under.

Claim to succeed to mother's first husband's properties—Plaintiff born after second marriage of mother—Non-access between mother and first husband proved—Presumption under S. 112 is rebutted. 68 Ind. Cas. 465 = A.I.R. 1923 Nag. 43.

——S. 112—Rebuttal of presumption under.

Very cogent evidence is necessary to rebut the presumption raised by S. 112. 63 Ind. Cas. 594 = A.I.R. 1921 Nag. 71.

——S. 112 — Rebuttal — Presumption — Prostitute — Coquette girl.

To rebut the presumption of a child's legitimacy, there must be strong, distinct, satisfactory and conclusive evidence that the husband before or after marriage had not access to his wife. A coquette or a flirt is not necessarily a prostitute. 29 M.L.J. 269 = 17 M.L.T. 357 = 29 Ind. Cas. 178 (F.B.).

——S. 112—Presumption under—Rebuttal—Conclusive proof of non-access necessary to establish illegitimacy.

Illegitimacy could not be positively inferred from a mere litigation for custody of wife when the child is born shortly thereafter; in order to establish the illegitimacy of a person born during the subsistence of a valid marriage between his mother and any man, it should be conclusively shown that the parties to the marriage had no access to each other at any time when he could have been born. 49 P.L.R. 1914 = 137 P.W.R. 1914 = 22 Ind. Cas. 409.

——S. 112—Presumption of legitimacy—If rebutted by age.

It cannot be assumed that in India it is impossible for a man of 70 years of age to beget children. 51 P.R. 1913 = 283 P.L.R. 1913 = 200 P.W.R. 1913 = 20 Ind. Cas. 462.

——S. 112—Presumption as to legitimacy—Rebuttal of.

Where two persons live together as husband and wife, any one alleging that a child born to such persons is illegitimate must prove it. But the onus is shifted by the admission that the woman was the wife of another person and was turned out by him on account of adultery. 19 Ind. Cas. 634 (All.).

(c) When arises.

——S. 112—Presumption—When arises—Absence of proof that mother was lawfully wedded wife of alleged father.

Although it is for the defendants, if they set up a case of illegitimacy, to prove that the plaintiffs are illegitimate, for, the legal presumption being in favour of legitimacy and marriage, the burden of illegitimacy lies on the person interested in making out the illegitimacy, yet where the plaintiffs have failed to prove that the mother of the alleged illegitimate son was the lawfully married wife of the father, the legal presumption cannot be raised in favour of the son and the burden of proof will not shift to the defendants. A.I.R. 1935 Oudh 80 = 1935 O.W.N. 25 = 10 Luck. 499 = 153 Ind. Cas. 349.

——S. 112—Presumption under—When arises—Duty of plaintiff.

It is for the plaintiff to establish all the facts mentioned by S. 112 before he could ask that they should be treated as conclusive proof of his paternity. 68 Ind. Cas. 465 = A.I.R. 1923 Nag. 43.

——S. 112—Presumption of legitimacy—Valid marriage to be proved.

The presumption arises only after it is proved that a child was born during continuance of a valid marriage. 66 Ind. Cas. 902 = 44 All. 470 = 20 A.L.J. 274 = A.I.R. 1922 All. 214.

——S. 112—Plaintiffs claim to be the son—Marriage before birth denied—Onus—Presumption if arises.

The plaintiff set up the case that he was the son of *M* by *I*. The defendants' case was that the union took place after the birth of the plaintiff,

Held, that it was for the plaintiff to prove that *M* was his father and no presumption could be raised in his favour. 61 Ind. Cas. 177 = 8 O.L.J. 27 = A.I.R. 1921 Oudh 81.

7. Proof.

——S. 112—Husband and wife—Acknowledgment when evidence of legal marriage stated—Acknowledgment does not legitimatize any person where marriage between his parents cannot be presumed.

While acknowledgment may be good evidence of a legal marriage in cases where marriage can be safely presumed it cannot be held so to be in the absence of any satisfactory and legal evidence of marriage in cases where the woman is found to be a prostitute and where the connection is found to have been adulterous in its inception. Acknowledgment may be evidence of a legal marriage in certain circumstances but it does not legitimatize any person where a marriage between his parents cannot be in the circumstances presumed. A.I.R. 1946 Lah. 450 = 48 P.L.R. 187 = 223 Ind. Cas. 505.

——Ss. 112, 41 and 13—Parentage—Method of proof—Guardianship proceedings for custody of child—Father not made party—Orders in guardianship proceedings—If relevant.

Where the father was not made a party to the guardianship proceedings for the custody of his child, the orders passed in those proceedings which were not proceeding *in rem*, are inadmissible under S. 41, Evidence Act, in subsequent suit involving the issue of the parentage of the child. Similarly, the order recognizing the right of guardianship cannot be relevant in the subsequent suit under S. 13. Those proceedings might be of value if the father had been notified and failed to allege that he was the father of the child. A.I.R. 1942 Mad. 129 = 54 M.L.W. 411 = 201 Ind. Cas. 39.

——Ss. 112 and 114—Legitimacy—Proof of—Entries in birth register signed by father.

Entries in a birth register under the signatures of the father or his servant or some other relation raise a presumption that the child born was legitimate for, when a man speaks of a child born to him, he means child born legitimately. 1937 M.W.N. 1282.

——S. 112—Marriage—Proof of—Legitimacy—Evidence by parents.

When acknowledgment by the father is proved, the onus is on those who deny a marriage to prove that no marriage had taken place.

Where a child establishes the position of filiation, which is the acknowledgment of the parents and habit and repute, everything must be presumed in his favour and this includes legitimacy. A.I.R. 1933 Lah. 520 = 34 P.L.R. 914 = 146 Ind. Cas. 198.

——S. 112—Parentage—Acknowledgment by parents—Shifting of burden.

Where parentage of the plaintiff is challenged, though the burden is initially on him to show that he was the son of his parents, it is shifted on to the defendants as soon as he shows that he has been acknowledged by his parents to be their son and that he has been accepted as such by repute and habit for the last many years and it would require much clearer and stronger and more reliable evidence on the defendant's part to justify a finding against the plaintiff's paternity. 102 Ind. Cas. 713 = A.I.R. 1927 Mad. 733.

——Ss. 112 and 114—Legitimacy—Continuance of marriage—Presumption—Divorce—Burden of proof.

It is well recognized rule of law that when a particular relationship is shown to exist, such as marriage, then its continuance must, *prima facie*, be presumed. For the purposes of S. 112 of the Evidence Act, the burden of proving that the divorce of the plaintiff's mother took place at a time which disentitles him from relying on the section lies on the defendants, and it is not the plaintiff's duty to show when the divorce took place. If the defendants are unable to show that the divorce took place at a time which excludes the plaintiff from the operation of S. 112, then the conclusive proof in favour of the plaintiff arises and can only be displaced by its being shown that the parties to the marriage had no access to each other at any time when the plaintiff could have been begotten by the husband of his mother. (1904) 7 Bom. L.R. 95.

8. Miscellaneous.

——S. 112—Legitimacy of child—'Fasid' marriage—No presumption under section but under Muhammadan Law.

Under the presumption of Muhammadan Law in the case of a *fasid* marriage a child born on the expiry of six months of copula is to be regarded as legitimate. 92 Ind. Cas. 82 = 1 Luck. 71 = 3 O.W.N. 114 = A.I.R. 1926 Oudh 231.

——S. 112—Legitimacy—Rule of Muhammadan Law—Rebuttable presumption arises—Muhammadan Law.

Where it was found that the plaintiff was born 331 days or eleven full months after his alleged father's death and that his mother had been living for the previous few years in illicit connection with another person.

Held, that the plaintiff-appellant was not the legitimate son of the alleged father. 82 Ind. Cas. 592 = A.I.R. 1923 All. 440.

——Ss. 112 and 114—Legitimacy—General presumption.

Where a party admits the paternity of the other party but pleads that he is of illegitimate descent, the legal presumption being in favour of legitimacy, the onus lies on the party alleging illegitimacy to prove it. 4 O.L.J. 556 = 43 Ind. Cas. 478.

——S. 112—Mahomedan Law—Legitimacy—Presumption.

A child begotten by *zina* cannot be made legitimate by the subsequent marriage of its parents before its birth, and S. 112 of the Act is inapplicable to Mahomedans. 15 N.L.R. 1 = 43 Ind. Cas. 883.

——S. 112—Presumption as to legitimacy and marriage—Burden of proof.

There is a legal presumption in favour of legitimacy and marriage and the burden of proving illegitimacy is on the person interested in making it out. 1 O.L.J. 89 = 23 Ind. Cas. 972.

——S. 112—Date of conception.

S. 112 refers only to a presumption of legitimacy and has no reference to date of conception. If the son wants to rely on the defence that he was conceived before the date of an alienation by the father he must prove it by clear and satisfactory evidence. 27 M.L.J. 580 = 16 M.L.T. 508 = 26 Ind. Cas. 61.

——S. 112—Legitimacy—Period of gestation.

In the absence of inherent impossibility of gestation of 330—333 days, a child born within that period from the last access of a husband is legitimate. So the mere circumstance of a child's birth within that period from the last access of the husband is insufficient to charge the wife of the offence of adultery if there is no other proof to support it. 77 P.R. 1911 = 260 P.W.R. 1911 = 12 Ind. Cas. 946.

——S. 114.

A. Synopsis.

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(1) Applicability.

——S. 114—Applicability.
S. 114, Evidence Act, applies not only to civil suits but also to criminal cases. A.I.R. 1940 Sind 42 = 41 Cr. L..J 401 (2) = 187 Ind. Cas. 127.

——S. 114—Applicability—Admission of execution on blank paper—Presumption.
Where it is shown either by proof or admission that the thumb-impression on the hand-note sued on is that of the defendant, but the defendant alleges that he put his impression only on a blank piece of paper, no presumption of any kind can be raised in favour of the plaintiff under S. 114, Evidence Act, Even assuming it is one of those cases contemplated by the section, the section is only permissive and not mandatory; the Court may refuse, having regard to the circumstances and to the evidence let in to rebut the plaintiff's case, to raise any such presumption. A.I.R. 1931 Pat. 219 = 12 P.L.T. 233 = 134 Ind. Cas. 635.

——S. 114—Applicability—Deed attested by more than two witnesses—One of them proving attestation—Presumption as regards other.
Where a deed is attested by more than two witnesses and one of the attesting witnesses proves its due execution and attestation and on his evidence, it is marked as an exhibit without objection, from the mere fact that another attesting witness who is subsequently examined does not formally prove attestation, it cannot be presumed that he did not in fact attest the deed. A.I.R. 1939 Pat. 555 = 5 B.R. 613 = 181 Ind. Cas 572

——S. 114—Applicability—Woman sleeping in room containing two cots—Court, if can presume that her husband must have slept on other cot on a particular night.
S. 114 is no justification for a Court presuming, without evidence that because a woman sleeps in a room with two cots, her husband, an inmate of house has slept on the other cot on a particular night. A.I.R. 1939 Sind 130 = 40 Cr. L.J. 661 = 182 Ind. Cas. 464.

——S. 114—Applicability.
Patwari receiving excess amount on account of land revenue—Amount neither credited nor returned but kept with himself:
Held, that the presumption under S. 114 would be that it continued to remain with him. A.I.R. 1938 Nag. 445 = 1938 N.L.J. 259 = 39 Cr. L.J. 895 = I.L.R. (1939) Nag. 180 = 177 Ind. Cas. 396.

——S. 114—Applicability.
Where, on raiding a house besides recovering certain slips of paper which were found to be instruments of gaming, two witnesses deposed to the effect that they staked money and the stakes had been accepted by the accused, it can be concluded that the instruments of gaming were kept or used for such purpose. A.I.R. 1933 All. 554 = 1933 A.L.J. 1254 = 34 Cr. L.J. 1244 = 146 Ind. Cas. 293.

(2) Attestation.

——S. 114—Attestation—Attesting witness, if can be presumed to have knowledge of contents.
An attesting witness cannot be presumed, from a mere fact of attestation, to be aware of the contents of the document, much less to a mere recital of boundaries. A.I.R. 1938 Lah. 97 = 177 Ind. Cas. 966.

——S. 114—Attestation—Attesting witness—If presumed to have knowledge of contents.
Attestation by a reversioner of a conveyance by a Hindu widow does not import knowledge of the contents of the deed. Consent to the transaction should not be imputed to the attestor nor does it operate as an estoppel. 44 Cal. 186 = 20 M.L.T. 335 = 31 M.L.J. 563 = (1916) 2 M.W.N. 336 = 4 L.W. 458 = 18 Bom. L.R. 868 = 14 A.L.J. 1103 = 24 C.L.J. 487 = 1 Pat. L.W. 1 = 21 C.W.N. 225 = 10 Bur. L.T. 177 = 36 Ind. Cas. 420 = 43 I.A. 249 (P.C.).

——S. 114—Attestation—No presumption of knowledge of contents.
The mere fact that a person witnessed a document does not prove that he had knowledge of its contents. 25 A. 296 = 1903 A.W.N. 50.

(3) Common ancestry.

——S. 114—Common ancestry—Pedigree.
Where the name of the common ancestor appears in the pedigree-table and where his sons are found to be in joint possession of the property holding equal shares, the presumption is that the common ancestor held the property. 116 Ind. Cas. 315 = A.I.R. 1928 Lah. 964.

——S. 114—Common ancestry—Pedigree.
The mere mention of a common ancestor in a pedigree table is not of itself sufficient to prove that all the land in the possession of his descendants descended from that common ancestor. 74 Ind. Cas. 685 = 5 L.L.J. 190 = A.I.R. 1923 Lah. 355.

——S. 114—Common ancestry—Presumption.
Where the predecessors of the parties are shown (*a*) to possess holdings of nearly equal size, almost consecutive; (*b*) hold equal shares in the shamilat khata and (*c*) occupy a joint compound they are presumed to be descended from the same common ancestor. 60 P.W.R. 1909 = 4 Ind. Cas. 549.

(4) Common course of events.

——S. 114—Common course of events—Adultery—Presumption.
Dictum.—When a man and a woman are found together under suspicious circumstances, it cannot be presumed that they are saying their prayers. A.I.R. 1933 All. 427 = 1933 A.L.J. 1108 = 55 All. 597 = 143 Ind. Cas. 890.

——S. 114—Common course of events—Adultery—Presumption.
A Court may safely presume adultery if a guilty attachment is found to subsist between the parties and that opportunities had occurred when a guilty intercourse might with facility have taken place. 9 Bur. L.T. 74 = 33 Ind. Cas. 118.

——S. 114—Common course of events—Survey entries—Inconsistency in two entries regarding possession of parties—Presumption as to change of possession between two entries.
Where there are two inconsistent survey entries regarding the possession of the parties, each must be presumed to be incorrect at the time that it was made, and the change of possession must, therefore, be held to have occurred at some time between the entries, but this is true only when the only evidence before the Court are the entries in the survey papers. But when there is other evidence on the record, it has to be decided whether this other evidence is preferable to the evidence afforded by the survey papers. A.I.R. 1942 Pat. 372 = 8 B.R. 501 = 199 Ind. Cas. 144.

——S. 114—Common course of events—Presumption that child was born alive.
No presumption under S. 114, Evidence Act, that the child born was born alive can be reasonably made especially in the case of a young woman giving birth to her first child and entirely unattended during the

process. A.I.R. 1941 Pesh. 22 = 42 Cr. L.J. 381 = 1941 Pesh. L.J. 22 = 193 Ind. Cas. 284.

——S. 114—Common course of events.

Human nature being what it is, whenever one finds a young man abducting a girl of marriageable age, the first and natural presumption must be that he has abducted her with the intention of having sexual intercourse with her either forcibly or with her consent after seduction or after marrying her. A.I.R. 1938 Lah. 474 = 40 P.L.R. 730 = 39 Cr. L.J. 844 = 177 Ind. Cas. 97.

——S. 114—Common course of events.

Where in the police party there were several senior officers of police and the witnesses for search were chosen :

Held, that it must be presumed that the witnesses have been properly chosen. A.I.R. 1935 Rang. 233 = 36 Cr. L.J. 1228 = 157 Ind. Cas. 798.

——S. 114—Common course of events.

S. 114, enables a Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in relation to the facts of the particular case. If articles, which are of foreign production, are found exhibited by vendors within Municipal limits it is permissible to presume that they had paid octroi duty on such goods when the same were originally imported. A.I.R. 1934 All. 318 = 3 A.W.R. 543 = 147 Ind. Cas. 1199.

——S. 114—Common course of events.

A child born in India must, under ordinary circumstances, he presumed to have his father's religion and his corresponding civil and social status. A.I.R. 1931 Oudh 177 = 8 O.W.N. 349 = 136 Ind. Cas. 642.

——S. 114—Common course of events—Ghee.

The Court is entitled to take for granted, when, it is not denied, that ghee is an article intended for human consumption. It is possible that it can be employed for remote or extraordinary purposes but the ordinary presumption that ghee is intended for human consumption is not a presumption of law but a supposition based on common sense when there is no assertion to the contrary. 49 C.L.J. 502 = A.I.R. 1929 Cal. 283.

——S. 114—Common course of event—'Common' course—Meaning.

The course of conduct which S. 114, calls "common" can be only that which is most common in the experience of the Judge who has to decide the point. 107 Ind. Cas. 203 = 24 N.L.R. 87 = A.I.R. 1928 Nag. 52.

——S. 114—Common course of events—Food partaken at evening meal by husband.

It is a violent presumption drawn from one's knowledge of human nature and of Indian village life which it is the duty of a tribunal in a case of dhatura poisoning to apply, namely, that the food partaken at the evening meal by a husband in an ordinary constituted house is prepared for him and served to him by his wife. 97 Ind. Cas. 44 = 49 All. 57 = 24 A.L.J. 958 = 27 Cr. L.J. 1068 = 7 L.R.A. Cr. 156 = A.I.R. 1926 All. 737.

——S. 114—Common course of events—Sending cheques by post.

From the mere fact that cheques were sent from time to time by post in the ordinary course of business to a certain person it cannot be inferred that there was any implied request from that person to send cheques by post. 93 Ind. Cas. 619 = 50 Bom. 118 = 28 Bom. L.R. 226 = A.I.R. 1926 Bom. 262.

——S. 114—Common course of events—Hindu Law—Ascetic ceremonies—Presumption.

Where a ceremony is admittedly performed, the presumption is that it was performed in accordance with the shastras. 96 Ind. Cas. 26 = 23 M.L.W. 664 = 1926 M.W.N. 938 = A.I.R. 1926 Mad. 744.

——S. 114—Common course of events.

The fact that a man is arrested in the district where an offence has been committed many months after its commission does not in any way lead to any inference against him. 86 Ind. Cas. 347 = 7 L.L.J. 51 = 26 Cr. L.J. 763 = A.I.R. 1925 Lah. 371.

——S. 114—Common course of events.

An inference of approbation of a book of an objectional character by persons having access to the library of an individual or association, possessing it, is not necessarily justifiable. 15 C.L.J. 517 = 13 Cr. L.J. 609 = 16 C.W.N. 105 = 16 Ind. Cas. 257.

(5) Compliance with law.

——S. 114—Compliance with law—Thing prescribed by statute.

There is no impropriety in referring a thing as having been done when that thing is required to be done by a section in a statute. 96 Ind. Cas. 1039 = 24 A.L.J. 825 = A.I.R. 1926 All. 369 (F.B.).

——S. 114—Compliance with the law.

In the absence of evidence to the contrary the presumption is that the law was complied with. (1906) A.W.N. 194, Rel. 39 All. 707 = 15 A.L.J. 757 = 42 Ind. Cas. 589 (F.B.).

(6) Conflict of presumptions.

——S. 114—Conflict of presumptions.

Where there are two presumptions and both are equally balanced the Court must prefer that which best accords with facts. 37 Bom. 513 = 15 Bom. L.R. 533 = 20 Ind. Cas. 162.

(7) Co-obligees on a money bond.

——S. 114—Co-obligees on a money bond—Presumption of tenancy in common rebuttable.

The presumption in a case of joint obligees of a money bond is that they are entitled to the debt and security, if any, in equal shares as tenants in common, and such presumption is rebuttable. (1902) A.W.N. 216 = 25 A. 155.

(8) Corroboration.

——S. 114—Corroboration—Unnecessary.

Where the law provides that a presumption arises under certain circumstances, that presumption must arise independently of whether there is any corroboration or not. 52 Ind. Cas. 480 (Cal.).

(9) Criminal trial.

——S. 114—Criminal trial—Delay in prosecution—Presumption—Right of accused.

The delay as such cannot raise a presumption against the prosecution, although the accused is entitled to say that in construing the evidence, presumptions are permissible to fill in, in his favour, the details obliterated by time. A.I.R. 1946 All. 227 = 1945 A.W.R. (H.C.) 298 (2).

——S. 114—Criminal trial.

No adverse inference can be drawn against an accused person for his not proving the report which he is alleged to have made to the Police. A.I.R. 1944 Sind 137 = 46 Cr. L.J. 19 = I.L.R. (1944) Kar. 114 = 215 Ind. Cas. 172.

——S. 114—Criminal trial—Accused illiterate—Special care as to inference.

Special care must be taken in the case of accused persons whose illiteracy or ignorance, when they come

from a primitive part of the country, may militate against them, to see that they are protected from such inferences as could only safely be drawn against persons of a higher degree of intellect and education. A.I.R. 1936 Rang. 455 = 37 Cr. L.J. 1137 = 165 Ind. Cas. 319.

——**S. 114—Criminal trial.**

Presumption is that the accused is innocent. A.I.R. 1935 Cal. 101 = 39 C.W.N. 259 = 36 Cr. L.J. 615 = 62 Cal. 384 = 154 Ind. Cas. 1006.

——**S. 114—Criminal trial.**

Where one of the accused did not explain the circumstances appearing against him, in a case of theft along with other accused, inference of a guilty common intention can be drawn. Such inference is not unwarranted even in the absence of an overt act on his part at the time of theft. 1934 M.W.N. 956.

——**S. 114—Criminal trial—Presence of injuries on body of person—Inference.**

It cannot be presumed merely from the circumstance that a person has injuries on his body, that he was present at the scene of occurrence. A.I.R. 1938 Lah. 150 = 39 Cr. L.J. 426 = 174 Ind. Cas. 431.

——**S. 114—Criminal trial—Finger-prints of man found upon piece of stolen property.**

It is more than doubtful if any presumption under S. 114, can arise against any person merely because his finger-prints were found upon a piece of stolen property. A.I.R. 1941 Cal. 479 = 43 Cr. L.J. 64 = 196 Ind. Cas. 679.

——**S. 114—Criminal trial—Blood-stains on clothes of accused.**

Presence of blood-stains on clothes of villager is not enough to found conviction for murder though it is important corroborative evidence when he is directly implicated by other evidence or circumstances. A.I.R. 1938 Nag. 52 = 39 Cr. L.J. 105 = 172 Ind. Cas. 213.

——**S. 114—Criminal trial—Blood-stained garments recovered from *zemindar's* house—His connection with murder, if can be presumed.**

The presence of a few blood-stains on a garment found in the house of a *zemindar* does not necessarily connect him with a murder. A.I.R. 1934 Lah. 171 = 36 Cr. L.J. 491 = 154 Ind. Cas. 224.

——**S. 114—Criminal trial.**

Person carrying in his cart dacoits, one of whom being injured and having blood-stains on clothes soon after dacoity—Unless he explains circumstances presumption is that he knew of part taken by those persons in dacoity and that one injured was injured in dacoity. 124 Ind. Cas. 553 = A.I.R. 1930 All. 431.

——**S. 114—Criminal trial.**

Evidence of eye-witnesses not on good terms, with accused should not be relied upon unless corroborated. 30 P.L.R. 582 = A.I.R. 1930 Lah. 311.

——**S. 114—Criminal trial.**

Where the prosecution witnesses are found to be untruthful as to the greater part of their evidence it is dangerous to convict the accused on the residue without corroboration. A.I.R. 1930 Oudh 460. = 7 O.W.N. 933 = 128 Ind. Cas. 211.

——**S. 114—Criminal trial—Agent provocateur as witness.**

The evidence of an agent provocateur is looked upon with suspicion and should be seldom relied upon in support of a conviction. 118 Ind. Cas. 544 = 11 L.L.J. 58 = 30 Cr. L.J. 941 = 30 P.L.R. 603 =1929 Cr. C. 3 = A.I.R. 1929 Lah. 436.

——**S. 114—Criminal trial—Witnesses relations of co-accused.**

Where four men are suspected and relatives of three try to implicate the fourth alone who is a stranger they are naturally suspected of *bias* and the principle universally adopted in the case of co-accused comes into play and a Court should require some independent corroboration before accepting the evidence. 1929 Cr. C. 539 = A.I.R. 1929 Sind 245.

——**S. 114—Criminal trial.**

Conviction should not be based on the evidence of witnesses who are bitter enemies of the accused unless it is supported by the evidence of reliable and disinterested witnesses. 99 Ind. Cas. 75 = 28 Cr. L.J. 43 = A.I.R. 1927 Lah. 874.

——**S. 114—Criminal trial.**

In a criminal case Courts are not permitted to proceed upon an assumption that accused actually did what they were required by the rules to do. 91 Ind. Cas. 833 = 30 C.W.N. 94 = 27 Cr. L.J. 147= A.I.R. 1926 Cal. 345.

——**S. 114—Criminal trial.**

An attempt to fabricate false evidence of *alibi* would be a very strong piece of evidence against the accused if his connection with such attempt had been established. But where the attempt was proved only against his co-accused no such connection should be presumed. 86 Ind. Cas. 344 = 7 L.L.J. 48 = 26 Cr. L.J. 760 = A.I.R. 1925 Lah. 323.

——**S. 114—Criminal trial—Penal Code, S. 408—Servant—Failure to account properly for property entrusted—Presumption of misappropriation.** 84 Ind. Cas. 331 = 2 Rang. 476 = 26 Cr. L.J. 267 =A.I.R. 1925 Rang. 47.

——**S. 114—Criminal trial—Possession of cocaine.**

Where cocaine was found in certain pots containing grain in a Bania's shop where the accused who were brothers were serving habitually in the shop.

Held, that they must have been daily handling the pots in question and that therefore the finding that both of them must have been aware of the existence of the cocaine in the pot is justifiable. 83 Ind. Cas. 892 = 5 L.R.A. Cr. 136 = 26 Cr. L.J. 188 = A.I.R. 1924 All. 776.

——**S. 114—Criminal trials.**

When a man points out unknown matters to others, one may presume that he is connected with the crime unless he can give some satisfactory explanation as to how he comes by that knowledge. 84 Ind. Cas. 643 = 24 Bom. L.R. 803 = 47 Bom. 74 = 26 Cr. L.J. 339 = A.I.R. 1923 Bom. 183.

——**S. 114—Criminal trial—Presumption as to probability.**

Where the accused gave the deceased a beating the previous day and were seen by various persons on the occasion, it is highly improbable that they would murder the person next day so to invite suspicion. 75 Ind. Cas. 733 = 6 L.L.J. 486 = 25 Cr. L.J. 45 = A.I.R. 1923 Lah. 436.

——**S. 114—Criminal trial.**

An accused was convicted under S. 412, Penal Code, and the Judge, holding that he must be presumed to have known the nature of the dacoity, sentenced him to the maximum punishment,

Held, that the sentence was excessive as the presumption alone would not justify fixing the accused with more than knowledge that the goods recovered from him had been obtained by dacoity. 59 Ind. Cas. 204 = 22 Cr. L.J. 60 = 32 C.L.J. 89.

——**S. 114—Criminal trial—Absconding accused—Presumption.**

No presumption as to guilt can be raised from the fact that the accused has absconded. 31 P.W.R. 1913 = 314 P.L.R. 1913 = 14 Cr. L.J. 601 = 21 Ind. Cas. 473.

younger. A.I.R. 1939 Sind 234 = I.L.R. (1939) Kar. 509 = 183 Ind. Cas. 717.

——S. 114—Criminal trial.

Intending natural consequences of one's act—Knowledge or ignorance of results—*See* Penal Code S. 441. 4 Bom. L.R. 280 = 26 B. 558.

(10) Custom.

——S. 114—Custom—Riwaj-i-am—Presumption under, is rebuttable.

The riwaj-i-am creates at best a rebuttable presumption only and whether a certain presumption of law is rebutted by the production of evidence by the parties or not, is a question of fact, and can, therefore, be determined finally by the District Judge. A.I.R. 1938 Lah. 785 = 179 Ind. Cas. 534.

——S. 114—Custom—Wajib-ul-arz and Riwaj-i-am—Entries in.

Entries in Wajib-ul-arz and Riwaj-i-am relating to question of custom are presumptive proof of the custom stated therein. It is therefore for the person rebutting it to prove that the statement of the custom in them is incorrect. 109 Ind. Cas. 59 (Lah.).

——S. 114—Custom—Applicability of Hindu Law to Muslims.

There is a presumption that Muslims are governed by Muhammadan Law, and if a person alleges that Cutchi Memons are governed by Hindu Law by custom the burden of proving the customs lies on him and the onus will be discharged by proof of actual instances in which the alleged custom has been followed. 93 Ind. Cas. 321 = 19 S.L.R. 376 = A.I.R. 1926 Sind 161.

——S. 114—Custom.

Where an agricultural tribe in a village community live by agriculture, a presumption is in favour of custom. 64 Ind. Cas. 180 = 4 U.P.L.R. (Lah.) 6.

(11) Death.

——S. 114—Death—There can be a presumption of death irrespective of S. 108.

S. 108 provides that in certain circumstances a rebuttable presumption of law arises as to death. It does not follow that if those circumstances do not exist there cannot be a presumption or inference of fact, under S. 114, Evidence Act, as to death. 103 Ind. Cas. 329 = A.I.R. 1927 All. 687.

——S. 114—Death—Common calamity.

Where two persons perish in common calamity such as an earthquake, and the question arises as to who died first, in the absence of evidence on the point, there is no persumption in law that the younger survived the elder. Such a question is always a question of fact. A.I.R. 1944 P.C. 100 = 11 B.R. 162 = 57 M.L.W. 608 = 1944 M.W.N. 661 = (1944) 2 M.L.J. 354 = 49 C.W.N. 52 = 47 P.L.R. 20 = 1944 A.L.J. 513 = I.L.R. (1945) Kar. (P.C.) 36 = 71 I.A. 171 = 216 Ind. Cas. 262 (P.C.).

——S. 114—Death—Common calamity.

There is no presumption of law arising from age or sex as to survivorship among persons whose death was occasioned by one and the same cause, *e.g.*, common boat disaster, nor is there any presumption that all died at the same time. The question is one of fact depending wholly on evidence, and if the evidence does no establish the survivorship of any one, the law will treat it as a matter incapable of being determined, the onus of proof being on the person asserting the affirmative. A.I.R. 1944 Cal. 132 = 77 C.L.J. 209 = 212 Ind. Cas. 222.

——S. 114—Death—Common calamity.

Where mother and daughter have together met with their death in earthquake and there is no reliable evidence to prove which of the two died first, there can be no presumption in law that the elder died before the

——S. 114—Deaths—Order of.

Where two persons, one aged 18 and the other 60 are found to have died on the same day, but it is not clear as to who died last, a Court is entitled to say that the probabilities are in favour of the younger man surviving the elder. 77 Ind. Cas. 117 = 24 Bom. L.R. 836 = 47 Bom. 37 = A.I.R. 1922 Bom. 347.

——S. 114—Death—Order of—Presumption.

The ordinary presumption is that the elder man died first. 18 Ind. Cas. 814 (Cal.).

(12) Debtor and creditor.

——S. 114—Debtor and creditor—Payment towards principal on certain date—Payment of interest up to that date—Presumption.

The fact that a certain sum is paid towards the principal on a certain date does not justify the conclusion that interest up to that date has been paid. In fact, it is not a matter of presumption or inference at all. I.L.R. (1950) 2 Assam 137 = A.I.R. 1950 Assam 216.

(13) Decree for cess at one rate.

——S. 114—Decree for cess at one rate—Rate at which tenant is to pay in subsequent years ; *See* 28 C. 109.

(14) Dedication.

——S. 114—Dedication—Temples in Malabar.

In the greater part of the Madras Presidency, where private temples are practically unknown, the presumption is that temples and their endowments form public charitable trust. But in Malabar, there is no presumption one way or the other. A.I.R. 1934 P.C. 230 = 11 O.W.N. 1150 = 40 M.L.W. 428 = 61 I.A. 405 = 1934 M.W.N. 1055 = 67 M.L.J. 788 = 58 Mad. 91 = 60 C.L.J. 344 = 39 C.W.N. 518 = 4 A.W.R. 425 = 151 Ind. Cas. 329 (P.C.).

——S. 114—Dedication.

Where for a number of years, prayers were offered by the public in a mosque close by tomb, and an annual *uras* attended by *momins* had been regularly held, the mosque and the tomb must be presumed to have been duly dedicated and to have become *wakf* by user and this presumption might fairly be extended to other buildings and lands enclosed within the compound wall which might be regarded as appurtenant to the tomb. A.I.R. 1934 Bom. 257 = 36 Bom. L.R. 526 = 152 Ind. Cas. 50.

(15) Deposit or loan.

——S. 114—Deposit or loan—Remittance of money.

Where money is remitted to a person there is no presumption that the transaction was on of deposit and not of loan. 107 Ind. Cas. 290 = A.I.R. 1928 Mad. 499.

——S. 114—Deposit or loan.

Where there is a doubt as to whether a transaction amounts to a loan or a deposit the presumption is that it is a deposit and not a loan. (1916) 1 M.W.N. 206 = 19 M.L.T. 237 = 34 Ind. Cas. 347.

(16) Discharge.

——S. 114—Discharge—Debt—Absence of demand.

If a money-lender has allowed a debt to remain outstanding for a very long period without obtaining some document or security for it and without at any time demanding payment, the presumption is that the debt has been paid off. 22 O.C. 335 = 6 O.L.J. 585 = 54 Ind. Cas. 95.

——S. 114—Discharge—Mortgage—Redemption—Proof of,

The Court is entitled to take into consideration as evidence the fact that on a particular date a particular sum was paid by the mortgagor to the mortgagee and this coupled with the fact that the mortgagor was put into possession of the property and has continued in possession of it, is good evidence upon which the Court might base its finding that the mortgage has been redeemed. 54 Ind. Cas. 117 (All.).

——S. 114—Discharge—Delay—Presumption—No demand by mortgagee for 36 years.

A long delay in making a demand for the money due under a mortgage coupled with other circumstances may throw the onus on the mortgagee of showing that debt was real and existing at the date of the suit. 46 Ind. Cas. 806 (Nag.).

——S. 114—Discharge—Presumption—Mortgage bond not sued on for a long time—Discharge.

Where an unregistered mortgage bond written by plaintiff's servant who was also the vendor of the stamp and attested only by a cousin and partner of the plaintiff, was not sued on for 30 years, *held*, the onus is heavily on the plaintiff to prove, not only execution and consideration of the bond but that it was still unpaid. 46 Ind. Cas. 657 (Nag.).

(17) Distraint—Legality.

——S. 114—Distraint, legality of—See 25 M. 729.

(18) Document.

——S. 114—Document—Attestation.

T.P. Act Section 59.—A mortgage deed was executed by a purdanashin lady, the attesting witnesses being on one side of a purda and the lady on the other. Her son took the deed of the lady behind the purda and came back with it signed after which it was attested. *Held*, that though the attesting witnesses did not see the lady sign the document, there could be no doubt that they were satisfied by the son that the deed was signed by the mother, and that therefore the deed was properly attested. 14 C.W.N. 165 = 3 Ind. Cas. 311.

——S. 114—Documents—Creation of title—Old document—Conduct of parties may negative creation of title.

Assuming that a document which is produced apparently from proper custody, was executed, still, if there are circumstances which show that it was not acted upon as one would have expected, a document of that nature to be acted upon, the presumption as to the title created by such document falls down. 77 Ind. Cas. 472 = A.I.R. 1923 Bom. 293.

——S. 114—Document—Date of execution.

There is a presumption that a document was executed on the date it bears. 6 O.L.J. 668 = 54 Ind. Cas. 846.

——S. 114—Document—Date of execution of deed.

It is a general though not a conclusive presumption that a document was made on the day of the date it bears. 44 Cal. 662 = 1 P.L.W. 425 = 5 L.W. 711 = 32 M.L.J. 425 = 21 C.W.N. 585 = 21 M.L.T. 344 = 15 A.L.J. 382 = 25 C.L.J. 508 = 19 Bom. L.R. 424 = (1917) M.W.N. 473 = 44 I.A. 172 = 40 Ind. Cas. 242 (P.C.).

——S. 114—Document—Execution—Promissory note by adult person of understanding—Presumption of due execution.

Ordinarily when a man *sui juris* and of understanding signs a document, such as a promissory note, after it is written up, and the same is produced from proper custody it is reasonable to apply the presumption under S. 114, Evidence Act, in favour of the person relying upon it and to call upon the person who impugns it to prove the special circumstances which invalidate it. When there is no plea of fraud or undue influence in the matter of the signature to the document, and his only plea of denial of execution is found against it must be held that the instruments is not only duly signed but also duly executed by him. 53 Mys. H.C.R. 1 = 28 Mys. L.J. 66.

——S. 114—Document—Execution—Ignorant and illiterate persons executing document—Presumption under S. 114, if can be drawn.

The usual presumption arising under S. 114, cannot be drawn, in cases of documents executed by ignorant and illiterate persons who are likely to be dominated by the will of others. A.I.R. 1939 Nag. 78 = 1938 N.L.J. 459 = I.L.R. (1939) Nag. 160 = 180 Ind. Cas. 443.

——S. 114—Document—Execution.

It would be a serious thing to hold that execution cannot be proved except by direct evidence. A.I.R. 1938 Nag. 152 = I.L.R. (1938) Nag. 333 = 176 Ind. Cas. 315.

——S. 114—Documents—Execution.

The execution of a pro-note by an illiterate woman was held proved, on the evidence of one respectable witness who was opposed by another witness, where the latter was suspected to be false. 22 M.L.W. 8 = A.I.R. 1925 P.C. 47 (P.C.).

——S. 114—Documents—Existence of.

It is a wrong presumption to hold that the mortgagee has only to allege that the original instruments is lost and if the Court comes to the conclusion that there was a mortgage, the mortgagee is relieved from the duty of affirmatively making out the terms of the contract, because the Court may presume that any contract which they set up is true. 30 M.L.W. 1045 = A.I.R. 1930 Mad. 65 = 57 M.L.J. 789.

——S. 114—Documents—Foreign record—Copy of.

True copy of deposition recorded in Court in Cutch —Copy certified to be true by a higher officer of the State than the trial Judge, but not by the Political Agent, presumption arises that the document is true copy.

Held, further that under S. 114 a presumption would arise that the copy was a correct copy of the record of the deposition as recorded by or under the supervision of the Judge who tried the suit. The fact that the certificate as to its being a true copy is given by a higher officer of the State than the trial Judge would really be an additional reason for accepting its authenticity, and, there is no reason to suppose that the mode of certificate, *viz.*, true copy, is not the one ordinarily in use in Cutch just as it is in British India. 113 Ind. Cas. 313 = 30 Bom. L.R. 1519 = A.I.R. 1929 Bom. 24.

——S. 114—Documents—Foreign school certificate.

School-leaving certificate in a State and that in British India are similar. 99 Ind. Cas. 307 = 50 Bom 716 = 28 Bom. L.R. 1225 = A.I.R. 1927 Bom. 11.

——S. 114—Documents—Genuineness.

Where a document is on plain paper unstamped and unregistered and such as has never seen the light of the day till it was filed and it has been shown that there were occasions when if genuine it should have been produced but was not produced the presumption is that the document is not genuine but a forged one. 123 Ind. Cas. 640 = A.I.R. 1930 Pat. 78.

——S. 114—Document — Sale — Contract against covenant for title shows document to be genuine.

Where after the completion of the sale-deed a proviso was added that, if any one claimed the land and the purchaser was deprived of it, he would not be entitled to a refund of the purchase money from the seller, and would have to bear the expenses of any litigation that may take place.

Held, such a stipulation would not have been added if the sale was not a genuine one. 69 Ind. Cas. 409 = A.I.R. 1923 Lah. 31.

——**S. 114—Documents—Insured cover.**

The mere fact that a cover insured for a certain amount is sent, raises no presumption in law that that cover contains the necessary amount of Government currency notes. 83 Ind. Cas. 993 = 21 A.L.J. 865 = 5 L.R.A.Cr. 15 = 26 Cr.L.J. 209 = A.I.R. 1924 All. 205.

——**S. 114—Document—Signature on document—Presumption as to its execution.**

The mere fact that a document is proved to bear a certain signature and that it comes from proper custody ought to be enough to raise an inference that it was signed with the intention of execution. It is a common course of human conduct. This presumption is, however, rebuttable. A.I.R. 1938 Nag. 152 = I.L.R. (1938) Nag. 333 = 176 Ind. Cas. 315.

——**S. 114—Documents—Knowledge of contents.**

Ordinarily the presumption is that if a person signs a document, he must be deemed to have agreed to all that is written thereon. 112 Ind. Cas. 843 = A.I.R. 1929 Lah. 203.

——**S. 114—Documents—Lease of wakf property.**

Where a lessee of a wakf property *prima facie* proves a heritable right in the tenure at a fixed rate an assumption that the grant was originally lawful can be made. 123 Ind. Cas. 722 = 32 Bom. L.R. 633 = 34 C.W.N. 462 = 1930 A.L.J. 377 = 51 C.L.J. 345 = A.I.R. 1930 P.C. 103 = 58 M.L.J. 641 (P.C.).

——**S. 114—Documents—Mortgage.**

When it is proved that the executant put his signature in the presence of the attesting witnesses it was almost certain that the attesting witnesses also put their signatures in the presence of the executant. The circumstances of the case warrant the application of the maxim "*Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*" and the deed must be considered as validly attested. A.I.R. 1930 Nag. 273 = 124 Ind. Cas. 453 = 13 N.L.J. 138 = 26 N.L.R. 277.

——**S. 114—Documents—Mortgage.**

Mortgage having option to call in whole amount of principal and interest, in case of default, before due date—Amounts paid towards principal and interest in default, but before due date—Presumption is that mortgagee exercised the option. 107 Ind. Cas. 650 = A.I.R. 1928 Mad. 637.

——**S. 114—Documents—Order of resumption.**

There is no law which requires a resumption of saranjam to be reduced to writing. The actual order of resumption therefore need not be produced in evidence. Such resumption can be proved under S. 114, Evidence Act and S. 91 will not govern such cases. 115 Ind. Cas. 369 = 30 Bom. L.R. 1463 = 53 Bom. 12 = A.I.R. 1929 Bom. 14.

——**S. 114—Document—Presumption.**

An ordinary sane person would have the final terms of a written document read over before accepting the deed and, therefore, when the executants are men of considerabfe experience it would require very strong evidence to convince a Court that the deed was signed without being read over. 117 Ind. Cas. 566 = A.I.R. 1929 Rang. 39.

——**S. 114—Document—Presumption.**

Documents is presumed to be duly stamped until contrary is proved. 1932 M.W.N. 432.

——**S. 114—Documents—Priority—When date is same.**

Where more documents than one bear date on the same day they are presumed to have been executed in the order necessary to effect the purpose for which they were executed. That is, it might be presumed that persons who are presumed to know the law observed it and that, when two acts are done on the same day, the one necessary to be done first to give the other validity was, in fact, done first.

But where a sale-deed in respect of property under the management of the Collector in execution, of a decree, has been executed and deposit in Collector's Court, sufficient to satisfy the decree is made on the same day, but it is found that the sum out of which the deposit was made was obtained at the time of the registration of the sale-deed, it cannot be presumed, in the absence of any reliable evidence to the contrary, that the deposit was made before the sale. 118 Ind. Cas. 865 = 12 N.L.J. 86 = A.I.R. 1929 Nag. 257.

——**S. 114—Documents—Validity.**

Where a person executing a deed required by law to be registered is of full age when appearing before the Registrar, and admits the execution of the deed, the presumption is that the transaction to which the deed relates is valid. A.I.R. 1930 All. 605 = 128 Ind. Cas. 433.

(19) Failure to cross-examine.

——**S. 114—Failure to cross-examine.**

When no evidence at all has been tendered by a party on whom the onus of proof lay and no request has been made for the cross-examination of the opposite party, it cannot be held that the theory, in respect of which the onus clearly lay upon the party, was established merely by the failure of the opposite party to offer himself for cross-examination. A.I.R. 1941 Mad. 704 = 53 M.L.W. 518 = I.L.R. (1941) Mad. 840 = (1941) 1 M.L.J. 605 = 1941 M.W.N. 400 = 198 Ind. Cas. 843.

——**S. 114—Failure to cross-examine—Accused putting forth witnesses on his behalf—Prosecution not cross-examining them—Evidence to be utilised against the party not cross-examining.**

Where a party does not choose to cross-examine the evidence of a witness examined against him, then the evidence of such a witness is ordinarily utilised against that party, and in a case where there were four witnesses examined on behalf of the accused but not cross-examined on behalf of the prosecution.

Held, that the evidence of the witnesses must be accepted, as they were not shaken by the prosecution. A.I.R. 1934 Oudh 424 = 11 O.W.N. 1035 = 35 Cr.L.J. 1278 = 151 Ind. Cas. 288.

——**S. 114—Failure to cross-examine.**

A Court cannot presume that a document is proved simply because the opposing counsel refuses to cross-examine the witness ; the counsel can wait until the Court gives a ruling. 39 Cal. 245 = 16 C.W.N. 265 = 13 Ind. Cas. 577.

(20) Foreign Law.

——**S. 114—Foreign law—Presumption in the absence of proof.**

It lies on him who asserts it to prove that the law of the foreign State differs from ours and in the absence of such proof it must be held that no difference exists except possibly so far as the law here rests on the specific Acts of the Legislature. 8 Bom. L.R. 525 = 30 Bom. 578.

(21) Grant.

——**S. 114—Grant—Resumption—Presumption in the case of grant of land.**

Where no evidence that the grant of land for services is on record there the presumption is that it is for past and future services and therefore the land is not resumable. 18 Bom. L.R. 695 = 35 Ind. Cas. 860.

(22) Handwriting.

——S. 114—Handwriting—Document writer, if can be assumed to be able to write in different ways.

It cannot be assumed that a habitual document writer would be either inclined or able to write in different ways or to initate the handwrting of others. 36 Mad. 159 = 11 M.L.T. 93 = 22 M.L.J. 270 = (1912) M.W.N. 125 = 13 Cr.L.J. 226 = 14 Ind. Cas. 418.

(23) Hindu Law.

——S. 114—Hindu Law—Adoption—Ceremonies, presumption of—Adoption 45 years ago.

When a person has, for nearly half a century, enjoyed the status of an adopted son, and has been treated as such all his life, it is not possible to get witnesses who were actually present at the time and could depose to the performance of the ceremony. In such circumstances, in the absence of anything to indicate the contrary, it must be presumed that all the requisite ceremonies were duly performed. A.I.R. 1937 Lah. 626 = I.L.R. (1938) Lah. 173 = 175 Ind. Cas. 746.

——S. 114—Hindu Law—Adoption—Datta Homa—Presumption of performance.

When an adoption has not been challenged by any member of the family for 48 years though definite evidence is not forthcoming to prove that the *Datta Homa* had been performed at the time adoption took place, it is permissible to presume from the fact, that the adoption had not been challenged for such a long period, that if the ceremony was necessary, it must have been performed. 80 Ind. Cas. 1041 = 46 All. 59 = A.I.R. 1923 All. 176.

——S. 114—Hindu Law—Adoption—Authority alleged to be given 100 years before suit—No direct evidence—Presumption from conduct of members.

In the case of a dispute as to the authorisation of a Hindu widow to adopt a son to her deceased husband, when the authorisation, if ever given, was given almost a hundred years before the date of the suit, the absence of direct evidence on the point is not conclusive. The question in such a case is whether it can be presumed, as a fair matter of inference from established facts that the lady must have had authority to make the adoption, that her authority to do so was known and recognised in the family and that it could safely be inferred from the conduct of the members of the said family. 76 Ind. Cas. 601 = 18 A.L.J. 473 = 42 All. 382.

——S. 114—Hindu Law—Alienation by father—Justifying necessity.

There is no presumption that an alienation by a Hindu father of a family property was for justifying necessity. 4 Bom. L.R. 587.

——S. 114—Hindu Law—Blending.

Although the Hindu Law recognises 'blending' and attaches such blending, legal consequences, yet there is no presumption in favour of blending. The presumption, if any, can only be one of fact to be drawn in the light of all surrounding circumstances and in accordance with what is described in S. 114, Evidence Act, as the common course of human conduct. A.I.R. 1938 Mad. 136 = 1937 M.W.N. 835 = 46 M.L.W. 576 = (1937) 2 M.L.J. 906 = 176 Ind. Cas. 542.

——S. 114—Hindu Law—Business carried on by one coparcener how far family business.

There is no presumption that a business carried on by a coparcener is a family business. 4 Bom. L.R. 968 = 27 B. 157.

——S. 114—Hindu Law—Disqualification from inheritance.

The presumption of Hindu Law is against disqualification and the onus is upon him who seeks to exclude. 4 C.L.J. 323.

——S. 114—Hindu Law—Manager litigating in respect of joint famiiy property—The presumption is that he represents his family. A.I.R. 1940 Mad. 636 = 51 M.L.W. 386 = 1940 M.W.N. 144.

——S. 114—Hindu Law—Manager.

The elder of two brothers would as such be presumed to be the head or the manager of the family in the absence of any positive evidence to the contrary. 71 Ind. Cas. 737 = A.I.R. 1923 Lah. 135.

——S. 114—Hindu Law—Manager.

Suit to set aside sale by manager of joint family—Nine-tenths of consideration found binding—Court can presume the binding nature of the balance also. 1922 M.W.N. 719 = 16 M.L.W. 595 = A.I.R. 1923 Mad. 120.

——S. 114—Hindu Law.

The legal presumption is that a Hindu family is joint and hence it is for the party alleging separation to prove it. 95 Ind. Cas. 774 = 13 O.L.J. 744 = A.I.R. 1926 Oudh 511.

——S. 114—Hindu Law—Partition—Hindu joint family—Presumption of union—Rebuttal.

Definition of shares in village records is not sufficient to rebut the presumption of union and jointness in a Hindu family. 42 All. 368 = 7 O.L.J. 48 = 2 U.P. L.R. 37 = 38 M.L.J. 521 = 23 O.C. 1 = 18 A.L.J. 532 = 22 Bom. L.R. 596 = 28 M.L.T. 5 = 56 Ind. Cas. 306 (P.C.).

——S. 114—Hindu Law—Partition—Separation.

Entries in revenue papers defining shares separate residence, institution of suit, altogether go to prove division. 4 O.L.J. 124 = 39 Ind. Cas. 433.

24. Human conduct.

——S. 114—Human conduct—Man having two wives—Presumption.

Whenever a man marries a second time while the first wife is alive there is no irrebuttable presumption that the man is in the grips of the second wife. Whenever a man has two wives it cannot be presumed that the second wife is all evil and the wrecker of the life of the first wife. There are cases in which the first wife so treats her husband as to drive him into contracting a second marriage. The question has to be decided on evidence in each case. A.I.R. 1944 All. 104 = 1944 A.L.J. 103 = 1944 A.W.R. (H.C.) 79 = I.L.R. (1944) All. 141 = 214 Ind. Cas. 135.

——S. 114—Human conduct—Point not raised—Inference is that it is not tenable.

Where a point could have been obviously taken before the Court for the decision of a suit and that point has not been taken, the natural inference is that that point was not taken because it was not tenable. A.I.R. 1942 Bom. 321 = 44 Bom. L.R. 752 = 203 Ind. Cas. 459.

——S. 114—Human conduct—Ouster—Abandonment.

The Evidence Act requires rules of commonsense to be applied to the consideration of cases and that the abandonment on the part of the departing brothers of any claim that they might have had to the property might be presumed under S. 114. A.I.R. 1941 Rang. 111 = 195 Ind. Cas. 234.

——S. 114—Human conduct—Account books withdrawn from Court by defendant after institution of suit—No credible explanation—Inference that they would have supported plaintiff's case.

Where no credible explanation has been given why the defendant has not produced the account books which had been taken out of Court by him after the institution of the suit, it is a legitimate comment of the other side that if these account books had been produced by the defendant, they would have supported

the case of the plaintiff. A.I.R. 1940 Cal. 33 = 70 C.L.J. 355 = 44 C.W.N. 114 = 188 Ind. Cas. 761.

——S. 114—Human conduct—Part of share in village sold—No presumption that corresponding share of vendor's house is also sold.

When a part of a share in a village is sold, no presumption arises that similar share of the house of the vendor standing on the share is also sold, though such presumption arises when the whole share is sold and nothing is reserved. A.I.R. 1940 Oudh 118 = 1940 O.W.N. 13 = 1940 R.D. 13 = 15 Luck. 288 = 185 Ind. Cas. 373 (1).

——S. 114—Human conduct—Number of letters produced—Inference that they are forged, if can be drawn.

Where a person produces a great number of letters purporting to have been written by a person who is dead, the suggestion that the letters are forged is inherently improbable for thereby he would be exposing himself to a greater risk of discovery. A.I.R. 1939 Cal. 244 = 68 C.L.J. 416 = 180 Ind. Cas. 445.

——S. 114—Human conduct.

Where an owner as a result of notice by the Municipality promptly removes an alleged encroachment, on one side of the house without protest that does not justify any presumption relating to the encroachment on the other side also. 19 N.L.J. 285.

——S. 114—Human conduct—Some of the accused absconding—Inference.

Ordinarily, the fact that an accused absconds is not regarded as indicative of his guilt. But where, in a rioting case, a very large number of persons must have taken part in the attack upon murdered men and only eight men out of the 72 that were challenged absconded, it is a fair inference to draw that they absconded due to a consciousness of guilt. A.I.R. 1934 All. 776 = 35 Cr.L.J. 919 = 4 A.W.R. 191 = 149 Ind. Cas. 210.

——S. 114—Human conduct.

Pieces of silver of size of rupee and counterfeit of rupees of same year found concealed in room in accused's possession :

Held, that the circumstances created a presumption of guilt that the accused was in possession of the coins fraudulently or with intent to commit fraud. A.I.R 1933 Oudh 85 = 9 O.W.N. 1198 = 34 Cr.L.J. 545 (2) = 143 Ind. Cas. 152.

——S. 114—Human conduct.

Theft of property from a store house—Accused in possession of false key of the store house :

Held, that mere possession of key does not raise a presumption against the accused. A.I.R. 1931 Sind 154 = 33 Cr.L.J. 106 = 135 Ind. Cas. 267.

——S. 114—Human conduct.

Concealment of motive gives rise to a presumption under S. 114, that there is one which cannot be avowed. 121 Ind. Cas. 175 = A.I.R. 1930 Sind 135.

——S. 114—Human conduct—Plaintiff's delay in bringing suit—Defendant prejudiced—Presumption.

Where the long delay of the plaintiffs in bringing the suit has prejudiced the defendants and has prevented them from bringing the best evidence that would otherwise have been available to them, the tendency of the Court must invariably be to make an inference against the plaintiff unless good cause is shown and the Court should attach great importance to such presumption in testing the credibility of the evidence actually given. 14 M.I.A. 67 ; A.I.R. 1924 P.C. 137, foll. 118 Ind. Cas. 154 = A.I.R. 1929 All. 561.

——S. 114—Human conduct—Deliberate default in payment of revenue.

Deliberate default in the payment of revenue with the intention that property may be sold free of encumbrances is a common device to defraud mortgagees, and it is obviously essential to the success of that device that the purchaser should be a mere benamidar for the defaulter, since no man is likely to allow his property to be sold for an inadequate price except to himself or to some person representing him. When therefore it is proved that this device has been adopted, there is a fair initial presumption under S. 114 that the purchaser represented the defaulter. 105 Ind. Cas. 258 = 5 Rang. 458 = A.I.R. 1927 Rang. 289.

——S. 114—Human conduct.

Ordinary care should be deemed to have been taken in every case. Negligence cannot be presumed. 80 Ind. Cas. 920 = A.I.R. 1925 Nag. 68.

——S. 114—Human conduct.

Where a person is at liberty to stop something being done in his house and is proved not to do so the presumption is that he is an accessory to the doing of that thing and he may be held to be in possession of the materials used in the doing of it. 86 Ind. Cas. 707 = 26 Cr.L.J. 851 = A.I.R. 1925 Oudh 684.

——S. 114—Human conduct—Suit against Railway—Exception not pleaded—Contrary should be presumed.

Where the plaintiff had expressly described his claim as one of compensation for non-delivery and the defendant had not pleaded that the goods had been lost,

Held, that the plaintiff's case would rest upon the presumption that the goods were still in the possession of the railway company. 74 Ind. Cas. 431 = 4 P.L.T. 443 = A.I.R. 1924 Pat. 25.

——S. 114—Human conduct.

Where the son as reversioner gave consent to a gift by the mother in favour of the grandson after his insolvency the consent was held not to be *bona fide*. 74 Ind. Cas. 113 = 21 A.L.J. 77 = 45 All. 260 = 4 L.R.A. (Civ.) 70 = A.I.R. 1923 All. 190.

——S. 114—Human conduct.

Where by taking over the sale and paying the full price, a co-owner has waived his own claim to sue such action on the part of the co-owner is presumptive evidence that the sale by another co-owner was not bad for want of necessity. 77 Ind. Cas. 475 = A.I.R. 1923 Lah. 502.

——S. 114—Human conduct—Laches—Delay in filing suit for dower—Relinquishment cannot be presumed.

Procrastination is the usual habit of litigants and where the parties are closely related, there must be constant talk and hope of settlement with the interference of relations or neighbours, who would like to get credit if not money, by taking sides. These are all circumstances which would lead to delay in filing a suit and it cannot be urged that relinquishment is the only possible inference of delay. 66 Ind. Cas. 448 = 8 O.L.J. 528 = A.I.R. 1922 Oudh 165.

——S. 114—Human conduct.

Waiver may be evidenced by conduct inconsistent with the continuance of the rights waived. 64 Ind. Cas. 461 (Nag.).

25. Husband and wife.

——S. 114—Husband and Wife—Joint Hindu family—Property standing in wife's name.

There is no presumption that where a property stands in the name of a Hindu wife, it really belongs to the husband. To uphold such a presumption it is necessary for the person who wants to make out that the property is not the property of the wife in whose name the document stands to establish that the money for purchase came from the husband. 98 Ind. Cas. 660 = 38 M.L.T. 153 = A.I.R. 1927 Mad. 194.

——S. 114—Husband and wife.

Gift of money in the hands of a stranger by a husband to wife. Subsequent receipt of money by husband—

Presumption is that he received it for his wife. 4 Bom. L.R. 180 = 26 B. 577.

26. Interpretation.

——S. 114—Interpretation—Ambiguity.

If there is any ambiguity in an order that which the law required to be done should be deemed to have been done. 5 C.W.N. 153 = 11 M.L.J. 65 = 3 Bom. L.R. 78 = 23 A. 220 = 28 I.A. 28 (P.C.).

——S. 114—Interpretation.—" May presume " in S. 114 effect of.

The words ' may presume ' in S. 114, leave it to the Court to make or not to make the presumption, according to the circumstances of the case ; and the presumption, when made, is rebuttable. A.I.R. 1943 F.C. 75 = I.L.R. (1943) Kar. (F.C.). 103 (Sup.)= 1943 M.W.N. 612 = (1943) 2 M.L.J. 468 = 24 P.L.T. 332 = 48 C.W.N. (F.R.) 1 = 45 Cr.L.J. 341 = 10 B.R. 394 = 1944 F.C.R. 1 = 211 Ind. Cas. 241 (F.C.).

27. Knowledge of date of birth.

——S. 114—Knowledge of date of birth.

An European may be presumed to know his own birth-day as a matter of course but there is no such presumption in the case of Hindus of the *Nattukottai Chetti* class. (1916) 1 M.W.N. 208 = 3 L.W. 210 = 33 Ind. Cas. 969.

28. Knowledge of law.

——S. 114—Knowledge of law—Presumption.

Though under the Hanafi Law, the ignorance of law is as much excusable as the ignorance of fact, yet the presumption is that a Hanafi who is brought up in a Mahomedan country, knows the laws that govern him. 8 A.L.J. 953 = 7 Ind. Cas. 820.

——S. 114—Knowledge of law—Transaction involving statutory obligation.

A person entering into a transaction involving a statutory obligation must be presumed to have impliedly agreed to submit to that obligation. 10 N.L.R. 81 = 26 Ind. Cas. 601.

29. Landlord and tenant.

——S. 114—Landlord and tenant—Rent—Enhanced rate—Payment for long time.

Where a tenant has been paying enhanced rent for a series of years in respect of garden crops, the Court may presume a contract supported by consideration to pay rent at that rate. 42 Mad. 75 = (1919) M.W.N. 161 = 36 M.L.J. 320 = 50 Ind. Cas. 616 (F.B.).

30. Legal origin to existing facts.

——S. 114—Legal origin to existing facts.

Court can presume a contract to pay the higher rate and a legal origin and consideration therefor from long continued payment of higher rate. 42 Mad. 475, *rel. on* 120 Ind. Cas. 743 = A.I.R. 1930 Mad. 339.

——S. 114—Legal orgian to existing facts—Court's duty. *See* ESCHEAT. 6 Bom. L.R. 43 = 28 B. 276.

31. Liquor—Possession.

——S. 114—Liquor—Possession of full bottles of wine.

The possession of full bottles of wine in a person's house when the number of bottles is less than that allowed by law does not raise the presumption that the bottles were for sale. U.B.R. (1911) 1 and 96 = 13 Cr.L.J. 424 = 14 Ind. Cas. 968.

32. Longstanding transaction.

——S. 114—Longstanding transaction—Validity of how far rightly executed.

A longstanding transaction must be presumed to have been in all respects rightly executed or legally done in the absence of evidence to the contrary. 4 Bom. L.R. 893.

33. Lost grant.

——S. 114—Lost grant—Easement.

Where a Zamindar has been using the water of a channel for irrigating his lands from the time of the permanent settlement, the Court may presume from long possession and enjoyment a right to use the water free of charge. Though an actual grant of a easement is not discovered or proved, it will be presumed. 46 I.A. 302 = (1919) M.W.N. 775 = 37 M.L.J. 724 = 18 A.L.J. 1 = 11 L.W. 204 = 2 U.P.L.R. (P.C.) 33 =54 Ind. Cas. 154 (P.C.).

——S. 114—Lost grant—Easement.

The presumption of a lost grant can be drawn only where the enjoyment of the easement cannot be otherwise accounted for. 50 Ind. Cas. 933 (Cal.).

——S. 114—Lost grant—Easement.

The presumption of a lost grant arises out of the strong desire of the Court to find a legal origin for an ancient and uninterrupted user. The right must be one which could have been the subject of a grant. 42 Bom. 288 = 20 Bom. L.R. 398 = 45 Ind. Cas. 448.

——S. 114—Lost grant—Presumption—Immemorial enjoyment of a right—Government.

Where a right has been enjoyed from time immemorial, a legal origin therefor, such as a contract or a grant must be presumed. Where a grant is made by the Government of a right irrespective of the use the grantee might make of it, the presumption is that it is a free grant. 14 M.L.T. 131 = 20 Ind. Cas. 804.

——S. 114—Lost grant—Enjoyment of tank.

Plaintiff claimed to be hereditary trustees of a village pond (common property of the villagers) and prayed for a declaration that as such they had right to look after the conservancy of the tank and for an injunction restraining defendants from molesting them in their enjoyment of it. The following acts were relied on by plaintiffs in support of their claim : (1) that they and their ancestors had been maintaining and conserving the tank at their cost ; (2) that they built at their cost a flight of steps sluices and had been cleaning it, repairing and strengthening the *bunds* ; (3) enjoying the fruits of the trees on the banks and (4) that the occupants of the houses on the *bunds* constructed them with the leave of the plaintiff's ancestors : *Held*, that the above acts were not sufficient to sustain the plaintiff's right as trustees, and the presumption of a lost grant could not be made in plaintiff's favour. 34 Mad. 323 = (1910) M.W.N. 576 = 8 M.L.T. 368 = 8 Ind. Cas. 114.

34. Marriage.

——S. 114—Marriage—Breach of contract to marry—One party interned during the War and unable to communicate with other—Rescission cannot be presumed.

In certain circumstances, silence, absence, conduct or expressions in letters may be amply sufficient to lead a Court of Law to conclude that a contract of marriage was dissolved by agreement of both parties.

But where circumstances were altogether extraordinary in that the parties were entangled and embarrassed by difficulties not of their making but by war breaking out and one of the party being interned during the war being suspected as German subject,

Held, that even then to prove that this contract was rescinded by mutual agreement is a burden of which the respondent must discharge himself. If he does not so prove he must make amends to the other party. 89 Ind. Cas. 824 = 2 O.W.N. 695 = 22 M.L.W. 726 = 30 C.W.N. 248 = A.I.R. 1925 P.C. 194 (P.C.).

——S. 114—Marriage—Cohabitation for long period.
Where the parties constantly, openly and continuously lived and cohabited together for several years and had several children and were regarded and recognized as man and wife by their relations and friends, these facts, in the absence of countervailing circumstances afford clear and conclusive evidence of marriage under S. 114, Evidence Act. A.I.R. 1943 Cal. 76 = I.L.R. (1942) 2 Cal. 299 = 75 C.L.J. 301 = 46 C.W.N. 729 = 205 Ind. Cas. 344.

——S. 114—Marriage—Presumption of legal marriage.
A presumption of a legal marriage having taken place may arise from the fact of two persons living together over a long period and being regarded by their neighbours and friends as husband and wife, but such a presumption has no application where it is not possible to have a legal marriage between the parties and an irregular union cannot be turned into a marriage by any amount of ceremonies or by any subsequent enactment. A.I.R. 1942 All. 175 = 1942 A.L.J. 179 = I.L.R. (1942) All. 259 = 1942 A.W.R. (H.C.) 84 (2) = 200 Ind. Cas. 269.

——S. 114—Marriage—Presumption of validity.
Ordinarily, if the circumstances can justify such a course the presumption should be in favour of validity of marriage. A.I.R. 1934 Lah. 550 = 37 P.L.R. 380 = 151 Ind. Cas. 508.

——S. 114—Marriage—Presumption of—Mere cohabitation.
A legal marriage cannot be inferred from mere cohabitation when the actual fact of an earlier marriage is proved, and merely because a person has been living with the wife of another, no presumption arises that she was first divorced by her husband. A.I.R. 1932 Sind 137 = 26 S.L.R. 111 = 140 Ind. Cas. 724.

——S. 114—Marriage—Continuous cohabitation.
The law presumes in favour of marriage and against concubinage when a man and a woman have cohabited continuously for a number of years. 117 Ind. Cas. 17 = 1929 A.L.J. 465 = 33 C.W.N. 645 = 31 Bom. L.R. 846 = 6 O.W.N. 517 = 56 I.A. 201 = 50 C.L.J. 89 = 30 M.L.W. 97 = 1929 M.W.N. 676 = 10 Lah. 725 = 31 P.L.R. 1 = A.I.R. 1929 P.C. 135 = 57 M.L.J. 366 (P.C.).

——S. 114—Marriage—No presumption.
Where the status of the man is lower than the woman's and the intercourse between them is admittedly jllicit for a large number of years no presumption of marriage arises merely because they lived as husband and wife and were regarded by their neighbours as such. 119 Ind. Cas. 182 = 31 Bom. L.R. 453 = A.I.R. 1929 Bom. 246.

——S. 114—Marriage—No presumption.
Presumption of a valid marriage from two persons living together as man and woman cannot be drawn where the union is between a man who is an Ahir and a Brahman widow, who cannot *prima facie* contract a valid marriage. 119 Ind. Cas. 698 = A.I.R. 1929 Nag. 343.

——S. 114—Marriage—Cohabitation and repute.
A Mahomedan lady lived continuously with another man and had children who were treated by her, her relatives and friends as issues of that man. The latter had absolute power of disposal over her money. The incomes both of the man and the woman were jointly assessed with taxes by the Municipality.
Held, that the reasonable conclusion was that the woman was married to the man. 112 Ind. Cas. 596 = A.I.R. 1929 Oudh 126.

——S. 114—Marriage—Presumption.
Where a man and woman are living together as husband and wife for a large number of years and have always treated each other as husband and wife, have always been looked on as husband and wife, and there is no obstacle to the marriage, the burden is on the person who denies the marriage to prove that it did not take place 121 Ind. Cas. 718 = 7 Rang. 777 = A.I.R. 1929 Rang. 341.

——S. 114—Marriage—Presumption.
Presumption of marriage arises from long cohabitation. 117 Ind. Cas. 64 = A.I.R. 1929 Rang. 64.

——S. 114—Marriage — Unmarried woman — Concubinage—No presumption of marriage from cohabitation.
A presumption of marriage may arise from long cohabitation, but if it is known that the connexion started in mere concubinage this presumption cannot arise. Relations or conditions of persons or things once shown to exist are presumed to continue until the contrary is proved. If it is proved that a certain woman was unmarried at a certain date the presumption is that she continues so until proved to have married and therefore when there is no proof of any marriage but there is a judicial decision that she was not married but was living as a concubine, there can be no presumption of marriage. 98 Ind. Cas. 887 = 8 L.L.J. 532 = 27 P.L.R. 829 = A.I.R. 1927 Lah. 48.

——S. 114—Marriage—Legitimacy when presumed—Cohabitation and repute.
The presumption of legitimacy cannot be raised without laying the foundation for it under S. 112. In absence of evidence legitimacy cannot be presumed. Under S. 114 the presumption of marriage arises from joint residence for a length of time or recognition as husband and wife by a certain number of persons. 79 Ind. Cas. 623 = A.I.R. 1925 Mad. 426.

——S. 114—Marriage—Legitimacy—Presumption.
It is open to a Sikh to marry any woman he pleased provided she adopted the Sikh religion. The mother of *J.S.* was always treated among the brotherhood as the wife of *S.S.* whose son *J.S.* claimed to be; *J.S.* was always treated as the legitimate son of *S.S.* who made no disposition of his property by will or otherwise, and *J.S.* was referred to in several deeds as the son of *S.S.* This was sufficient proof that *J.S.* was a legitimate son of *S.S.* 6 O.L.J. 331 = 52 Ind. Cas. 449.

——S. 114—Marriage—Long cohabitation.
Cohabitation for several years as husband and wife lead to the presumption of valid marriage. 17 Cr.L.J. 112 = 9 Bur. L.T. 81 = 8 L.B.R. 225 = 32 Ind. Cas. 848.

——S. 114—Marriage—Unsatisfactory evidence—Presumption.
The law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously. This presumption is not to be rebutted or shaken by mere balance of probability but by evidence strong, distinct, satisfactory and conclusive. Plaintiff's mother and defendant's father lived as husband and wife for a long series of years. The defendants treated the plaintiffs as their legitimate brothers. The plaintiff's mother described herself in a document executed by her as the wife of the defendant's father who was a witness to the document. *Held*, that the presumption of law is that the plaintiff's mother and the defendant's father were married lawfully, and the presumption was not rebutted though the evidence of marriage which took place long ago was not satisfactory. 17 C.W.N. 494 = 15 Ind. Cas. 328.

——S. 114—Marriage—Legitimacy—Form of marriage gone through—Recognition by relations.
Where a man and a woman were proved to have been recognised by all persons concerned as man and wife, so described in important documents and their daughters were respectably married as would be natural in the case of legitimate children. *Held*, that these

facts, following upon a ceremony of marriage which undoubtedly took place, though its validity was attacked, afforded an extremely strong presumption in favour of the validity of the marriage and legitimacy of its offspring. The like presumption applies to the question whether the formal requisites of a valid marriage ceremony were satisfied. 38 Cal. 700 = 15 C.W.N. 790 = (1911) 2 M.W.N. 91 = 13 Bom. L.R. 534 = 14 C.L.J. 72 = 10 M.L.T. 53 = 21 M.L.J. 933 = 11 Ind. Cas. 502 (P.C.).

——S. 114—Marriage—Legitimacy—Presumption of.

The presumption of legitimacy arising from long cohabitation between parents is very weak if the mother was a prostitute before coming to live with the father. 32 All. 345 = 37 I.A. 105 = 14 C.W.N. 690 = 7 A.L.J. 579 = 11 C.L.J. 649 = 12 Bom. L.R. 447 = 8 M.L.T. 59 = (1910) M.W.N. 312 = 20 M.L.J. 579 = 13 O.C. 170 = 6 Ind. Cas. 674 (P.C.).

——S. 114—Marriage—Legitimacy—Presumption of legitimacy and marriages.

There is a presumption in favour of legitimacy and marriage, and therefore the onus of proving illegitimacy is on the person interested in making it out. 1905 A.W.N. 214.

——S. 114—Marriage—Essentials to raise presumption.

Before applying the presumption of marriage arising from cohabitation with habit and repute, it is necessary to make sure that the conditions necessary for its existence do exist first of all there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Secondly the habit and repute of that particular status which alone is effective, is habit and repute of that particular status which, in the country in question, is lawful marriage. The difference between English and Oriental customs about the relations of the sexes makes such caution especially necessary. Among most English people, open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as a matter of fact, a repute of marriage. But in countries where customs are different it is necessary to be more discriminating, more especially owing to the laxity with which the word "wife" is used by witness in regard to connections not reprobated by opinion, but not constituting marriage. 18 M.L.J. 3 = 5 A.L.J. 63 = 7 C.L.J. 112 = 10 Bom. L.R. 41 = 3 M.L.T. 93 = 14 Bur. L.R. 3 = 4 L.B.R. 175 = 12 C.W.N. 220 = 35 C. 232 = 35 I.A. 41 (P.C.).

——S. 114—Marriage—Divorced woman.

In the case of a divorced woman, the presumption is that she continues unmarried until proved to have married again. 81 P.L.R. 1915 = 88 P.W.R. 1915 = 29 Ind. Cas. 194.

——S. 114—Marriage from cohabitation—None under Hindu Law. *See* 1906 A.W.N. 204 = 3 A.L.J. 807.

35. Murder.

——S. 114—Murder—Murder by some dacoits of person running from scene of dacoity—Murder not in furtherance of common intention.

It can hardly be natural that the common intention of all the persons who took part in the robbery was to murder not only persons who resisted them in the execution of the robbery but also to murder the persons who ran away from the scene of the robbery and therefore a murder of a person running from the scene of robbery cannot be said to be in furtherance of the common intention of dacoits. 115 Ind. Cas. 1 = 30 Cr.L.J. 385 = A.I.R. 1929 Lah. 338.

——S. 114—Murder.

The trial Judge rejected evidence about three objects, an umbrella, a stick and a bundle said to have been pointed out by the accused, as being in the well where the body of the dead man was found. This was not the exclusive evidence against the accused but there was other considerable evidence also.

Held, that the Judge should not have rejected the evidence. 2 M.Cr.C. 56 = A.I.R. 1929 Mad. 92.

——S. 114—Murder.

Person knowing of his wife's murder but making no report to police nor trying to find out murderer—His conduct may lead to conclusion that he was murderer. 116 Ind. Cas. 193 = 6 O.W.N. 218 = 30 Cr.L.J. 567 = 12 A.I.Cr.R. 420 = 4 Luck. 679 = A.I.R. 1929 Oudh 190.

——S. 114—Murder—Poisoning by members of family—Presumption when arises.

A violent presumption that the deceased was poisoned by the members of the family arises, perhaps one of the strongest presumptions known to the law, when a man dies in his own house surrounded by his own family, and poisoned shortly after eating food which must have been prepared for him by his wife, and no explanation is forthcoming from the occupants of the household as to what had happened to him to cause his death, and where, in addition to such violent presumption, the persons accused are proved to have been guilty of persistent lying in an attempt to account for the absence of the deceased, and are also shown to have hidden the corpse to save themselves, the presumption becomes a certainty. 97 Ind. Cas. 44 = 49 All. 57 = 24 A.L.J. 958 = 27 Cr.L.J. 1068 = 7 L.R.A.Cr. 156 = A.I.R. 1926 All. 737.

——S. 114—Murder—Possession of ingredient of bomb—No explanation.

The presumption under S. 114 of the Evidence Act cannot be invoked to the help of the prosecution for murder on the bare circumstance that the accused had got one of the implements which form an ingredient of a bomb prepared by a blacksmith some days before the occurrence and had given a false name to the blacksmith and had failed to give a proper account as to what became of the implement afterwards. 20 M.L.J. 657 = 7 M.L.T. 314 = 6 Ind. Cas. 51 = 1910 M.W.N. 77 = 11 Cr.L.J. 222.

36. Notice.

——S. 114—Notice.

Semble: Proper service of notice can be presumed in the absence of non-service. A.I.R. 1932 Cal. 267 = 59 Cal. 255 = 35 C.W.N. 1239 = 137 Ind. Cas. 147.

——S. 114—Notice—Registered cover—Postman's endorsement of 'refusal' thereon—Effect.

Where a notice sent by post in a registered cover is returned by the postman with a note that the addressee refused to receive it and the posting of the notice has been proved, there is a presumption under S. 114 that the addressee did refuse to receive it. Where such presumption arises, it is for the party putting forward the plea of want of notice to rebut it. 121 Ind. Cas. 382 = 31 P.L.R. 26 = A.I.R. 1930 Lah. 439.

——S. 114—Notice.

Suit against Railway—Postal acknowledgment with other evidence may be sufficient proof of notice. 73 Ind. Cas. 440 = 4 L.R.A. (Civ.) 48 = A.I.R. 1923 All. 145.

——S. 114—Notice under Bengal Cess Act—No Presumption as to liability.

No presumption of S. 114, Cl. (*c*) of Evidence Act applies with respect to notice provided by S. 52 of Cess Act and the person who claims that a right or an obligation such as the payment of cess by a tenure-holder, has accrued, must prove that the liability had been incurred and the things described in the Act had actually been done. The owner of rent-free lands is not bound

to pay road cess before the publication of the valuation rolls under S. 52. 65 Ind. Cas. 138 = 3 P.L.T. 282 = 1922 P.H.C.C. 167 = A.I.R. 1922 Pat. 303.

——S. 114—Notice—Title of third person.

A purchaser of immovable property in the possession of a third person is presumed to have notice of the title of such third person. 33 Ind. Cas. 121 (L.B.).

——S. 114—Notice—Notice of document is not notice of contents.

The fact that a person (a purdanashin lady) executed certain documents containing collateral recitals which were registered and acted upon does not raise any presumption that the lady was aware of the existence of the recitals in the instruments acted upon. 9 C.L.J. 172 = 19 M.L.J. 186 = 11 Bom. L.R. 196 = 13 C.W.N. 370 = 31 A. 116 = 36 I.A. 9 (P.C.).

——S. 114—Notice—Notice to quit—Letter 'refused' effect of—Question of fact.

The effect to be given to the word *refused* on a registered cover as proof of the tender of the packet to the addressee is a question of fact to be decided under all the circumstances of each case. (The High Court refused to interfere with the finding of the lower courts that the notice had not been duly served). 3 Bom. L.R. 420.

37. Ownership.

——S. 114—Ownership—Wall.

Certain footings to the wall of a house existed for a long time and the lateral extension of the cornices of the house corresponded with the extension of the footings. It was presumed that the land covering the footings belonged to the owner of the wall. 38 Cal. 687 = 16 C.W.N. 313 = 12 Ind. Cas. 459.

38. Permanent Settlement.

——S. 114—Permanent Settlement—Taluka —Inclusion of.

The principle of *proesumiture retro* applies not only to cases of the existence of a taluk at the settlement but to cases of long possession when it can be presumed that certain lands existing from before settlement were within the taluk at the permanent settlement. Such a presumption is one of fact and the Court should attach weight to it having regard to all circumstances. 35 Ind. Cas. 885 (Cal.).

——S. 114—Permanent Settlement—Evidence of possession and title—Specified land including estate at that survey—Presumption that it was included within estate at permanent settlement does not arise as matter of law.

A thak map is valuable evidence of possession, and hence of title. It cannot be a proposition of law that merely because certain specified lands were included in an estate at the time the thak survey in 1859 was made, they must have been included within that estate at the permanent settlement. The Court may draw such inference from the surrounding circumstances. 15 C.W.N. 706 = 13 C.L.J. 293 = 7 Ind. Cas. 849.

39. Permanent tenancy.

——S. 114—Permanent tenancy—Temple trustee.

A presumption cannot be drawn in favour of what offends against legal principles. A presumption of permanent tenancy cannot be applied to debutter property because the creation of a fixed rent would be a breach of duty in a shebait. 15 C.L.J. 227 = 16 C.W.N. 418 = 13 Ind. Cas. 596. *Also* 33 M.L.J. 84 = 41 Ind. Cas. 788; 34 M.L.J. 234 = 44 Ind. Cas. 895.

40. Plaint by Corporation.

——S. 114—Plaint by a Corporation—Verification by Officer—Authority to verify presumed until disproved. *See* 5 C.W.N. 91.

41. Possession and ownership.

——S. 114 — Possession and ownership — Land—Presumption of ownership—Agricultural land and land within municipal area.

In an agricultural village the zamindar is presumed to be the owner of every inch of land included within ambit of his zamindari. In the case of land not forming part of an agricultural village at any anterior time and in part of a town or a city, there is neither the presumption of the ownership of such land by the zamindar, nor is there the presumption that the land in the occupation of persons useful in the village economy is deemed to be by permission of the zamindari. Occupiers of land in such places would be presumed to be in possession as proprietors. 1950 A.W.R. 395 = 1950 A.L.J. 84.

——S. 114—Possession and ownership—Title-deed of land in name of certain person—Presumption that buildings and wells constructed thereon belong to him.

Where the title-deed, *i.e.*, the sale-deed shows that the land is the property of a certain person, there is a presumption of fact in the absence of evidence to the contrary that the bungalow and the wells constructed thereon are his property, specially when it is not unlikely that he had some money to spare for that purpose. I.L.R. (1950) Nag. 124 = 1949 N.L.J. 261 = A.I.R. 1949 Nag. 378.

——S. 114—Possession and ownership—Onus.

Where the plaintiff is not in possession of the property claimed by him the onus of showing a good title is on him. A.I.R. 1940 Lah. 311 = 42 P.L.R. 294.

——S. 114—Possession and ownership—Revenue sale—Presumption—Purchaser not taking possession—No presumption that possession of old proprietors continued and was adverse to purchaser.

If it be once shown that the lands in dispute passed by the revenue sale held for arrears of revenue, there can, in law, be no presumption that contrary to the purchaser's rights, the possession of the old proprietors continued as before and that it was adverse to the purchaser and that the old proprietors remained in receipt of rent from the agricultural tenants from the mere fact that the purchaser has not taken possession of the land after the sale. A.I.R. 1939 Pat. 364 = 20 P.L.T. 677 = 182 Ind. Cas. 982.

——S. 114—Possession and ownership—Direct evidence about lands in possession of ancestors of party impossible—Presumptions.

As it is obviously impossible for any one at the present day to adduce direct evidence about the lands which were in possession of party's ancestors as *sir* while they were in proprietary possession during the Shahi times, or even at some time during the twelve years preceding the annexation and oral evidence on these points at the present day is altogether out of question and documentary evidence also is practically impossible because at that time, there was no regular system of Record of Rights like what exists now and because the *khasra* numbers, which are so helpful for the purpose of identifying the plots, have come into existence only since the first regular settlement, it is justifiable for the Court to make certain reasonable presumptions. A.I.R. 1936 Oudh 290 = 1936 O.W.N. 545 = 12 Luck. 223 = 162 Ind. Cas. 738.

——S. 114—Possession and ownership—Long enjoyment of proprietary right—Presumption of lawful origin—Legal necessity.

Per WORT, J., (ROWLAND, J., Contra.)—The presumption of a lawful origin in support of proprietary rights, long and quietly enjoyed, is not a branch of law of evidence but a presumption arising in law in the absence of evidence.

Where there is no fact established directly connected with the question of necessity of a grant and the defendant having adduced no evidence in support of his

argument, that the grant was within the competence of the grantor and also where the grant has been challenged after a long lapse of time, the Judge, in the circumstances, is entitled to assume that the grant was lawfully and not unlawfully made in the sense that it was a grant made for legal necessity. The question of legal necessity is one of fact. A.I.R. 1936 Pat. 275 = 2 B.R. 495 = 17 P.L.T. 488 = 162 Ind. Cas. 797.

——**S. 114—Possession and ownership.**

There is no presumption that the occupier of a house in the village *abadi* is entitled to retain it so long as he cultivates land in the village. The Court may, however, presume any fact which it thinks likely to have happened regard being had to the natural course of events, human conduct and public and private business. A.I.R. 1932 All. 252 = 1932 A.L.J. 142 = 16 R.D. 222 = 54 All. 379 = 141 Ind. Cas. 800.

——**S. 114—Possession and ownership.**

Presumption that the *talukdar* is the owner of all property in the *taluk* applies even in respect of *abadi* lands. A.I.R. 1932 Oudh 51 = 8 O.W.N. 1281 = 15 R.D. 751 = 135 Ind. Cas. 693.

——**S. 114—Possession and ownership.**

Piece of land adjacent to joint property in name of joint owners is presumed to be joint. 121 Ind. Cas. 785 = 7 Rang. 744 = A.I.R. 1930 Rang. 72.

——**S. 114—Possession and ownership.**

If possession does not pass under the sale, a presumption is apt to arise straightaway that the sale-deed is a fraudulent one. 113 Ind. Cas. 884 = A.I.R. 1928 Nag. 306.

——**S. 114—Possession and ownership.**

Determination of title to waste land—No one proving possession—Court can hold that the land is in possession of rightful owner. 98 Ind. Cas. 849 = 44 C.L.J. 265 = A.I.R. 1927 Cal. 49.

——**S. 114—Possession and ownership.**

The mere fact that a person chooses to pay somebody else's mortgage debt does not necessarily show that he has some title in the property mortgaged. 96 Ind. Cas. 199 = 43 C.L.J. 452 = 31 C.W.N. 205 = A.I.R. 1926 Cal. 916.

——**S. 114—Possession and ownership.**

The mere fact that in the revenue records the sons of a particular person are shown as jointly owning land is not sufficient to raise a certain presumption that that person was the owner of the land. 97 Ind. Cas. 241 = 8 Lah. 30 = 8 L.L.J. 485 = 27 P.L.R. 721 = A.I.R. 1926 Lah. 659.

——**S. 114—Possession and ownership.**

Where defendants were shown to have been in peaceful possession for more than 60 years.

Held, that it required very strong evidence indeed to prove that the possession was only that of mortgagees. 84 Ind. Cas. 373 = 2 Rang. 397 = A.I.R. 1925 Rang. 7.

——**S. 114—Possession and ownership.**

Where the vacant plot of land belonged to one party the natural inference would be that it was he who built upon the land at his own expense and *onus* lies heavily on the other party to prove that it was he that did so. A.I.R. 1925 Sind 16.

——**S. 114—Possession and ownership.**

There is no presumption that the gadhi in a village in Berar belongs to the Deshmuk. 75 Ind. Cas. 622 = A.I.R. 1924 Nag. 199.

——**S. 114—Possession and ownership.**

The mere fact that the deeds are in the possession of the mortgagor does not itself prove that the mortgagee was a mere benamidar for the mortgagor. 79 Ind. Cas. 186 = A.I.R. 1923 Bom. 429.

——**S. 114—Possession and ownership.**

Where defendant's name was mutated as full owner as per Will and was not challenged for over 12 years,

Held, the presumption was that he was full owner under the Will. 79 Ind. Cas. 462 = 5 L.L.J. 14 = A.I.R. 1923 Lah. 252.

——**S. 114—Possession and ownership.**

Where possession can be referred to a lawful origin the presumption is that it was acquired lawfully and the burden of proving the contrary is on the party who alleges it, *e.g.*, the burden would be on the party who alleges that he held the property as trespasser where he ought to hold as legatee or heir. 9 O.L.J. 262 = A.I.R. 1922 Oudh 231.

——**S. 114—Possession and ownership—Land submerged under water—Reformation—Party in possession up to the time of diluvion will be presumed to be in possession after reappearance.**

If the plaintiff shows his possession down to the time of the diluvion, his possession is presumed to continue as long as the land continued to be submerged.

Further in the case of land covered by water, the Court may, and generally should, presume, in the absence of evidences to the contrary, that a possession enjoyed by the plaintiff before the twelve years, has continued until within the 12 years. In other words, when the plaintiff has shown that he was in possession of the land at the time of diluvion, it must be presumed that he has continued to be in possession within 12 years of the suit. 2 P.L.T. 59 = A.I.R. 1921 Pat. 234.

——**S. 114—Possession and ownership—When land is not capable of actual enjoyment in the usual modes, previous possession of plaintiff will be presumed to continue till contrary is proved.**

Per DAWSON-MILLER, C.J.—Possession, however, is not necessarily the same thing as user and if the land is of such a nature as to render it unfit for actual enjoyment in the usual modes it may properly be presumed that the previous possession of the plaintiff continued until the contrary is proved. This presumption is a presumption of fact. It is by no means conclusive and whether it should be applied or not must depend upon the facts of each particular case.

Per MULLICK, J.—In every case the Court may draw a presumption as to possession from title. It is a presumption of fact which the Evidence Act expressly warrants by S. 114. S. 4 of that Act enacts that the Court may regard the fact as proved unless and until it is disproved or may call for proof of it. The discretion of the Court is to be exercised with due regard to the nature of the land and the evidence in the case. 2 P.L.T. 55 = 1921 P.H.C.C. 118 = A.I.R. 1921 Pat. 158.

——**S. 114—Possession and ownership—Possession, presumption of.**

When in a suit relationg to land, the plaintiff's title and possession within the limitation is challenged, and he establishes his title by a purchase, he is presumed to be in possession up to the time of suit. 7 O.L.J. 258 = 2 U.P.L.R. (J.C.) 106 = 56 Ind. Cas. 720.

——**S. 114—Possession and ownership.**

Prior possession however short is sufficient *prima facie* title in ejectment against a wrong-doer. But mere possession is not sufficient where it is shown that the title is out of the plaintiff. 11 Bom. L.R. 1093 = 4 Ind. Cas. 246.

——**S. 114—Possession and ownership—Proof of title.**

Possession is in itself proof of title in the absence of proof displacing the presumption that arises from possession. The man in possession starts with this presumption in his favour, and the maxim *praesumiture retro* applies, and it is, therefore, for the other side to show, not only that the former's possession is not

evidence of his title, but that the latter has a superior title. 10 Bom. L.R. 571.

——S. 114—Possession and ownership.

A person whose title to immoveable property rests upon mere possession is competent to deal with such property as if he were the owner, and his acts will be good as against all the persons other than the true owner. If such a possessor executes a registered deed of gift of the property he is subject to the rule that no one can derogate from his own grant. (1904) A.W.N. 222 = 1 A.L.J. 625 = 27 A. 169.

[*Also* 1901 A.W.N. 204=24 A. 157.]

See SPECIFIC RELIEF ACT, S. 9. 13 M.L.J. 146 = 26 M. 514.

——S. 114—Possession and ownership—Proof of title.

In England possession is *prima facie* evidence of a seisin in fee. In India it is ordinarily presumptive proof of title. 1903 A.W.N. 81 = 25 A. 366 at 370.

——S. 114—Possession and ownership.

Possession is *prima facie* evidence of ownership. 28 M. 69.

See also 5 Bom. L.R. 225.

——S. 114—Possession and ownership.

As between a person paying rent and one receiving rent, payment of rent raises a presumption of title in favour of the latter. 4 Bom. L.R. 28 = 26 B. 410.

——S. 114—Possession and ownership.

Possession following title—Presumption—When evidence as to possession conflicting. *See* 8 C.W.N. 876.

42. Presumption.

——S. 114—Presumption—Guiding principles for drawing.

In making presumptions of fact or in drawing inferences of fact from evidence, a Judge or a jury must always have regard to all the known facts of the case. They must do so because they are required to decide on all questions of fact as reasonable men. To attempt to isolate a particular fact or group of facts from surrounding circumstances and to discuss the logical inference may be useful mental exercise ; but it is wholly out of place in a judicial decision.

It is not the law that the Judge or jury must be certain that no other explanation of the facts is possible before they find the accused person guilty. But, if their inference is that he is guilty, it must be a reasonable inference reached with due regard to all the circumstances and with such care and assurance as a reasonable man would think necessary before he drew an important inference in his own most serious affairs, and all the facts proved must be clearly in their minds. In the case of theft, the Judge or jury must be satisfied that there is no reasonable doubt that the accused person was the thief, and in that sense, they must be satisfied that the only explanation of the facts reasonably to be accepted is that he was the thief. It is not required that they should be satisfied that no other conceivable explanation is consistent with the facts. If the accused offers a reasonable explanation, then it is for the prosecution to show that the explanation is untrue, but if the accused offers no explanation, it is not for the Judge or the jury to invent one. A.I.R. 1933 Mad. 233 = 64 M.L.J. 88 = 1932 M.W.N. 801 = 37 M.L.W. 220 = 56 Mad. 231 = 34 Cr. L.J. 481 = 143 Ind. Cas. 46.

——S. 114—Presumption—Guiding principles for drawing.

The presumption of an origin in some lawful title which the Court has so often readily made in order to support possessory rights, long and quietly enjoyed, where no actual proof of title is forthcoming is one which is not a mere branch of the law of evidence. It is resorted to because of the failure of actual evidence. The matter is one of presumption based upon the policy of law but even considered as an inference from proved facts the grant presumed is the thing which may be regarded as likely to have happened. At the same time it is not a presumption to be capriciously made nor it is one which a certain class of possessor is entitled to, *de jure*. In a case such as this where it is necessary to indicate what particular kind of lawful title is being presumed the Court must be satisfied that such a title was in its nature practicable and reasonably capable of being presumed without doing violence to the probabilities of the case. It is the completion of a right to which circumstances clearly point where time has obliterated any record of the original commencement. The longer the period within which and the remoter the time when first a grant might be reasonably supposed to have occurred the less force there is in an objection that the grant could not have been, lawful. 123 Ind. Cas. 722 = 32 Bom. L.R. 633 = 34 C.W.N. 462 = 1930 A.L.J. 377 = 51 C.L.J. 345 = A.I.R. 1930 P.C. 103 = 58 M.L.J. 641 (P.C.).

——S. 114—Presumption—Guiding principle for drawing.

Presumption should not be made against but in favour of the existing state of things. 94 Ind. Cas. 974 = 53 Cal. 533 = 53 I.A. 100 = 30 C.W.N. 745 = 24 A.L.J. 761 = A.I.R. 1926 P.C. 41 (P.C.).

——S. 114—Presumption—Rule of.

Presumption is only an inference as to the existence of one fact from the existence of some other fact founded upon a previous experience of their connection. A.I.R. 1942 Cal. 553 = 75 C.L.J. 372 = 46 C.W.N. 239 = 203 Ind. Cas. 188.

——S. 114—Presumptions.

Presumptions are not made at random. Some connexion must be shown to exist between the fact proving and the fact to be proved, which warrants an inference from the one to the other when the two are brought into proximity. 94 Ind. Cas. 458 = 1926 M.W.N. 344 = A.I.R. 1926 Mad. 511 = 50 M.L.J. 251.

——S. 114—Presumption.

Every apparent transaction must be assumed to be real till contrary is proved by party challenging it. 62 Ind. Cas. 455 = 2 P.L.T. 658 = 6 P.L.J. 218 = A.I.R. 1921 Pat. 125.

——S. 114—Presumption, if can fill up gaps.

Presumptions are permissible to fill in the gaps in the evidence which have been obliterated by the passage of time. A.I.R. 1937 Nag. 43 = I.L.R. (1936) Nag. 167 = 171 Ind. Cas. 174.

——S. 114—Presumptions—If can fill-up gaps.

Where the argument is that owing to lapse of time, as a matter of law, legal necessity should be presumed regard must be had to the amount of evidence likely to be available after the lapse of a long time and presumptions should be allowed to fill in the gaps disclosed in the evidence. Presumptions not to supplement but to contradict the evidence would be out of place. A.I.R. 1936 P.C. 60 = 1936 O.W.N. 38 = 40 C.W.N. 257 = 43 M.L.W. 120 = 38 P.L.R. 69 (2) = 2 B.R. 215 = 1936 M.W.N. 184 = 1936 A.W.R. 37 = 70 M.L.J. 225 = 19 N.L.J. 36 = 38 Bom. L.R. 344 = 63 C.L.J. 42 = 1936 A.L.J. 755 = 160 Ind. Cas. 45 (P.C.).

——S. 114—Presumption—If can fill-up gaps.

Gaps in the prosecution evidence cannot be supplied by raising presumptions under S. 114. (1910) M.W.N. 77 = 7 M.L.T. 314 = 11 Cr. L.J. 222 = 20 M.L.J. 657 = 6 Ind. Cas. 51.

——S. 114—Presumptions.

Suit under S. 53 (2), Patents and Designs Act for damages and injunctions—Onus of proving that defen-

dants had knowledge of plaintiff's rights in the designs is on the plaintiff—S. 106, Evidence Act, has no application, nor a presumption under S. 114 arises. A.I.R. 1936 Cal. 493 = 40 C.W.N. 938 = 63 Cal. 1146 = 166 Ind. Cas. 535 (2).

——S. 114—Presumption and circumstantial evidence—Scope.

Circumstantial evidence is often characterized as presumptive. But 'presumption' in the sense of a mere circumstantial inference is very different from 'presumption' in the sense of a rule of procedure affecting the duty of proof. A.I.R. 1941 Cal. 541 = I.L.R. (1941) 2 Cal. 44 = 45 C.W.N. 590 = 74 C.L.J. 145 = 197 Ind. Cas. 376.

43. Scope.

——S. 114—Scope—Presumption under—If obligatory on Court to make.

It cannot be said that a Court should make a presumption under S. 114 of the Evidence Act on the materials before it. It is optional with the Court concerned to make a presumption under S. 114. 1948 A.W.R. (Rev.) 199 = 1948 R.D. 348.

——S. 114—Scope—Truth and honesty—Presumption of law.

No presumption in favour of bad faith, dishonesty or fraud should be made in any case—least of all when they are attributed to an officer of state. The law presumes that ordinary standards of truth and honesty are observed until the contrary is shown by evidence incompatible with such standards. A.I.R. 1945 Pat. 44 = 23 Pat. 968 (F.B.).

——S. 114—Scope.

If witness goes into the box and testifies on oath, the jury, unless there is something elase operating on their minds, may draw an inference not as a matter of law but rather as a matter of fact that he is *prima facie* likely to be speaking the truth particularly in capital cases. A.I.R. 1939 Cal. 682 = I.L.R. (1939) 1 Cal. 187 = 43 C.W.N. 133 = 41 Cr. L.J. 59 = 184 Ind. Cas. 614.

——S. 114—Scope.

S. 114 does not go so far as to enable the Court to presume that a certain state of things existed in the past without any proof from the party who is required to satisfy the Court on the point. A.I.R. 1930 Cal. 815 = 35 C.W.N. 133 = 58 Cal. 585 = 129 Ind. Cas. 769 = 52 C.L.J. 235.

——S. 114—Scope.

The distinction between a mere inference and a presumption of fact is that the latter is an inference under S. 114 and includes a presumption of the nature described in the illustrations. It also includes anything that, in English law, would rank as a presumption of law. 106 Ind. Cas. 250 = 50 All. 145 = 25 A.L.J. 833 = A.I.R. 1928 All. 16.

——S. 114—Scope.

What a party himself admits to be true may reasonably be presumed to be so and until the presumption was rebutted the fact admitted must be taken to be established. 65 Ind. Cas. 398 = 8 O.L.J. 609 = A.I.R. 1922 Oudh 98.

——S. 114—Scope—Value of presumption.

Rebuttable presumptions are given to the ascertainment of facts. It is an abuse of their true function to convert them into an excuse for evading the ascertainment of facts. 2 L.W. 650 = 29 M.L.J. 362 = (1915) M.W.N. 614 = 30 Ind. Cas. 983.

——S. 114—Scope of—Wrong-doer.

The law relating to presumptions should not enable a wrong-doer, to turn it to his own use. 8 A.L.J. 247 = 10 Ind. Cas. 742.

——S. 114—Scope.

Per STANLEY, C.J.—A presumption is a logical assumption that a thing is true until it is disproved. 32 All. 427 = 7 A.L.J. 682 = 6 Ind. Cas. 609 (F.B.).

——S. 114—Scope—Presumption.

The true foundation of a presumption is either some policy or general conformity with fact. 28 M. 1.

——S. 114—Scope of—Illustrations—Illustrations are not exhaustive—Presumption is one of fact.

Per FAZL ALI, C.J. AND SINHA, J.—The Ilustrations which are appended to S. 114 are not exhaustive, but merely illustrate the principle underlying the main provision. The presumption to be drawn under S. 114 is one of fact and whether it should be drawn or not in a particular case must depend upon the facts of that case. A.I.R. 1946 Pat. 1 = 24 Pat. 781 (F.B.).

——S. 114—Scope of Illustrations.

The principle laid down by S. 114 is one of very wide application, which covers, not merely the particular instances given in the illustrations to the section, but all sorts of analogous cases in which the actual facts are distinguishable from the facts presumed by any one of the illustrations, but are equally amenable to the general principle enunciated by the section itself. A.I.R. 1945 Bom. 292 = 47 Bom. L.R. 63 = 47 Cr. L.J. 51 = 221 Ind. Cas. 86.

——S. 114—Scope of Illustrations.

The illustrations to S. 114, Evidence Act, are not exhaustive. They do not restrict presumptions regarding the existence of facts to the facts covered by the illustrations. On the contrary, if a question arises as to whether the existence of a particular fact may be presumed, the criterion must be in the words of S. 114. A.I.R. 1945 Mad. 208 = 1945 M.W.N. 107 = (1945) 1 M.L.J. 202 = 58 M.L.W. 209 = 46 Cr. L.J. 711 = 220 Ind. Cas. 229.

——S. 114—Scope of Illustrations.

The illustrations appended to S. 114 are not intended to lay down rules of law which are exhaustive of the presumptions that may be made under the provisions of the section itself or that they are intended to apply without exception. They are merely examples of circumstances in which certain presumptions may be made and other presumptions of a similar kind in similar circumstances may be made under the provisions of the section itself. A.I.R. 1944 All. 281 = 1944 A.W.R. (H.C.) 249 = 1944 A.L.J. 411 = 1944 O.W.N. (H.C.) 198 = 46 Cr. L.J. 155 = I.L.R. (1944) All. 694 = 216 Ind. Cas. 248.

——S. 114—Scope of illustrations.

The principle laid down in the section is of wide application and covers other cases analogous to those given in the illustrations to the section. 1 O.L.J. 95 = 15 Cr. L.J. 440 = 24 Ind. Cas. 146.

44. Silence.

——S. 114—Silence—Written notice—Omission to send reply—Adverse inference, if may be drawn.

In a prosecution for an offence under S. 406, I.P. Code, in respect of certain documents entrusted to the accused, the defence of the latter was that he had returned them to the complainant. The complainant had sent a written notice to the accused to return the document, but the accused sent no reply at all and gave no explanation of his conduct in that behalf.

Held, that the Court was justified in drawing an inference adverse to the accused. 49 Cr. L.J. 690 = A.I.R. 1948 Pat. 406.

——S. 114—Silence—Failure to object to statement of accounts—Evidence of correctness.

If a statement substantially affecting a person's interest is made to him and the circumstances are such

that he would certainly or probably have objected had the statement been incorrect, then his silence can be treated as an admission, *i.e.*, as evidence of the correctness of the statement. 8 S.L.R. 112 = 27 Ind. Cas. 309.

45. Statements and affidavits.

——S. 114—Statements and affidavits.

Where a Court has to choose between two conflicting statements of a witness, by one of which he stands to gain a sum, while by the other he stands to lose a bigger sum, the statement against interest should ordinarily be preferred. A.I.R. 1930 Pat. 293 = 126 Ind. Cas. 369.

——S. 114—Statements and affidavits.

When there is a definite allegation in an affidavit which is the only evidence in the case and that allegation is not traversed by the other side, it must be held to be correct. 115 Ind. Cas. 247 = 1929 M.W.N. 139.

——S. 114—Statements and affidavits—Contradiction between affidavits on opposite sides—Judge's note about the proceedings is to be accepted.

Where parties agreed to abide by oath of the plaintiff and the question was what the nature of the agreement was and there was a direct contradiction between affidavits of the two pleaders, which were filed after a long time had elapsed, as to the nature of the agreement.

Held, proper thing to do would be to rely upon the note the Judge made at the time and presume that what took place in the presence of the Judge who must have been aware of the facts and the nature of the agreement was what was agreed to between the parties. The Judge had no interest or motive in supporting the allegations of one side or the other and it must be presumed that he acted properly in administering the oath in accordance with what the parties agreed to. 107 Ind. Cas. 648 = A.I.R. 1928 Mad. 625.

——S. 114—Statements and affidavits—Statement after suit is of very little evidentiary value.

The making of a statement in a document after the suit had been launched and was pending is very different from stating on oath in the witness box, and the Court will not attach much weight to the statement even if it is admissible when no question about it has been put to the person making the statement when he was examined as a witness. A.I.R. 1923 Mad. 225.

46. Wills.

——S. 114—Will—Female legatee—Use of word 'malik'—Presumption.

The ordinary meaning of the word 'Malik' in reference to property is 'absolute owner' and if the testator used the word it is to be presumed that he uses it in its ordinary meaning. The fact that the legatee of a Hindu is a woman points to a probability that the testator intended that after her death, his property should return to his heirs-at-law, that is his own family. But it is a very weak indication of that probability, not nearly as strong by itself as the indication of the contrary to be found in the use of the word 'malik.' 69 Ind. Cas 286 = A.I.R. 1923 Nag. 56.

——S. 114—Will entirely written by testator—*Prima facie* case of genuineness—*Onus* shifts on defendants to establish forgery.

There is nothing unnatural in a Hindu sonless and not in a good state of health, writing a document by which directions are given to a widow to adopt the testator's nephew. It is certainly extremely improbable that a person wishing to put forward a forged will would run the risk of imitating the handwriting of the deceased or get it imitated by some one else when it would be so easy to attack a forged document when it runs over a folio page and purports to have been written by the testator. The plaintiff has to prove the document on which he relies but when once he has gone as far as putting before the Court a *prima facie* case which bears the signs of being genuine, then it is for the defendant to produce reliable grounds for upsetting the plaintiff's case and satisfy the Court that it is not only improbable but impossible. 80 Ind. Cas. 189 = A.I.R. 1922 Bom. 296.

——S. 114—Will—Execution of—Knowledge of contents.

Execution raises a presumption of knowledge and approval of contents. 141 P.L.R. 1911 = 20 P.R. 1912 = 233 P.W.R. 1911 = 10 Ind. Cas. 130.

——S. 114—Will—Parsis—Presumption.

There is no presumption that a Parsi lady will leave her property to her heirs on an intestacy in preference to exercising her power of testamentary disposition. 12 Bom. L.R. 569 = 7 Ind. Cas. 657.

——S. 114—Will—Importunity.

If the testator was in a sound state of body and mind the presumption is that he executed the will without coercion or undue influence. 11 C.W.N. 824.

47. Miscellaneous.

——S. 114—Miscellaneous.

If at the time of booking, the Railway Company is dissatisfied and the person delivering the goods for carriage agrees that the condition of the packages is not satisfactory, it cannot afterwards be made matter of objection in a suit upon the contract that the packages were in good condition. 106 Ind. Cas. 247 = 55 Cal. 142 = 47 C.L.J. 32 = 32 C.W.N. 53 = A.I.R. 1928 Cal. 170.

——S. 114—Miscellaneous—Migration—Personal law—Applicability.

The ordinary presumption of law is that when a person leaves one district and goes into another where a different custom prevails, he carries his personal law with him and unless there is something to show that he had abandoned his personal law and had adopted the law of his new district, he will continue to be governed by the personal law of his old district. 103 Ind. Cas. 170 = 9 Lah. 110 = A.I.R. 1928 Lah. 212.

——S. 114—Miscellaneous—Omission to presume is no ground for revision.

A Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it; but it cannot be taken to be a principle of law that the Court must presume it, and if the Court does not make such a presumption under the circumstances of a case, it is no ground for interfering in revision. 103 Ind. Cas. 560 = 1 L.C. 195 = 28 Cr. L.J. 704 = 8 A.I. Cr. R. 414 = A.I.R. 1927 Oudh 318.

——S. 114—Miscellaneous—Malicious prosecution—Charge absolutely groundless—Reasonable and probable cause cannot be presumed.

In execution of a decree, the officer of the Court went to judgment-debtor's house and attached some articles. The judgment-debtor thereupon filed a complaint of theft against the decree-holder which was found to be groundless. In a suit for malicious prosecution by decree-holder against judgment-debtor,

Held, where on the face of it, the charge brought by defendant against plaintiff is groundless, it can safely be inferred that the defendant had no reasonable and probable cause and the plaintiff cannot be asked to give further evidence directly going to show that there was no reasonable and probable cause. 73 Ind. Cas. 446 = A.I.R. 1923 All. 531.

——S. 114—Miscellaneous.

Butcher without licence importing meat in quantities more than required for his personal use and distributing it—No proof of receiving money—Presumption that he actually imported meat and sold it is justified. 118 Ind. Cas. 223 = 1929 Cr. C. 318 = 30 Cr. L.J. 906 = A.I.R. 1929 Sind 150.

——S. 114—Miscellaneous.

A person whose property is lost by fire soon after he had effected a fire insurance cannot be suspected of arson. A.I.R. 1941 Rang. 324 = 1941 Rang. L.R. 566 = 43 Cr. L.J. 373 = 198 Ind. Cas. 455.

——S. 114—Miscellaneous—Contract—Presumption of irrevocability—Proof of revocability.

Per MUKERJEE, J.—Every contract is *prima facie* permanent and irrevocable and it lies upon a person who says that it is revocable or determinable, to show either some expression in the contract itself or something in the nature of the contract from which it is reasonably to be implied, that it was not intended to be permanent and irrevocable but was to be in some way or other, subject to determination. The contract may, for instance, be shown to be for a limited time terminable upon the happening of a particular contingency or terminable at the option of either party upon reasonable notice. In each case, however, it lies upon the party who asserts that the contract is terminable to show how and in what manner it is revocable or determinable. (1907) 6 C.L.J. 727.

——S. 114—Miscellaneous—Transaction, validity of.

The presumption is that everything the law requires to make a transaction valid was duly done. A.I.R. 1937 Nag. 63 = 163 Ind. Cas. 415.

——S. 114—Miscellaneous—Rent decree—Presumption—Purchase in execution of a rent decree against tenant—What passes under—Bengal Tenancy Act (8 of 1885), S. 163.

A presumption can be drawn under S. 114, Evidence Act, that there cannot be a rent decree unless there was a rent suit. Hence a purchaser in execution of a rent decree acquires the property and not merely the right, title and interest of the tenant. A.I.R. 1934 Pat. 175 = 154 Ind. Cas. 348.

——S. 114—Miscellaneous—Attesting witness—Presumption as to time of signature.

Under S. 114, it may be presumed that an attesting witness signed after the executant had signed. A.I.R. 1931 Cal. 806 = 53 C.L.J. 586 = 134 Ind. Cas. 767.

——S. 114—Miscellaneous.

Where a person was adjudicated insolvent on 13-12-1926 and he received certain sums between 13-12-1926 and 6-2-1926, it was held, that the Court might fairly presume that the source of the trade which brought these sums into the insolvent's hands after his adjudication consisted of assets in his possession at the time of the adjudication. 1931 M.W.N. 1312.

——S. 114—Miscellaneous—Jurisdiction of Court—Presumption.

It is a general principle of law that every presumption shall be made in favour of the jurisdiction of a Civil Court and that it should not be taken away except by express words or by necessary implication. 33 M. 208 = 5 Ind Cas. 137 = 7 M.L.T. 181 = 20 M.L.J. 91.

——S. 114—Miscellaneous—Appointment as commission agent—Subsequent appointment as agent to purchaser—How far old terms continue.

Where a commission agent is employed under a certain agreement on certain terms and for a certain period, and he is afterwards employed merely as a purchaser on certain terms carefully and elaborately reduced into writing, there is no necessary presumption that the terms of the previous agreement apply and continue to apply unless expressly cancelled or modified by the second agreement. 4 Bom. L.R. 627.

——S. 114, ILLUSTRATIONS (*a*).

Synopsis.

(*a*) Applicability.
(*b*) Burden of proof.
(*c*) Grounds for presumption.
(*d*) Nature of possession.
(*e*) Possession following theft.
(*f*) Possession not immediate.
(*g*) Possession of stolen cattle.
(*h*) Presumption under.
(*i*) Reasonable explanation.
(*j*) Recent possession.

(*a*) Applicability.

——S. 114, Illus. (*a*)—Applicability—Conditions—Dumb accused—Explanation for possession of stolen articles not taken—Conviction—Legality.

In order to raise the presumption under Illus. (*a*) to S. 114, Evidence Act, the accused must first be given an opportunity to account for his possession. When that has not been done, the accused cannot legally be convicted under S. 380 or 411, I.P. Code. The fact that the accused is dumb does not do away with the necessity to get the explanation of the accused, especially when he is able to express his thoughts through signs. In such cases, the Court should get the aid of an interpreter and get the explanation of the accused. If that is not done the conviction based on the presumption from the mere fact of possession is unsustainable. 53 Mys. H.C.R. 162 = 28 Mys. L.J. 196.

——S. 114, Illus. (*a*)—Applicability—Conditions for.

Unless the prosecution prove circumstances in which, by statute, a person may be presumed guilty under a particular section of the Penal Code, the question of presumption of guilt does not arise.

A dacoity took place in the house of one *P*, a week later, one *G* and the accused *R* were found offering for sale to one *S* four gold ear-rings belonging to *P*. The prosecution evidence was that while *G* offered the articles for sale, *R* was only with him and spoke nothing. *R* was convicted under S. 412, Penal Code. In the charge to the jury, the Judge said : " There is no evidence nor any circumstance to suggest an inference that *G* knew that the ear-rings were stolen properties taken away at the dacoity in the house of *P*. But *R*, who was with him, may reasonably be taken to be aware of the dacoity in the house of *P*. In case you find that the ear-rings belonged to *P*, then the presumption would be that *G* is either the thief or had received the goods knowing them to be stolen unless he can account for his possession ". Then after explaining Illus. (*a*) to S. 114, Evidence Act, the Judge proceeded, " *R* has not given an explanation as to how he should have been with *G* while he was offering the ear-rings for sale to *S*. It is, therefore, for you to consider whether the inference reasonably follows that *R* was an accomplice of *G* in the matter of disposal of two pairs of gold ear-rings. If he was, then he is equally liable for the offence " :

Held, that before any explanation could be expected from *R*, it was the duty of the prosecution to establish that he was in possession of some stolen property. On the facts, it was *G* who was in possession of the ear-rings and not *R*.

Held, further, that there was a misdirection to the jury and *R* could not be convicted under S. 412, Penal Code. When the Judge told the jury that *R* may reasonably be taken to be aware of the dacoity in the

house of *P*, he was inviting them to presume what the prosecution had to prove. Although his direction with regard to the presumption against *G* may be justifiable in view of the Illus. (*a*) to S. 114, Evidence Act, yet when he said that *R* had not given any explanation as to how he should have been with *G* while he was offering the ear-rings for sale to *S*, he implied that *R* was liable to be presumed guilty of some offence unless he came forward with an explanation. A.I.R. 1942 Pat. 250 = 8 B.R. 393 = 43 Cr. L.J. 353 = 198 Ind. Cas. 307.

——S. 114, Illus. (*a*)—Applicability—Conditions.

Before a presumption under S. 114 (*a*) can arise, it must be proved that the goods found in the possession of the accused have been stolen. A direction to the jury that the presence of a reasonable presumption of the property being stolen property is enough to raise the presumption of guilt, is misdirection. 88 Ind. Cas. 515 = 26 Cr. L.J. 1155 = 52 Cal. 223 = A.I.R. 1925 Cal. 666.

——S. 114, Illus. (*a*)—Applicability.

Even though there is no direct evidence of theft or of house-breaking and the only evidence is the possession by the accused of stolen articles shortly after the theft it will be open to the Court to draw a presumption under S. 114 that he must have been the thief if he is not able to satisfactorily explain that possession. If the theft could not have been committed without house-breaking it may be presumed he must have committed the house-breaking. But when it is not possible to communicate with the accused because he was born deaf and dumb and could not be made to understand what he was asked and could not give an explanation of his possession no inference under S. 114 can be drawn, and the accused cannot be found guilty of the offence of house-breaking and theft under Ss. 457 and 380, Penal Code. A.I.R. 1946 Mad. 60 = 1945 2 M.L.J. 407 = 58 M.L.W. 574 = 1945 M.W.N. 692 = 223 Ind. Cas. 106 = 47 Cr. L.J. 357.

——S. 114, Illus. (*a*)—Applicability.

Under S. 410, I.P.C., property which has been criminally misappropriated is designated "stolen property" and there is no logical reason why a man who is in possession of stolen goods soon after they have been criminally misappropriated, if he cannot account for the possession, should be regarded as less likely to have misappropriated them or to have received them knowing them to be stolen than if they had been the subject of theft. A.I.R. 1945 Mad. 208 = 1945 M.W.N. 107 = (1945) 1 M.L.J. 202 = 58 M.L.W. 209 = 46 Cr. L.J. 711 = 220 Ind. Cas. 229.

——S. 114, Illus. (*b*)—Applicability.

The prosecution must establish, not only that the stolen property was recovered from the house or other place in the occupation of culprit but also that the incriminating article was in the house or other place and the culprit was fully aware of its presence. A.I.R 1945 All. 230 = 1945 A.L.J. 124 = 1945 O.W.N. (H.C.) 152 = 1945 A.W.R. (H.C.) 68 (2) = 47 Cr. L.J. 104 = I.L.R. (1945) All. 290 = 221 Ind. Cas. 176.

——S. 114, Illus. (*a*)—Applicability.

Although illustrations to a section, unlike the marginal notes, are to be considered as a part of the section itself, and are to be accepted as being both relevant and valuable for the construction of the section, they merely exemplify the application of the rule contained in the section and do not control the plain meaning of the section itself. They are not to be regarded as exhaustive, but are only intended as a guide to the working and application of the section to which they are appended. It would be wrong on principle to hold that Illus. (*a*) to S. 114, Evidence Act, in any way fetters the discretion given to the Court to presume the existence of any fact which it thinks likely to have happened having regard to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. It would not, therefore, be right to lay down any hard and fast rules as to when and what presumption may be raised, as it always depends on the particular circumstances of each case.

The illus. (*a*) to S. 114 applies to stolen property which may include, under S. 410, I.P.C., any property which is the subject-matter of theft, extortion, robbery (including dacoity), criminal misappropriation or breach of trust. The presumption would, therefore, be that a person in recent possession of articles seized in a dacoity is either a dacoit or receiver of stolen property. It is important to note that this presumption is not of one definite offence but of an alternative offence, because possession of stolen property by itself is not sufficient to prove participation in the offence of theft. It can only go to corroborate other independent evidence of theft. If there is no such evidence, the conviction may be of the alternative offence and the punishment only for the lower offence of possession under S. 72, I.P.C. A.I.R. 1945 Bom. 292 = 47 Bom. L.R. 63 = 47 Cr. L.J. 51 = 221 Ind. Cas. 86.

——S. 114, Illus. (*a*)—Applicability.

Where certain persons are found the day after the burglary has taken place, with the stolen property in circumstances suggesting that they are dividing up the booty it is reasonable to infer that they are persons guilty of burglary. Such an inference, however, is not one of law but one of fact based upon the common course of events and human conduct. A.I.R. 1944 All. 281 = 1944 A.W.R. 249 = 1944 A.L.J. 411 = 1944 O.W.N. 198 = 46 Cr. L.J. 155 = I.L.R. (1944) All. 694 = 216 Ind. Cas. 248.

——S. 114, Illus. (*a*)—Applicability.

Illustration (*a*) to S. 114 relates only to stolen property obtained by committing theft and not property obtained by criminal misappropriation. Hence where the animals scattered from a herd in forest by *cheetah* scare and subsequently accused who were cattle dealers were found selling them, no inference under S. 114. Illus. (*a*) can be raised. A.I.R. 1943 Mad. 26 = 56 M.L.W. 547 = (1943) 2 M.L.J. 334 = 1943 M.W.N. 580 = 45 Cr. L.J. 220 = 210 Ind. Cas. 315.

——S. 114, Illus. (*a*)—Applicability—Brass bell stolen in Bombay found in shop of accused thirteen days after the theft.

When one is dealing with property of some value, and it is very unlikely that the man from whom the accused got it, had come by it honestly; or when one is dealing with property stolen in a village where there are not likely to be many dealings in it, the presumption may be drawn more readily than in the case of a theft in a city like Bombay, and in the case of property like an old brass bell which was stolen, and found in the accused's shop thirteen days afterwards. A.I.R. 1941 Bom. 325 = 43 Bom. L.R. 629 = 42 Cr. L.J. 893 = 196 Ind. Cas. 526.

——S. 114, Illus. (*a*)—Applicability—Dacoity and robbery.

Though Illus. (*a*) to S. 114, Evidence Act, only mentions a case of ordinary theft, it is well-established that its principle applies not only to ordinary cases of theft, but also to cognate offences such as dacoity and robbery. 25 Pat. 262 = 13 B.R. 113 = 228 Ind. Cas. 36 = 48 Cr. L.J. 133 = A.I.R. 1947 Pat. 205 = 27 P.L.T. 323.

——S. 114, Illus. (*a*)—Applicability—Dacoity.

S. 114, Illus. (*a*), is in general terms and the fact that the section does not provide an illustration with reference to a dacoity does not mean that there is no such presumption. Where the accused is found to be in recent possession of the property stolen in a dacoity, it can be presumed that he was one of the

dacoits or that he had dishonestly received or retained the property knowing or having reason to believe that the possession had been transferred by dacoity or that he had dishonestly received or retained it knowing or having reason to believe that it was stolen property. A.I.R. 1945 Cal. 421 = 47 Cr. C.J. 193 = 49 C.W.N. 392 = 221 Ind. Cas. 499.

——S 114, Illus. (*a*)—Applicability—Dacoity.

Dacoity with murder—Accused found in possession of murdered man's property—Possession not explained :

Held, that the accused was guilty under S. 376, Penal Code. A.I.R. 1944 Sind 113 = I.L.R. (1943) Kar. 371 = 45 Cr. L.J. 704 = 213 Ind. Cas. 317.

——S. 114, Illus. (*a*)—Applicability—Dacoity.

Question whether the Court will make one and which of the presumptions under S. 114, Illus. (*a*) is irrelevant upon a consideration of the provisions of Ss. 236 and 237 of the Criminal P.C. Such a presumption is not one of the facts which " can be proved."

The provisions of S. 114, Illus. (*a*), do not entitle the Court to presume the knowledge of dacoity or dacoits which is required for a conviction under S. 412, I.P.C. A.I.R. 1936 Cal. 796 = 39 C.W.N. 620 = 62 Cal. 956 = 37 Cr. L.J. 701 = 162 Ind. Cas. 927.

——S. 114, Illus. (*a*)—Applicability—Dacoity.

The presumption not confined to charges of theft but extends to all charges, however penal, not excluding even murder. Consequently where a person charged with dacoity is shown to have been in possession of part of stolen property soon after the dacoity it may be presumed that he was one of the dacoits or he received the property knowing it to have been stolen at the dacoity. A.I.R. 1930 Pat. 513 = 9 Pat. 606 = 11 P.L.T. 867 =128 Ind. Cas. 121.

——S. 114, Illus. (*a*)—Applicability—Murder.

Article belonging to murdered man found with accused—Accused unable to account for same—Inference—Incriminating circumstances. 54 Mys. H.C.R. 237.

——S. 114, Illus. (*a*)—Applicability—Murder.

A person who is found in possession of articles which were with a person who has been murdered, at the time of the murder, may sometimes, but not necessarily, be presumed to be a murderer and a thief. Before any presumption is raised, there must be evidence that the articles were in fact in the possession of the deceased at the time and the Court must be satisfied that possession could not have been transferred from the deceased to the accused except by the former being murdered. 3 A.I. Cr. D. 529.

——S. 114, Illus. (*a*)—Applicability—Murder.

Where the accused produces ornaments of a murdered woman soon after the murder and gives no explanation as to how he came into possession of the same, the presumption under S. 114 applies. A.I.R. 1943 Bom. 458 = 45 Bom. L.R. 884 = 45 Cr. L.J. 221 = I.L.R. (1944) Bom. 25 = 210 Ind. Cas. 362.

——S. 114, Illus. (*a*)—Applicability—Murder.

Two accused in company of deceased at time of murder—One subsequently found in possession of jewels worn by deceased.

The accused admitted his presence with the deceased but explained that he was in the company of the deceased because the other accused had asked him to fetch the deceased. He did not, however, admit his guilt :

Held, that such a statement might raise suspicion against the accused, but it was not such as to raise the irresistible presumption of guilt. A.I.R. 1941 Mad. 359 = 52 M.L.W. 942 = 1940 M.W.N. 1272 = (1941) 1 M.L.J. 227 = 42 Cr. L.J. 664 = I.L.R. (1941) Mad. 503 = 195 Ind. Cas. 76.

——S. 114, Illus. (*a*)—Applicability—Murder.

Charge specific that murder was caused by throttling—No proof that deceased was murdered at all—No presumption of guilt can be drawn from the recent possession by the accused of jewellery taken from the deceased. A.I.R. 1940 Mad. 12 = 1939 M.W.N. 873 = 50 M.L.W. 435 = 41 Cr. L.J. 242=185 Ind. Cas. 829.

——S. 114, Illus. (*a*)—Applicability—Murder and robbery or receiving stolen property.

It may be presumed under S. 114 that the accused was either involved in the murder and robbery or at least received the stolen property knowing it to be the proceeds of the robbery. But when the question arises whether the presumption of the graver offence or of the lesser offence is to be drawn, it is for the prosecution to establish the graver presumption rather than for the graver presumption to be drawn in the absence of an explanation from the accused. A..I.R. 1939 Pat. 577 = 20 P.L.T. 420 = 5 B.R. 706 = 18 Pat. 450 = 40 Cr. L.J. 625 = 181 Ind. Cas. 1001.

——S. 114, Illus. (*a*)—Applicability—Murder.

The presumption arising out of the accused's recent possession of the stolen property which had been removed from the person of deceased at or about the time of his murder is one of fact which are inferences which the Court naturally and logically draws from given facts without the help of legal direction and, therefore, fall more properly within the province of logic and do not constitute a branch of jurisprudence. Such presumptions are always permissive in the sense that the Court has the discretion to draw or not to draw them. Whether the Court is to draw or not to draw them, must depend upon the circumstances of each case. A.I.R. 1937 Rang. 439 = 39 Cr. L.J. 47 = 172 Ind. Cas. 66.

——S. 114, Illus. (*a*)—Applicability—Murder.

When the unexplained possession of articles is the only circumstance appearing in the evidence against the accused, it is not sufficient to warrant a presumption of complicity in murder. A.I.R. 1936 Nag. 200 = 37 Cr. L.J. 1047 = I.L.R. (1936) Nag. 78 = 164 Ind. Cas. 964.

——S. 114, Illus. (*a*)—Applicability—Murder.

The possession of the jewels of a murdered woman if unexplained is presumptive evidence that the accused was the murderer as well as that he committed theft. 69 Ind. Cas. 377 = 14 M.L.W. 418 = A.I.R. 1921 Mad. 679.

——S. 114, Illus. (*a*)—Applicability—Murder and theft—Possession of stolen property not explained—Accused cannot be presumed to have committed murder.

When the charge is that the accused committed murder or theft in a building or both, it is not legitimate to presume that the accused are guilty of the more serious offence of murder because they are unable or unwilling to explain their possession of stolen property, and when the unexplained possession of stolen property is the only circumstance appearing in the evidence against an accused they cannot be convicted of murder unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. 93 Ind. Cas. 42 = 50 Mad. 274 = 27 Cr. L.J. 394 = A.I.R. 1926 Mad. 638.

——S. 114, Illus. (*a*)—Applicability—Murder.

Where in a case of murder the accused is found to have had recent possession of the articles belonging to the deceased, having traces of human blood, this is a fact from which the Court might presume not only theft but murder too. 17 C.W.N. 1077 = 14 Cr. L.J. 556 = 21 Ind. Cas. 156.

——**S. 114, Illus (*a*)—Applicability—Murder—Robbery.**
In a case where murder and robbery form part of one and the same transaction the recent and unexplained possession of stolen articles by the accused unless shown that he was only the receiver of stolen property, would raise a presumption not only of robbery but also of murder. 21 M.L.J. 1071 = (1911) 2 M.W.N. 478 = 12 Cr. L.J. 564 = 12 Ind. Cas. 652.
See also 20 Cr L.J. 753 = 53 Ind. Cas. 481.

——**S. 114, Illus. (*a*)—Applicability—Possession of stolen property.**
If a thief got into a house by house-breaking and the stolen property was found in his possession, he may be presumed to have committed the theft as well as house-breaking. 17 Cr. L.J. 32 = 32 Ind. Cas. 160.

——**S. 114, Illus. (*a*)—Applicability**
Stolen property, possession. *See* PENAL CODE, S. 379. 9 Bom. L.R. 27.

(b) Burden of proof.

——**S. 114, Illus. (*a*)—Burden of proof.**
The propositions regulating the burden of proof in a criminal trial and the nature of presumption arising from recent possession of stolen articles stated in detail. A.I.R. 1945 Cal. 93 = I.L.R. (1944) 1 Cal. 595 = 46 Cr. L.J. 465 = 218 Ind. Cas. 345.

——**S. 114, Illus. (*a*)—Burden of proof—Explanation by accused—Duty of prosecution.**
Presumption under Illus. (*a*) does not, in any way, shift the burden of proof to the accused. Nor does it mean that the accused must prove it positively that he received the property in the manner indicated by him. If the explanation given by the accused is not inherently improbable or palpably false and the Court or the jury trying the case find it to be reasonably true, the adverse presumption shall be deemed to have been rebutted. The explanation must be sufficient to cast a doubt on the guilt of the accused and in that case, unless the prosecution proves beyond reasonable doubt that the accused received the property knowing it to be stolen, the benefit of doubt shall go to him. A.I.R. 1945 All. 19 = 1944 A.L.J. 445 = 1944 A.W.R. 272 = 1944 O.W.N. (H.C.) 234 = 46 Cr.L.J. 233 = I.L.R. (1945) All. 11 = 217 Ind. Cas. 192.

——**S. 114, Illus. (*a*)—Burden of proof.**
The onus of establishing the guilt of an accused person always rests on the prosecution. Where an accused person is found to be in possession of the property recently stolen, the Court can presume that he was the thief or that he received the goods knowing them to be stolen. There is only a presumption of this which can be rebutted by the accused giving a reasonable explanation of his possession of the articles in question. The fact that the presumption is made does not throw the onus upon the accused of proving affirmatively that he had no knowledge that the goods were stolen. By reason of the presumption, the accused must give a reasonable explanation of his possession and an explanation which may well be true. The accused is not bound to establish beyond all doubt that he obtained the goods innocently. The view that the onus of proof shifts on to the accused when the Crown shows that he was in possession of recently stolen property is erroneous. A.I.R. 1942 Pat. 439 (2) = 23 P.L.T. 18 = 8 B.R. 411 = 43 Cr. L.J. 355 = 198 Ind. Cas. 400.

——**S. 114, Illus. (*a*)—Burden of proof.**
The accused who is found soon after the theft in possession of the "stolen" property, is presumed to be either the thief or to have received the property knowing it to be stolen. This presumption cannot, however, arise at all if the accused is able to account for his possession. There is no question in such cases of the accused being required to prove his innocence. The issue in such cases is whether the accused is to be convicted, and he can only be convicted if he is proved to be guilty, and not merely because he fails to establish his innocence. "Not guilty" is a wider expression than "innocent". A.I.R. 1941 Pat. 175 = 42 Cr. L.J. 215 = 7 B.R. 241 = 21 P.L.T. 1021 = 191 Ind. Cas. 702.

——**S. 114, Illus. (*a*)—Burden of proof.**
Under S. 114, the Court may, if the circumstances justify it, draw a presumption of guilt against a person who is in possession of stolen property; but this presumption does not automatically arise. If several months have passed, or if the accused is able to give an apparently reasonable explanation of his possession of the stolen property, the presumption will not arise. S. 114 does not relieve the prosecution of the onus of proving the accused's guilt in respect of a charge under S. 411, I.P.C.; the onus is there just as in the case of any other charge but under certain conditions, a presumption may arise to alleviate it. A.I.R. 1937 All. 47 = 1936 A.L.J. 1158 = 1936 A.W.R. 973 = 38 Cr. L.J. 196 = 166 Ind. Cas. 363.

——**S. 114, Illus. (*a*)—Burden of proof.**
In cases under Ss. 411 and 412, I.P.C. the onus of proof never passes to the accused. The Crown must prove guilty knowledge. 164 Ind. Cas. 721 = 62 C.L.J. 257 = 40 C.W.N. 159 = 37 Cr. L.J. 976.

——**S. 114, Illus. (*a*)—Burden of proof.**
S. 114 and Illus. (*a*) thereto speak of the Court's power to draw a presumption and act upon it unless the accused can account for his possession. But this does not mean that the accused must prove affirmatively that he came by the goods innocently. It is sufficient if he can give an explanation which may raise doubt in the mind of the Court as to the guilt of the accused. If he (the accused) gives any explanation which in the opinion of the jury, may possibly be true although they do not necessarily believe it, then the Crown cannot rely upon the presumption and must prove the guilt of the accused just as in any other criminal case.
It is wrong to suppose that when the distance of time between the theft and the recovery of the stolen property from the possession of the accused is short, then the burden shifts on the accused to prove affirmatively that he came by the possession of the property in an innocent manner. A.I.R. 1933 All. 893 = 1933 A.L.J. 1534 = 56 All. 250 = 35 Cr. L.J. 621 = 148 Ind. Cas. 141.

——**S. 114, Illus. (*a*)—Burden of proof.**
Trial under S. 411, I.P.C.—Neither the receiving nor the retention of stolen property established beyond reasonable doubt:
Held, that the accused was not under any necessity to prove that he had no reason to believe that the property was stolen property. A.I.R. 1933 Sind 359 = 35 Cr. L.J. 206 = 146 Ind. Cas. 952.

——**S. 114, Illus. (*a*)—Burden of proof.**
S. 114 does not mean that the accused must affirmatively prove that he came by the goods innocently. That section only exempts the Crown from proving the guilt of the accused unless he gives some explanation as to how he came by the goods. If he gives any explanation which may possibly be not true, then the Crown cannot rely upon the presumption and must prove the guilt of the accused just as in any other criminal case. A.I.R. 1931 Cal. 617 = 35 C.W.N. 291 = 33 Cr. L.J. 40 = 134 Ind. Cas. 1071 (2).

——**S. 114, Illus. (*a*)—Burden of proof—Criminal case—*Onus* never changes.**
In a criminal case the *onus* is on the prosecution to prove beyond reasonable doubt the guilt of the accused. The *onus* never changes.

Where the Judge stated in his direction to the jury regarding Evidence Act, S. 114, Illus. (*a*), that if the property was proved or reasonably presumed to be stolen property, the *onus* would shift to the accused to show that he acquired the property in an innocent manner:

Held, that it was a misdirection. 88 Ind. Cas. 515 = 52 Cal. 223 = 26 Cr. L.J. 1155 = A.I.R. 1925 Cal. 666.

(*c*) Grounds for presumption.

——S. 114, Illus. (*a*)—Grounds for presumption—Accused showing place where stolen property is concealed—When a ground.

The mere fact that an accused person points out the place in which stolen property is concealed does not give rise to any presumption under S. 114, or justify his conviction of the offence of receiving stolen property, still less of the offence of theft or dacoity. But if such property is produced from the house of the accused person a presumption would arise under S. 114, Illus. (*a*), that the accused was either the thief or had received the goods knowing them to be stolen unless he can account for his possession of the stolen articles. 32 Bom. L.R. 574 = A.I.R. 1930 Bom. 244.

(*d*) Nature of possession.

——S. 114, Illus. (*a*)—Nature of possession.

Where an article alleged to have been stolen at a dacoity is recovered from a house occupied by the accused and his father and there is no evidence as to which portion of the house was occupied by the accused and which portion by the other members of the family and from which portion the articles was recovered the article cannot be said to have been recovered from the possession of the accused. A.I.R. 1946 Pat. 169 = 24 Pat. 646.

——S. 114, Illus. (*a*)—Nature of possession—Extent of presumption—Duty of prosecution.

Where it is proved that the accused made a statement to the effect that "I have concealed the property at a particular place and I will produce it", and if it is discovered in consequence of that statement, it would be evidence of his possession, even though the stolen articles are kept or concealed in another man's property, because unless he had possession, he would not have kept them at that place. Where, however, the accused, without stating that he had concealed stolen property merely produces it from a place to which other people could have access, it would not be sufficient to establish his possession even though the property may be concealed because it is consistent with any other person having done so and the accused might have merely knowledge of it. In absence of any incriminating statement made by the accused leading to the discovery of property, its production alone from another man's property would not be sufficient to establish the accused's possession. It may at the most show his knowledge that the property was concealed there. Mere knowledge that stolen property is lying hidden somewhere is not an incriminating circumstance for the offence of theft or receiving stolen property, and such knowledge cannot by itself raise a presumption of possession. It is the prosecution that has to establish accused's possession apart from his knowledge and it is only when his possession is proved that the accused has to account for it in order to escape from the presumption under Illus. (*a*) to S. 114.

The same general principle would apply though with less force where the stolen articles are merely pointed out and produced by the accused from a place of which he had only joint possession. It must, however, be noted that dependents of a person living with him cannot be said to be in joint possession of the house for this purpose as they are in occupation under him and not independently of him. A.I.R. 1945 Bom. 292 = 47 Bom. L.R. 63 = 47 Cr. L.J. 51 = 221 Ind. Cas. 86.

——S. 114, Illus. (*a*)—Nature of possession.

In order to raise legitimately the presumption of theft, the possession of stolen property should be exclusive as well as recent. 111 Ind. Cas. 732 = 29 Cr. L.J. 924 = 23 S.L.R. 5 = A.I.R. 1929 Sind 9.

——S. 114, Illus. (*a*)—Nature of possession.

From the mere fact that the articles were discovered in accused's possession soon after the theft the Judges did not draw the presumption that accused was the thief himself. 83 Ind. Cas. 705 = 5 L.R.A. Cr. 81 = 26 Cr. L.J. 145 = A.I.R. 1924 All. 701.

——S. 114, Illus (*a*)—Nature of possession.

Stolen articles found in accused's premises raise a *prima facie* presumption against him—Accused not having control over premises, evidence against him is not conclusive but circumstances of each case should be considered. A.I.R. 1921 Pat. 480.

——S. 114, Illus. (*a*)—Nature of possession.

If articles are found in a house occupied by several members, there is no presumption that they were in the possession of the *karta*. There is a presumption against crime and misconduct and the more heinous and improbable a crime is, the greater is the force of the evidence required to overcome such presumption. 40 Cal. 898 = 18 C.W.N. 185 = 23 Ind. Cas. 25.

(*e*) Possession following theft.

——S. 114, Illus. (*a*)—Possession following theft.

When a person is found in possession of stolen articles soon after the theft, the law presumes that such person must either be the thief or the receiver of the stolen goods. The identity of the stolen articles being established, the identity of the thief or the receiver of the stolen goods is presumed to be established. 7 O.W.N. 527 = A.I.R. 1930 Oudh 353.

——S. 114, Illus. (*a*)—Possession following theft.

The fact that a person is found in possession of the stolen property shortly after the theft raises the presumption that he took part in the theft. 123 Ind. Cas. 393 = 31 Cr. L.J. 492 = 1930 Cr. C. 767 = A.I.R. 1930 Pat. 385.

(*f*) Possession not immediate.

——S. 114, Illus. (*a*)—Possession not immediate.

The presumption under Illus. (*a*) to S. 114, Evidence Act, can be raised only when the person is found in possession soon after the theft. Lapse of time is an important factor to be considered. Where the case is one of theft of a bicycle, it has to be borne in mind that it readily changes hands; when it is not of any great value, a person who is found in possession of it about 12 months after the alleged theft cannot safely be presumed to be guilty of theft or of possession of stolen property knowing it to be stolen, and he cannot be required to explain how he has come by it. In such circumstances no conviction under S. 411, I.P. Code, can be sustained. 224 Ind. Cas. 372 = 47 Cr. L.J. 599 = A.I.R. 1946 Sind 153.

——S. 114, Illus. (a)—Possession not immediate—One month after theft.

Lapse of time of a month is too long an interval in the case of property like empty gunny bags to presume safely that the accused possessed them knowing them to be stolen or that he was in possession as a thief. 1937 M.W.N. 552.

——S. 114, Illus. (a)—Possession not immediate.

Where it was proved that six months after theft, some of the stolen goods were found in the possession of the accused:

Held, that owing to the length of time which elapsed between the theft and the finding of the goods, the

presumption under S. 114, Illus. (*a*), could not be relied on. The most that could be said was that it was suspicious that this man should have been found in possession of the goods. A.I.R. 1935 Cal. 680 = 36 Cr.L.J. 1466 = 158 Ind. Cas. 840.

——S. 114, Illus. (a)—Possession not immediate.

Where a stolen animal is found in the possession of a person about nine months after its loss, it cannot be said that he was in possession of it soon after the theft.

The possession of stolen property, even if accompanied by a failure to give an account as to how such possession was acquired, or by a false account, or by accounts which are contradictory, or by a concealment of the property, would raise not a violent or strong presumption but a probable presumption merely. A.I.R. 1931 Pat. 85 = 12 P.L.T. 350 = 32 Cr.L.J. 614 = 130 Ind. Cas. 800.

——S. 114, Illus. (a)—Possession not immediate.

Where there is long lapse of time between the theft and the discovery of the stolen property (in this case over 15 months), the onus of proving innocent possession should not be cast on the accused. 62 P.L.R. 1916, Rel. on. 108 Ind. Cas. 912 = 29 Cr.L.J. 464 = 29 P.L.R. 441 = A.I.R. 1928 Lah. 687.

——S. 114, Illus. (a)—Possession not immediate.

No possession arises out of mere possession of stolen articles 12 years after they were stolen. 96 Ind. Cas. 650 = 27 Cr.L.J. 986 (Lah.).

——S. 114, Illus. (a)—Possession not immediate.

Possession of stolen property 19 months after theft raises no presumption that the holder thereof was either the thief or received the goods knowing them to be stolen. 95 Ind. Cas. 471 = 27 Cr.L.J. 807 = A.I.R. 1926 Lah. 528.

——S. 114, Illus. (a)—Possession not immediate.

Where the accused was found possessed of stolen goods several months after the theft and at a place several miles away from the place of occurrence no presumption that he is either the thief or a receiver of stolen property arises and the *onus* is not on the accused to explain how he got the property and the prosecution cannot succeed by proving the defence to be false. 91 Ind. Cas. 544 = 27 Cr.L.J. 112 = A.I.R. 1926 Lah. 272.

——S. 114, Illus. (a)—Possession not immediate.

Two and a half years before the discovery, at the house of accused, of the articles (four silver ornaments of ordinary type worth Rs. 100) these had been removed from the houses of the two complainants by means of a dacoity. The accused was a goldsmith by caste and profession and when asked, he explained that he himself had made them for his wife. The articles were found, except in one case, on the person of the wife of the accused.

Held, that the accused cannot be presumed to be in possession of the articles with guilty knowledge. 85 Ind. Cas. 722 = 26 Cr.L.J. 578 = 5 L.R.A. Cr. 199 = A.I.R. 1925 All. 220.

——S. 114, Illus. (a)—Possession not immediate.

Though usually a Court is not justified in drawing the presumption of guilty knowledge from possession of property such as jewellery nearly two years after the property had been stolen or otherwise lost to the real owner, the Court is always entitled to request the possessor to disclose the name of the person from whom he had obtained the articles and the particulars as to the origin of the possession and the Court is entitled to draw unfavourable inferences, if the accused refuses to disclose such facts or gives an explanation which can be shown to be false. 81 Ind. Cas. 443 = 2 Rang. 80 = 25 Cr.L.J. 907 = A.I.R. 1924 Rang. 256.

——S. 114, Illus. (a)—Possession not immediate.

Where the nature of the articles is such that they may be constantly changing hands, the recovery of such articles more than 5 months after the theft cannot, in law, give rise to a presumption against the possessor, and it is not incumbent upon him to explain how he came by them. 62 Ind. Cas. 867 = 22 Cr.L.J. 595 = A.I.R. 1921 Lah. 89.

——S. 114. Illus. (a)—Possession not immediate.

The presumption concerning stolen goods in S. 114, Illus. (*a*) of the Evidence Act arises only when the stolen goods are found 'soon after' the theft. Thirteen months after the occurrence cannot be regarded as coming within the rule. 11 L.W. 43 = 26 M.L.T. 389 = 20 Cr.L.J. 819 = 53 Ind. Cas. 819.

——S. 114, Illus. (a)—Possession not immediate.

No ground for presumption under S. 114, Evidence Act, arises where stolen properties of an ordinary kind and of small value are found in the possession of the accused after a long time. 22 C.W.N. 597 = 19 Cr.L.J. 702 = 46 Ind. Cas. 158.

——S. 114, Illus. (a)—Possession not immediate.

S. 114, Illus. (*a*) of the Evidence Act is merely illustrative of the manner in which the inferences can be drawn from the common course of events, human conduct, etc. In a prosecution for receipt of stolen goods, lapse of time after the theft is usually an important factor in determining the guilt of the accused but the importance to be attached to it must vary with the circumstances of the individual case and depends on the frequency with which the property is likely to have changed hands. No maximum period is suggested as that beyond which no inference of guilt can be drawn. 19 Cr.L.J. 189 = 43 Ind. Cas. 605.

——S. 114, Illus. (a)—Possession not immediate.

The finding in the possession of a person six months after the commission of a dacoity of articles stolen in that dacoity, such articles consisting of jewellery of a very ordinary type and by no means of any distinctive appearance, is not sufficient to form the basis of a conviction for participation in the dacoity. 3 A.L.J. 808 = (1906) A.W.N. 314 = 29 A. 138.

(g) Possession of stolen cattle.

——S. 114, Illus. (a)—Possession of stolen cattle.

In Sind, possession of stolen cattle three or four months after theft is sufficient to raise presumption of guilt under the section ; but the accused may set up title by lawful origin to rebut the presumption. 10 S.L.R. 167 = 18 Cr.L.J. 411 = 38 Ind. Cas. 971.

(h) Presumption under.

——S. 114, Illus. (a)—Presumption under—Scope of.

See PENAL CODE (45 OF 1860) SS. 411 AND 412 AND EVIDENC ACT (1 OF 1872) S. 114, ILLUS. (*a*), 1950 A.W.R. 203 = A.I.R. 1950 A. 398.

——S. 114 (a)—Presumption under—Nature and scope of—Conviction on presumption—Legality.

See PENAL CODE (45 OF 1860), S. 380 AND EVIDENCE ACT (1 OF 1872), S. 114, ILLUS. (*a*). (1950) 1 M.L.J. 792 = A.I.R. 1950 Mad. 778.

——S. 114, Illus. (a)—Presumption under—When arises—Facts to be proved by prosecution.

The presumption permitted by Illus. (*a*) to S. 114, Evidence Act, does not arise until the prosecution has established three facts : (1) the ownership of the articles in question, (2) their theft, and (3) their recent possession by the accused. When these essential facts relating to the ownership, theft and possession of the articles has been established, the Court may infer that the accused knew how they had been removed from the possession of the owner, that is to say, in a case of ordinary theft that they had been stolen, and

in a case of dacoity that they had been stolen in the course of a dacoity. 25 Pat. 262 = 228 Ind. Cas. 36 = A.I.R. 1947 Pat. 205 = 48 Cr.L.J. 133 = 13 B.R. 113 = 27 P.L.T. 323.

——**S. 114, Illus. (a)—Presumption under.**

Where the accused stated in defence that the incriminating articles recovered from him were his own property, which was disbelieved by the Courts, it must be held that the accused had failed to satisfactorily account for the possession of the articles in question and the prosecution is entitled to rely on the presumptions under S. 114 (*a*). Evidence Act, that the accused was either a thief or a receiver of the stolen goods. A.I.R. 1941 Oudh 618 = 1941 O.W.N. 1061 (2) = 42 Cr.L.J. 818 = 1941 A.W.R. 287 = 17 Luck. 182 = 196 Ind. Cas. 166.

——**S. 114, Illus. (a)—Presumption under—Extent of.**

The nature of the presumption which the Court should draw in each individual case under Illus. (*a*) depends entirely upon the nature of the evidence adduced. Where a long interval has elapsed before the stolen property has been recovered, it is often unsafe to assume that the possessor was the actual thief. The highest presumption which can be drawn from possession of stolen property, by itself, and in the absence of any other evidence, is presence at the scene of the theft. A.I.R. 1939 Rang. 361 = 41 Cr.L.J. 44 = 184 Ind. Cas. 545.

——**S. 114, Illus. (a)—Presumption under.**

Case under Ss. 411 and 414, I.P.C., possession of property satisfactorily explained by the accused :

Held, that the presumption under S. 114, Evidence Act did not arise and the prosecution must prove guilty knowledge of the accused. It was the duty of the Judge to tell so to the jury and the omission to state this amounted to a misdirection. A.I.R. 1937 Pat. 191 = 38 Cr.L.J. 129 = 18 P.L.T. 210 = 3 B.R. 124 = 166 Ind. Cas. 91.

——**S. 114, Illus. (a)—Presumption under.**

It is clear that under S. 114, Illus (*a*), there is a presumption against a man in possession of recently stolen goods that he knew them to be stolen. But it is not necessary to rely on that presumption if the facts do not warrant it. A.I.R. 1937 Lah. 700 = 39 P.L.R. 1 = I.L.R. (1937) Lah. 227 = 38 Cr.L.J. 1066 = 171 Ind. Cas. 342.

——**S. 114, Illus. (a)—Presumption under.**

The presumption, under S. 114, is only a presumption of facts and is rebuttable. Where the accused is proved to have been in lawful custody of the article as a bailee, unless the prosecution proves that he had knowledge as to its being a stolen article, the guilt cannot be brought home to him. 164 Ind. Cas. 111 (1) = 18 N.L.J. 237 = 37 Cr.L.J. 1004.

——**S. 114, Illus. (a)—Presumption under.**

Charge under S. 411, I.P.C.—Serious doubts that the accused may have been a *bona fide* purchaser of bullocks when he purchased them—Articles in possession of accused for several months :

Held, that the presumption under S. 114 had been sufficiently rebutted. A.I.R. 1936 Oudh 380 = 1936 O.W.N. 668 = 37 Cr.L.J. 907 (1) = 164 Ind. Cas. 97.

——**S. 114, Illus. (a)—Presumption under.**

An accused, on arrest, told that he knew the place where the stolen property was and showed that place and the other accused, on temptation of his brother being let off, got the recovery of the part of the stolen property from the field not belonging to him :

Held, that no presumption under S. 114, arose against both these accused. 1935 M.W.N. 1195.

——**S. 114, Illus. (a)—Presumption under.**

Where an article which was stolen in October was recovered from the possession of the accused in the following May, the Court, under S. 114, is entitled to presume that the accused is either a thief or a retainer of stolen goods knowing them to be stolen unless he can account for his possession of the goods. A.I.R. 1933 All. 461 = 1933 A.L.J. 523 = 34 Cr.L.J. 1018 = 145 Ind. Cas. 609.

——**S. 114, Illus. (a)—Presumption under.**

Possession of stolen property some days after the commission of offence legitimately leads to the presumption under S. 114, Illus. (*a*). 1933 M.W.N. 325.

——**S. 114, Illus. (a)—Presumption under.**

To justify a presumption of guilt under S. 114, Illus. (*a*) the possession of the accused in respect of property proved to have been stolen must be established. A.I.R. 1932 Sind 180 = 34 Cr.L.J. 163 = 141 Ind. Cas. 537.

——**S. 114, Illus. (a)—Presumption under—Stolen property found in possession of a person three weeks after theft—Presumption.**

Where stolen property is found in the possession of a person three weeks after theft, the presumption is that he must have received the property knowing or having reason to believe it to be stolen and not that he has committed theft. In order to raise a presumption the length of time that has elapsed, the amount of property found in a man's possession, and the circumstances leading to discovery, have to be considered and in raising the presumption as to the receipt of the stolen property it is not necessary that there should be evidence that he knew it to be stolen. (1912) M.W.N. 97 = 13 Cr.L.J. 140 = 13 Ind. Cas. 828.

(i) Reasonable explanation.

——**S. 114, Illus. (a)—Reasonable explanation of possession by accused—What is.**

The presumption under Illus. (*a*) to S. 114 of the Evidence Act is not available to the prosecution, if the accused gives a reasonable explanation of his possession of stolen property. It is not, however, a reasonable explanation on the part of the accused to deny the existence of the facts proved by the prosecution, as to the ownership of the articles alleged to be stolen, their theft or his possession of the same. The explanation which would render the presumption unavailable to the prosecution is an explanation of how articles belonging to the complainant are found in his possession shortly after they had been stolen. It is only when he offers such an explanation with regard to his possession that the presumption does not arise. 25 Pat. 262 = 228 Ind. Cas. 36 = A.I.R. 1947 Pat. 205 = 48 Cr.L.J. 133 = 13 B.R. 113 = 27 P.L.T. 323.

——**S. 114, Illus. (a)—Reasonable explanation.**

An allegation by the accused that the so-called stolen property which has been proved to belong to the complainant is not, in fact, stolen property but is the property of his relation is not an explanation of possession under S. 114, Illus. (*a*). A.I.R. 1945 Cal. 421 = 47 Cr.L.J. 193 = 49 C.W.N. 392 = 221 Ind. Cas. 499.

——**S. 114, Illus. (a)—Reasonable explanation.**

When an accused has given a satisfactory account for his possession, the question of the application of S. 114, no longer arises and then it is necessary to show by evidence direct or circumstantial that there was some collusion between thief and the receiver or that the receiver had real reason to believe that the property which he had purchased was stolen. A.I.R. 1942 Pat. 439 (1) = 43 Cr.L.J. 911 = 9 B.R. 54 = 203 Ind. Cas. 16.

(j) Recent possession.

——**S. 114, Illus. (a)—Recent possession—Meaning of.**

The presumption permitted by S. 114, Illus. (*a*) of the Evidence Act does not arise until the prosecution

has established three facts; namely, the ownership of the articles in question, the theft of those articles and their recent possession by the accused. No fixed time-limit can be laid down to determine whether possession is recent or otherwise and every case must be judged on its own merits. The presumption of guilt varies according to whether the stolen articles are or are not calculated to pass readily from band to hand and therefore the importance to be attached to possession must vary with the circumstances of each individual case. 51 P.L.R. 110 = 3 A.I.Cr.D. 381 = A.I.R. 1949 E.P. 315 = 50 Cr.L.J. 794.

——S. 114, Illus. (a)—Recent possession—Test to determine.

No fixed time-limit can be laid down to determine whether possession is recent or otherwise; every case has to be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. If the stolen articles are such as are not likely to pass readily from hand to hand, the period of ten weeks cannot be said to be too long to attract the presumption. A.I.R. 1945 Nag. 1 = 1945 N.L.J. 17 = I.L.R. (1945) Nag. 151 = 46 Cr.L.J. 448 = 218 Ind. Cas. 294.

——S. 114, Illus. (a)—Recent possession.

It is not possible to lay down any maximum period to draw the presumption that the person is guilty of theft. 1932 M.W.N. 862.

——S. 114, Illus. (a)—Recent possession—Possession of stolen property a couple of hours after burglary.

A person found in possession of the stolen property a couple of hours after the commission of a burglary can be rightly convicted of an offence under S. 457, I.P.C. A.I.R. 1933 Oudh 117 = 34 Cr.L.J. 649 (1) = 10 O.W.N. 47 = 143 Ind. Cas. 835.

——S. 114, Illus. (a)—Recent possession of stolen property—Presumption.

Possession of the stolen property by a person on the next morning after a burglary is presumptive evidence that he is one of the thieves. 11 A.L.J. 94 = 14 Cr.L.J. 124 = 18 Ind. Cas. 684.

——S. 114, Illus. (a)—Recent possession—Test.

No fixed time-limit can be laid down to determine whether possession of articles is recent or otherwise. But every case must be judged on its own facts. If a few stolen articles were found in possession of a person under circumstances which may give rise to the probability of his coming by them honestly some time after the theft the presumption under the law might not arise against him. 94 Ind. Cas. 361 = 27 Cr.L.J. 617 = A.I.R. 1926 Cal. 925.

——S. 114, Illus. (a)—Recent possession—What is.

The question as to what amounts to recent possession sufficient to justify the presumption of guilt in any particular case, varies according as the stolen article is, or is not, calculated to readily pass from hand to hand. But the strength and nature of such presumption must vary according to the seriousness of the offence and the nature of the property involved. 109 Ind. Cas. 801 = 11 N.L.J. 104 = 29 Cr.L.J. 609 = 10 A.I.Cr.R. 340 = A.I.R. 1928 Nag. 213.

——S. 114, Illustrations (b).

Synopsis.

A. Accomplice.
- **(*a*) Who is.**
- **(*b*) Corroboration.**
- **(*c*) Credibility.**
- **(*d*) Evidence of.**
- **B. Approver—Evidence of.**
- **C. Bribe-giver.**
- **D. Co-accused.**
- **E. Corroboration.**
- **F. Duty of Judge.**

A. (*a*) Accomplice—Who is.

——S. 114, Illus. (b)—Accomplice—Who is.

An accomplice means a guilty associate or partner in a crime; a person who is connected with the offence, or who makes admissions of facts showing that he had a conscious hand in it. Where a witness is not concerned with the commission of the crime he cannot be said to be an accomplice although he gives no information about it until the arrival of the Police owing to fear of the accused. Pak. L.R. (1950) Lah. 183 = 51 Cr.L.J. 1123 = A.I.R. 1950 Lah. 129.

——S. 114, Illus. (b)—Accomplice—Who is—Person aware of intention to commit crime omitting to give information—Corroboration.

A person who is aware of the intention of certain people to commit a murder and does not disclose it to anybody is a consenting party to the crime and an accomplice and his evidence cannot be accepted without corroboration. The evidence of accomplices cannot be accepted as corroborative of each other. 20 P.R.Cr. 1919 = 14 P.W.R. (Cr.) 1919 = 20 Cr.L.J. 191 = 49 Ind. Cas. 607.

——S. 114, Illus. (b)—Accomplice—Who is.

An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he could be jointly indicated with the principal. A person who cannot be so indicated owing to the absence of the element of *mens rea* he having acted under pressure exerted by the principal is not an accomplice and his evidence does not require corroboration. I.L.R. (1945) Nag. 315 = 221 Ind. Cas. 507 = 47 Cr.L.J. 196 = 1945 N.L.J. 134 = A.I.R. 1945 Nag. 143.

——S. 114, Illus. (b)—Accomplice—Who is—Corroboration required.

A person who assisted the criminals to the extent of keeping a look-out to see whether the police were approaching, is an accomplice whose evidence requires corroboration. The corroborative evidence need not be such as to prove independently that the person named was guilty of the crime. Evidence proving that the accused were, at the time the crime was committed, near the scene of the crime and so placed as to justify the inference that they were accompanying persons whose complicity in the crime has been satisfactorily proved by independent evidence, is sufficient corroboration of the evidence of the accomplice. I.L.R. (1944) 2 Cal. 312 = 226 Ind. Cas. 153 = 47 Cr.L.J. 695 = A.I.R. 1946 Cal. 156.

——S. 114, Illus. (b)—Accomplice—Who is.

Where a witness helps the accused in his concealment, his position is that of an accomplice and it is not safe to use his evidence against the accused without material corroboration. 46 P.L.R. 283.

——S. 114, Illus. (b)—Accomplice—Who is—Gambling cases—Evidence of Police agent, value of—Corroboration, necessity of.

In a great many of gambling cases, the Police agents are not only accomplices, but are also unreliable witnesses because they are generally paid by results. It is always in their interest to secure a conviction in the hope of getting a part of the fine which may be imposed. The evidence of a Police agent in these cases must always be corroborated before it can be acted upon. The case is not improved by providing the Police agent with a companion and calling him a *panch*,

and in such a case, the evidence of the *panch* is not enough to corroborate the Police agent. A.I.R. 1937 Bom. 385 = 39 Bom. L.R. 613 = I.L.R. (1937) Bom. 670 = 38 Cr.L.J. 1047 = 171 Ind. Cas. 282.

——**S. 114, Illus. (b)—Accomplice—Who is—Informer—Corroboration, necessity of.**

The rule requiring independent corroboration in material particulars of the evidence of an accomplice is now virtually a rule of law. On the same principle, corroboration is insisted upon in the case of the evidence of informers. The evidence of an accessory, after the event, suffers more or less from the same taint as the evidence given by an accomplice. It would be very unsafe to accept the solitary evidence of such a person as proving the guilt of the accused without independent corroboration in material particulars. A.I.R. 1937 Oudh 259 = 1937 O.W.N. 104 = 38 Cr.L.J. 286 = 13 Luck. 115 = 166 Ind. Cas. 667.

——**S. 114, Illus. (b)—'Accomplice,' who is.**

Witnesses who admittedly had witnessed the crime who have assisted in concealing the evidence of that crime or at least connived at such being done and who have not attempted to give any information either to the police or to any other person to enable the offender to be brought to justice are in a very little better position than that of accomplices. 120 Ind. Cas. 190 = 31 Cr.L.J. 50 = 1929 Cr.C. 87 = A.I.R. 1929 Lah. 540.

——**S. 114, Illus. (b)—Accomplice—Who is.**

In order to render the wife of the deceased an accomplice, there should be evidence to show that she shared with the accused any intention that the deceased should be killed. A.I.R. 1939 Mad. 266 = 49 M.L.W. 175 = 1938 M.W.N. 1272 = 40 Cr.L.J. 606 = 181 Ind. Cas. 933.

——**S. 114, Illus. (b)—Accomplice—Who is.**

Where the witness was the accused's paramour, and on her own admission accompanied him to the scene of the murder and waited outside the hut while the accused went in and murdered the husband of the witness and then covered him with a chadar and where after that, she returned to the village and shut herself up in her house and gave no information to any one until the next morning when she told one of the P.Ws. privately what had happened.

Held, that in these circumstances she was, to all intents and purposes, an accomplice of the murderer. 88 Ind. Cas. 854 = 6 Lah. 183 = 26 P.L.R. 331 = 26 Cr.L.J. 1238 = A.I.R. 1925 Lah. 432.

——**S. 114, Illus. (b)—Accomplice—Who is.**

An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he can be jointly indicated with the defendant (principal). 14 M.L.J. 226 = 27 M. 271.

A. (*b*) Corroboration.

——**S. 114, Illus. (b)—Accomplice—Corroboration by another accomplice—Sufficiency.**

For the purposes of the rule of practice, the evidence of one accomplice is not corroborative of the evidence of another. 3 A.I.Cr.D. 392 = A.I.R. 1949 P.C. 172 = 50 Cr.L.J. 642 (P.C.).

——**S. 114, Illus. (b)—Accomplice—Corroboration by another accomplice—Sufficiency.**

A conviction cannot be based on the evidence of accomplices unless it is corroborated in material particulars by the evidence of persons who are not accomplices. Tainted evidence cannot corroborate other tainted evidence. 39 C.W.N. 761, disappr. 40 C.W.N. 1164 (P.C.), Rel. on. 53 C.W.N. 479 = 3 A.I. Cr.D. 593 = A.I.R. 1949 Cal. 594 = 51 Cr.L.J. 129.

——**S. 114, Illus. (b)—Accomplice—Corroboration by another accomplice.**

It is unsafe to rely on the testimony of an accomplice without independent corroboration both as to the crime and as to the identity of the criminal; the corroboration of one tainted evidence by another tainted evidence is not an independent corroboration.

Per HENDERSON, J.—To say that an accomplice is to be corroborated in material particulars is not the same thing as to say that he is to be corroborated by a witness who is not an accomplice. No doubt it is a rule of prudence to say that ordinarily evidence which is itself tainted should not be accepted as corroboration of tainted evidence. But it is opposed to all common sense to lay down that in a case, the circumstances of which show that the rule of prudence does not apply, the Court is precluded from acting on evidence which it believes to be true. 163 Ind. Cas. 566 = 62 Cal. 891 = 39 C.W.N. 761 = 37 Cr.L.J. 840.

——**S. 114, Illus. (b)—Accomplice—Corroboration by another accomplice.**

It is necessary that the evidence of an accomplice should be corroborated in material particulars by independent evidence which is free from the taint attached to the evidence of an accomplice. A.I.R. 1934 Mad. 248 = 1933 M.W.N. 1129 = 35 Cr.L.J. 1040 = 67 M.L.J. 74 = 40 M.L.W. 237 = 149 Ind. Cas. 964.

——**S. 114, Illus. (b)—Accomplice—Corroboration—Conspiracy—All specific acts of conspiracy need not be corroborated.**

In a case of a conspiracy, if there is corroboration not only of the general fact of the existence of a conspiracy but also of the participation in it of any particular accused, it would not be necessary that there should be corroboration of all the specific acts in the conspiracy said to have been done by that accused unless the evidence of the accomplice on the point was intrinsically open to suspicion. A.I.R. 1944 Pat. 67 = 22 Pat. 681 = 10 B.R. 494 = 45 Cr.L.J. 624 = 25 P.L.T. 57 = 212 Ind. Cas. 298.

——**S. 114, Illus. (b)—Accomplices—Corroboration—Several accomplices—Evidence of one cannot be corroborated by that of other—Manner of scrutinizing evidence of several accomplices indicated.** A.I.R. 1943 Pat. 146 = 9 B.R. 251 = 44 Cr.L.J. 494 = 22 Pat. 27 = 206 Ind. Cas. 109.

——**S. 114, Illus. (b)—Accomplice—Corroboration by another accomplice.**

Whether corroboration of one accomplice by another accomplice is sufficient corroboration or not is largely an academical question because it is clear that if two accomplices give depositions in detail which agree with each other very closely and it is unlikely that on all those details they have agreed beforehand, there is very much stronger reason for believing that the story given by both the approvers is true than there would be if only one accomplice had been available; and since the evidence of an approver can be acted upon without corroboration, there can be nothing illegal in acting on the evidence of accomplices that has been rendered more credible by agreement between them on the details elicited in cross-examination. In considering whether the evidence of an accomplice can be accepted, one has also to take into consideration the extent of his complicity. A.I.R. 1939 Mad. 283 = 1938 M.W.N. 962 = 40 Cr.L.J. 483 = 181 Ind. Cas. 364.

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

There can be no doubt that the statement of an accomplice should normally be corroborated. To what extent such corroboration is needed would depend on the circumstances of each case. The Court is not, however obliged to hold that he is unworthy of credit and must be corroborated. A.I.R. 1942 Oudh 163

= 1941 O.W.N. 1255 = 43 Cr.L.J. 139 = 1941 A.W.R. (C.C.) 358 = 197 Ind. Cas. 277.

——**S. 114 Illus. (b)—Accomplice—Corroboration.**

In spite of all that has been said to the contrary in law, the evidence of an accomplice stands on the same footing as any other evidence. The Court or jury is not obliged to hold that he is unworthy of credit and must be corroborated. A.I.R. 1942 Oudh 221 = 1941 A.W.R. (C.C.) 402 = 1941 O.W.N. 1369 = 43 Cr.L.J. 416 = 17 Luck. 516 = 198 Ind. Cas. 714.

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

Two further illustrations given to Illus. (*b*), S. 114, show circumstances in which the presumption normally to be drawn is capable of being displaced. These illustrations are not exhaustive. They are given by way of guidance only, and in order that a Court may test the facts of a particular case to see whether anything has emerged to show that the evidence of an accomplice need not be corroborated in material particulars. A.I.R. 1938 Rang. 177 = 1938 Rang. L.R. 190 = 39 Cr.L.J. 581 = 175 Ind. Cas. 465 (F.B.).

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

It is open to a Court to depart from the rule mentioned in Illus. (*b*), if it thinks that there are special circumstances in the case making it safe to do so, and in such cases, S. 133 makes it clear that a conviction is not illegal merely because it is based upon the uncorroborated testimony of an accomplice or of accomplices. A.I.R. 1938 Nag. 328 = 1938 N.L.J. 185 = I.L.R. (1938) Nag. 516 = 39 Cr.L.J. 818 = 176 Ind. Cas. 853.

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

A conviction based entirely on the uncorroborated evidence of an accomplice will upset the conviction. 1938 Rang. L.R. 213.

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

When the rule of corroboration is not applied, there should be strong reason for not following it. 167 Ind. Cas. 752 = 19 N.L.J. 221 = 38 Cr.L.J. 444.

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

When a trial takes place before a Judge and a jury, it is the duty of the Judge to warn the jury that it is unsafe to act upon the uncorroborated evidence of an accomplice. In the same way, when a trial takes place before Commissioners who are the Judges both of law and of facts, it is right and proper and indeed obligatory upon them that they should warn themselves that it is unsafe to act on the uncorroborated testimony of the accomplice. The question whether the evidence of an accomplice has been sufficiently corroborated is largely a matter for the Court which is trying the case. 164 Ind. Cas. 779 = 39 C.W.N. 754 = 37 Cr.L.J. 999 (F.B.).

——**S. 114, Illus. (b)—Accomplice—Corroboration, extent and nature of.**

The evidence of an accessory must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implication in it and the evidence of one accomplice is not available as corroboration of another. This is now virtually a rule of law. A.I.R. 1936 P.C. 242 = 44 M.L.W. 253 = 1936 A.L.J. 869 = 37 Cr.L.J. 914 = 40 C.W.N. 1164 = 1936 M.W.N. 889 = 1936 A.W.R. 741 = 38 Bom. L.R. 1101 = 163 Ind. Cas. 681 (P.C.).

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

Illustration (*b*) to S. 114 is to be read along with S. 133 and neither rule is to be ignored in the exercise of judicial discretion. It is the duty of the Court to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case though at the same time, the Court may rightly, in exceptional cases, notwithstanding the maxim, and in the absence of corroboration, give credit to the accomplice's testimony against the accused, if it sees good reason for doing so upon grounds other than, so to speak, the personal corroboration. A.I.R. 1936 Oudh 156 = 37 Cr.L.J. 163 = 1936 O.W.N. 64 = 11 Luck 662 = 159 Ind. Cas. 875.

——**S. 114, Illus. (b)—Accomplice—Corroboration—Confirmation as to circumstances of felony and as to individuals charged—Distinction.**

There is a great difference between confirmation of an accomplice as to the circumstances of the felony, and those which apply to the invididuals charged. The former only show that the accomplice was present at the commission of the offence but the others show that the prisoner was connected with it. This distinction ought always to be attended to. The confirmation required is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. The Court should not legitimately apply rules of prudence which relate to the sworn testimony of an accomplice or approver to the retracted confession of a confessing prisoner, and by means of the application of these rules, impliedly make that retracted confession substantive evidence against the persons accused along with the confessing prisoner. A.I.R. 1936 Oudh 156 = 37 Cr.L.J. 163 = 1936 O.W.N. 64 = 11 Luck. 662 = 159 Ind. Cas. 875.

——**S. 114, Illus. (b)—Accomplice—Corroboration—Circumstantial evidence.**

To insist on corroboration of the story of the accomplice in every detail, would practically mean requiring independent proof which will do away with the necessity of relying on the testimony of the accomplice at all. The corroboration need not be direct evidence that the accused committed the crime ; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But evidence in corroboration must be independent. A.I.R. 1935 Lah. 125=36 P.L.R. 488 = 15 Lah. 673= 36 Cr.L.J. 673 = 155 Ind. Cas. 197.

——S. 114, Illus. (b)—Accomplice—Corroboration.

The evidence necessary for corroboration is independent testimony which affects the accused by connecting or tending to connect him with the crime ; it must be evidence which implicates it. The corroboration need not be direct evidence ; it is sufficient if it is merely circumstantial evidence of his connection with the crime but it must be evidence which tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. A.I.R. 1933 Pat. 112 = 34 Cr.L.J. 476 = 146 Ind. Cas. 934.

——**S. 114, Illus. (b)—Accomplice—Corroboration, extent and nature of.**

The corroboration must be with regard to circumstances showing that the particular accused was connected with the crime. A.I.R. 1932 Oudh 317 = 9 O.W.N. 3 = 33 Cr.L.J. 920 = 7 Luck. 511 = 139 Ind. Cas. 751.

——**S. 114, Illus. (b)—Accomplice—Corroboration, if essential.**

As a matter of law, the uncorroborated evidence of an accomplice is sufficient to support a conviction but as a matter of policy, it is generally unsafe to rely on such evidence alone.

The force of the presumption to be drawn varies as the malice to be imputed to the deponent. A.I.R. 1931 Sind 78 = 35 Cr.L.J. 1170 = 150 Ind. Cas. 917.

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

Evidence of accomplice requires corroboration. A.I.R. 1930 All. 740 = 1930 A.L.J. 1462 = 128 Ind. Cas. 393.

——S. 114, Illus. (b)—Accomplice—Corroboration.
The statement made by an accomplice should be accepted when it is strongly corroborated in material particulars by clear and cogent evidence authenticity of which is not open to doubt. 120 Ind. Cas. 257 = 31 Cr.L.J. 26 = 1930 Cr.C. 45 = A.I.R. 1930 All. 29.

——S. 114, Illus. (b)—Accomplice—Corroboration.
Although it is not illegal to convict on the uncorroborated evidence of an accomplice there is a consensus of opinion that a conviction on the uncorroborated testimony of an accomplice is rarely justified. Nature of corroboration that is required indicated. 7 O.W.N. 862 = 1930 Cr.C. 1079 = A.I.R. 1930 Oudh 455.

——S. 114, Illus. (b)—Accomplice—Corroboration.
Although it is not illegal to convict on the uncorroborated evidence of an accomplice, a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime, but the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connexion with the crime. 7 O.W.N. 527 = A.I.R. 1930 Oudh 353.

——S. 114, Illus. (b)—Accomplice—Corroboration.
The testimony of a professed accomplice requires to be carefully scrutinized with anxious search for possible corroboration. 112 Ind. Cas. 375 = 29 M.L.W. 155 = A.I.R. 1929 P.C. 15 (P.C.).

——S. 114, Illus. (b)—Accomplice—Corroboration.
The statement of a co-accused is admissible in evidence but according to the usual practice and as a rule of prudence it is unsafe to accept the tainted testimony of an accomplice so long as it is not corroborated in material particulars. The difficulty enhances where the said accomplice does not adhere to his statement. 121 Ind. Cas. 103 = 11 L.R.A. Cr. 1 = 13 A.I.Cr.R. 52 = 1929 Cr.C. 656 = 31 Cr.L.J. 206 = A.I.R. 1929 All. 928.

——S. 114, Illus. (b)—Accomplice—Corroboration.
Where police officers act in conspiracy with one another to demand and receive illegal gratification and are ready to make use of their official position to enforce such demand, the testimony of accomplices who are really victimised by them into offering them illegal gratification and have not willingly done so requires a much slighter degree of corroboration than would be the case if the accomplices were entirely voluntary accomplices. 120 Ind. Cas. 340 = 53 Bom. 479 = 31 Bom. L.R. 545 = 1929 Cr.C. 114 = 31 Cr.L.J. 65 = A.I.R. 1929 Bom. 296.

——S. 114, Illus. (b)—Accomplice—Corroboration.
Although S. 114, Illus. (*b*) provides that a Court may presume that the evidence of an accomplice is unworthy of credit unless corroborated, "may" is not "must" and no decision of Court can make it "must." Therefore in spite of all that has been said to the contrary in law, the evidence of an accomplice stands on the same footing as any other evidence. The Court is not obliged to hold that he is unworthy of credit and must be corroborated. It is for the Court to consider after taking into consideration all the circumstances one of which being that he is an accomplice whether it does or does not rely on the evidence. To entirely rule out the uncorroborated evidence of an accomplice might in many cases lead to miscarriage of justice. 1929 Cr.C. 669 = A.I.R. 1929 Cal. 822.

——S. 114, Illus. (b)—Accomplice—Corroboration.
The corroboration indicated in S. 114, Illus. (*b*), is corroboration in material particulars and these particulars must be such as to connect or identify each of the accused with the offence. It is not necessary that the accomplice should be corroborated in every material particular. 115 Ind. Cas. 258 = 32 C.W.N. 945 = 56 Cal. 150 = 30 Cr.L.J. 435 = 12 A.I.Cr.R. 265 = A.I.R. 1929 Cal. 57.

——S. 114, Illus. (b)—Accomplice—Corroboration.
There is no definite rule of law that a person cannot be convicted upon the uncorroborated evidence of an accomplice. But Illus (*b*) to S. 114 of the Evidence Act is the rule in such cases and Courts must act up to it. If the suspicion which attaches to the evidence of an accomplice be not removed that evidence should not be acted upon unless corroborated in material particulars. Rule as to corroboration elaborately discussed. 11 P.L.T. 545 = 1931 Cr.C. 233 = 32 Cr.L.J. 383 = 129 Ind. Cas. 535 = A.I.R. 1931 Pat. 105.

——S. 114, Illus. (b)—Accomplice—Corroboration.
The well-known rule of criminal law that an accomplice is unworthy of credit unless he is corroborated in material particulars, which is formulated in S. 114, Illus. (*b*) is not absolute as will be evident from S. 114 as to Illus. (*b*) and S. 133, but it is only in exceptional cases that the corroboration can be dispensed with. A.I.R. 1928 Oudh 430, Cons. 118 Ind. Cas. 423 = 6 O.W.N. 441 = 30 Cr.L.J. 922 = 1929 Cr.C. 143 = A.I.R. 1929 Oudh 321.

——S. 114, Illus. (b)—Accomplice—Corroboration.
Although a conviction is not "illegal" merely because it proceeds on the uncorroborated testimony of an accomplice, the rule of practice is now firmly established that corroboration of such testimony in material particulars connecting each of the individual accused with the crime is necessary to justify his conviction. Corroboration need not necessarily consist of direct evidence that the accused committed the crime. It is sufficient even if it consists of circumstantial evidence of his connection with the crime. The extent of the corroboration required varies with circumstances of each case, including the character and antecedents of the approver and the degree of suspicion attached to his evidence. 1929 Cr.C. 626 = A.I.R. 1929 Lah. 850.

——S. 114, Illus. (b)—Accomplice—Corroboration.
The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged and it would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice, that the accused committed the crime, is true not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the crime ; it is sufficient if it is merely circumstantial evidence of his connexion with the crime.
Corroborative evidence need not be sufficient in itself to base a conviction on. Confirmation of the story of an accomplice does not mean that there should be independent evidence of the accomplice's account of the crime itself. What the law clearly requires is that some relevant and material part of the approver's story incriminating the accused should have support from an independent source. This supplies a test of the truth of the accomplice's narrative as a whole by checking it in some relevant portion. 103 Ind. Cas. 49 = 28 Cr.L.J. 625 = 8 A.I.Cr.R. 273 = A.I.R. 1927 Lah. 581.

——Ss. 114, Illus. (b) and 133—Accomplice—Corroboration.
Although under S. 133, Evidence Act, an accomplice is a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of such accomplice, the rule of caution that such testimony

should be supported by extrinsic evidence connecting the accused with the crime as now regarded as a rule of law, and although it is not illegal to convict a person on the uncorroborated testimony of an approver, the Courts in points of facts always insist upon the rule being followed. 103 Ind. Cas. 49 = 28 Cr.L.J. 625 = 8 A.I.Cr.R. 273 = A.I.R. 1927 Lah. 581.

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

In dealing with the evidence of an accomplice the Judge is not bound to rely on such statements only as are corroborated by other reliable evidence. Once a foundation is established for a belief that a witness is speaking the truth because he is corroborated by true evidence on material points, the Judge is at liberty to come to a conclusion as to the truth or falsehood of other statements not corroborated. 86 Ind. Cas. 72 = 27 Bom. L.R. 120 = 26 Cr.L.J. 696 = A.I.R. 1925 Bom. 261.

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

The corroboration must go to the guilt of each of the accused separately. It must be such as to satisfy the Court that the approver has not substituted the name of one or more of the accused for that of some other person, possibly a particular friend of his own who actually took part in the offence. The rule is not absolute. But it is only in exceptional cases that the corroboration can be dispensed with. 89 Ind. Cas. 261 = 12 O.L.J. 429 = 26 Cr.L.J. 1317 = A.I.R. 1925 Oudh 715.

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

Conviction of accused cannot be based on evidence of accomplices unless such evidence is corroborated in some material and satisfactory manner. 2 P.L.T. 757 = A.I.R. 1921 Pat. 406.

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

Among the presumptions a Court may make is the presumption that an accomplice is unworthy of credit, unless he is corroborated in material particulars. That is a direction of law or of practice, which Judges themselves should give to every jury in any case in which they have to direct them upon the law and which in matters of fact they should themselves follow : 4 Cal. 483, foll. 95 Ind. Cas. 74 = 48 All. 409 = 24 A.L.J. 410 = 7 L.R.A. Cr. 105 = 27 Cr.L.J. 746 = A.I.R. 1926 All. 377.

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

Evidence of an approver is in itself tainted evidence though in some cases it may be worth believing for various reasons. The uncorroborated statement of an approver taken at the end of the trial is of no value at all. Statements of witnesses extorted by the Police under threats of implication in the crime are less valuable especially where they had no reason for refraining from deposing against the culprits. 105 P.L.R. 1920 = 21 Cr.L.J. 507 = 56 Ind. Cas. 667.

——**Ss. 114, Illus. (b) and 133—Accomplice—Corroboration.**

A conviction on the evidence of an accomplice is not justified unless it is corroborated. 19 Cr.L.J. 42 = 42 Ind. Cas. 1002.

——**Ss. 114, Illus. (b) and 133—Accomplice—Corroboration.**

An accomplice is a competent witness and a conviction based on his uncorroborated testimony is not illegal under S. 133 of the Evidence Act. Notwithstanding S. 114, Illus. (b) Courts are not tied down in any technical way but it is their duty when deciding whether any corroboration of a particular accomplice is required and what amount or kind of corroboration is required to look at the question as a prudent man desiring to arrive at the truth. As a general rule, corroboration is necessary but no general rule can be laid down as to the extent and nature of such corroboration. 246 P.L.R. 1915 = 17 P.R. (Cr.) 1915 = 11 P.W.R. (Cr.) 1915 = 16 Cr.L.J. 354 = 28 Ind. Cas. 738.

——**Ss. 114, Illus. (b) and 133—Accomplice—Corroboration.**

The provision contained in S. 133 and in S. 114 (b) amounts to a direction to all Judges and Magistrates that a fact cannot be held proved within the meaning of S. 3 if the only evidence is the statement of an unreliable witness. All accomplices are not wholly unworthy of credit. 6 S.L.R. 195 = 14 Cr.L.J. 262 = 19 Ind. Cas. 534.

——**Ss. 114, Illus. (b) and 133—Accomplice—Corroboration—Necessity.**

The law as such does not necessarily demand any corroboration to validate the accomplice's evidence. It is a rule of practice to have such corroboration and must be applied with due regard to each particular case. No precise degree of corroboration is required. Corroboration is required not only of the incidents but also of the identity of the offender. Every detail need not be fortified. 15 Bom. L.R. 288 = 14 Cr.L.J. 225 = 19 Ind. Cas. 321.

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

The presumption contained in S. 114, Illus. (b) does not apply when the act of the accomplice imports no great moral delinquency. The rule as to corroboration is a rule of practice. 6 S.L.R. 106 = 13 Cr.L.J. 767 = 17 Ind. Cas. 79.

——**S. 114, Illus. (b)—Accomplice—Corroboration.**

Though a conviction on the uncorroborated testimony of an accomplice is not illegal, the Court should ordinarily require that that evidence should be considered in material particulars. Hearsay evidence cannot be admitted to corroborate accomplice evidence. 1 U.B.R. (1911) 96 = 13 Cr.L.J. 424 = 14 Ind. Cas. 968.

——**Ss. 114, Illus. (b) and 133—Accomplice—Corroboration.**

(Per BENSON, WALLIS AND MILLER, J.)—A Court can act on the uncorroborated evidence of an accomplice when it believes his evidence to be true. Illus. (b) to S. 114 of the Evidence Act does not render nugatory the express declaration in S. 133 of the Evidence Act. (Per ABDUR RAHIM, J.)—S. 133 should be considered along with Illus. (b) to S. 114. Except under special circumstances the Court should presume that the evidence of an accomplice is unworthy of credit against accused persons unless it is corroborated in material particulars. 21 M.L.J. 283, Foll. (Per SUNDARA AIYAR, J.)—S. 114 should be read along with S. 133 of the Evidence Act. Though the Evidence Act does not require the Court to presume the untrustworthiness of any accomplice evidence, the proper course for the Court to follow is to make the presumption unless there is a special occasion for not doing so.

(Per BENSON, WALLIS AND MILLER, J.J.) : ABDUR RAHIM AND SUNDARA AIYAR, JJ.. Contra)—Under S. 157 of the Evidence Act the previous statements of an accomplice are sufficient corroboration of his evidence given at the trial whatever weight may be attached to them. 35 Mad. 397 = 13 Cr.L.J. 352 = (1912) M.W.N. 549 = 12 M.L.T. 1 = 14 Ind. Cas. 896 (F.B.).

——**Ss. 114, Illus. (b) and 133—Accomplice—Corroboration.**

(Per WHITE C.J. AND AYLING, J.)—Courts can act on the evidence of an accomplice even if there is no corroboration in the strict sense of the word although such evidence should be scrutinised with great care and accepted with the greatest caution. Previous statements of an accomplice can be regarded as corroborative of the evidence given by him at the

trial. (SANKARAN NAIR, J. Contra)—A person should not be convicted except under very special circumstances upon the uncorroborated testimony of an accomplice. The illustrations given under S. 114 are for the most part such rules of evidence as are treated as the presumptions of law. The Evidence Act converts them into maxims or presumptions to be drawn by the Court. A previous statement by the accomplice himself or a statement by another accomplice is not the corroboration required by the act. 35 Mad. 247 = (1912) M.W.N. 207 = 13 Cr.L.J. 305 = 22 M.L.J. 490 = 11 M.L.T. 1 (Sup.) = 14 Ind. Cas. 849.

——S. 114, Illus. (b)—Accomplice—Corroboration.

It is unsafe to act on the uncorroborated testimony of an accomplice even though he is a mere relative of the accused. 1 P.W.R. 1911 (Cr.)= 19 P.L.R. 1911 = 12 Cr.L.J. 5 = 9 Ind. Cas. 39.

——S. 114, Illus. (b)—Accomplice—Corroboration.

Where material discrepancies occur between the statements of the corroborating witnesses before the Police and their depositions in the Court there is no corroboration and consequently the prosecution must fail. 36 P.W.R. (Cr.) 1910 = 11 Cr.L.J. 580 = 8 Ind. Cas. 193.

——Ss. 114, Illus. (b), and 133—Accomplice—Corroboration.

It is not a rule of law but one of mere practice and prudence that an accomplice is unworthy of credit unless he is corroborated in material particulars. A conviction will not be disturbed by the High Court under its revisional jurisdiction on the mere ground that the said rule of practice has not been adhered to by the Court which has convicted unless there are exceptional circumstances calling for the exercise of that jurisdiction in the interests of justice. 11 Bom. L.R. 858 = 10 Cr.L.J. 433 = 3 Ind. Cas. 963.

——S. 114, Illus. (b)—Accomplice—Corroboration.

Although a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, the evidence of an accomplice, ordinarily speaking, should be corroborated in material particulars, and such evidence should be accepted with a great deal of caution and scrutiny. In dealing with the question as to what amount of corroboration is required in the case of testimony given by an accomplice, the Court must exercise careful discrimination and look at all the surrounding circumstances in order to arrive at a conclusion, whether the facts deposed to by the person alleged to be an accomplice are borne out by those circumstances or whether the circumstances are of such a nature that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *aliunde* as to the facts deposed to by that accomplice. A person is not an accomplice in the strict sense, but can be described as such only in a secondary sense ; his evidence against the accused does not require the same amount of corroboration that the evidence of an actual participator in the offence would require. A person who received part of stolen property as the price for his silence in regard to the theft, which he became aware of after it was committed, is not an accomplice in the strict sense. 5 C.W.N. 517 = 28 C. 339.

A. (c) Credibility.

——S. 114, Illus. (b)—Accomplice—Credibility.

The testimony of one accomplice is of little value as a piece of corroborative evidence in support of the testimony of another accomplice. The testimony of an approver can be used for the purpose of corroboration if the taint attached to it is removed. But this "taint" must be removed to such an extent that the Court is prepared to believe the testimony of the approver in the same way and to the same extent as the testimony of an ordinary witness whom it considers to be worthy of credit. 1929 Cr. C. 626 = A.I.R. 1929 Lah. 850.

——S. 114, Illus. (b)—Accomplice—Credibility.

The uncorroborated evidence of an accomplice should not be accepted unless for special reasons. But where such reasons exist conviction based thereon is not illegal.

Where the statement of a deceased accomplice it not made in the presence of the accused little weighs can be attached to it as corroborative evidence. 9 M.L.T. 503 = 9 Ind. Cas. 978.

A. (d) Evidence of.

——S. 114, Accomplice—Evidence of.

Evidence of accomplices must be received with caution and not ordinarily to be accepted without corroboration in material particulars. A.I.R. 1941 Mad. 324 = 1940 M.W.N. 1164 = 52 M.L.W. 790 = 42 Cr. L.J. 404 = 193 Ind. Cas. 342.

——S. 114, Illus. (b)—Accomplice—Evidence of.

The Court, though it may presume the evidence of accomplices to be unworthy of credit, is not compelled to do so. A.I.R. 1936 Pat. 531 = 3 B.R. 54 = 38 Cr. L.J. 72 = 165 Ind. Cas. 564.

——S. 114, Illus. (b)—Accomplice—Evidence of—Element of compulsion.

The Illus. (b) to S. 114, with regard to the evidence of an accomplice introduces no element of compulsion. A.I.R. 1936 Rang. 373 = 37 Cr. L.J. 992 = 164 Ind. Cas. 677.

——S. 114, Illus. (b)—Accomplice—Evidence of.

In dealing with the evidence of an accomplice, it is the duty of the Judge to explain the provisions of Ss. 114 and 133, Evidence Act. A.I.R. 1934 Pat. 309 = 15 P.L.T. 264 = 35 Cr. L.J. 1104 = 13 Pat. 529 = 150 Ind. Cas. 687.

——S. 114, Illus. (b)—Accomplice—Evidence of.

The evidence of an accomplice, who accepts the pardon in order to save his own skin, must be viewed with great care and caution and it is not safe to act on his evidence unless corroborated in material particulars. A.I.R. 1934 Oudh 90 = 35 Cr. L.J. 397 = 11 O.W.N. 62 = 9 Luck. 355 = 147 Ind. Cas. 317.

——S. 114, Illus. (b)—Accomplice—Evidence of.

Per SCROOPE, J.—Though there is no definite rule of law that a person cannot be convicted upon the uncorroborated evidence of an accomplice, such evidence is unsafe to act upon.

Per CHATTERJI, J.—The rules laid down in S. 133, and S. 114, Illus. (b) are parts of one subject and neither section is to be ignored in the exercise of judicial discretion. The general result of the two provisions is that, in almost all cases, the presumption mentioned in S. 114, Illus. (b), should be raised and corroboration in material particulars required.

The Illus. (b) is, however, the rule, and when it is departed from, the Court should show, or it should appear that the circumstances justify the exceptional treatment of the case. It is not enough for Court to state the rule *pro forma* and merely as a reason to evade it ; the Court must act up to it. A.I.R. 1931 Pat. 105 = 11 P.L.T. 545 = 32 Cr. L. J. 383 = 129 Ind. Cas. 535.

——S. 114, Illus. (b) and 133—Accomplice—Evidence of.

A conviction cannot be sustained on the evidence of an accomplice unless there is corroboration in material particulars by means of independent testimony. The degree of corroboration required depends upon the facts of such case. The position, connection and general conduct of an accused cannot be taken as

affording sufficient corroboration. Nor can the circumstances elicited in the accomplice's evidence be held in themselves as affording sufficient corroboration. 14 Bom. L.R. 367 = 13 Cr. L.J. 542 = 15 Ind. Cas. 814.

——S. 114, Illus. (b)—Accomplice—Evidence of.

An accomplice confesses himself a criminal. No man ought to be treated as an accomplice on mere suspicion unless he confesses that he had a conscious hand in the crime or he makes admissions of facts showing that he had such hand. If the evidence of a witness falls short of these tests he is not an accomplice ; and his testimony must be judged on principles applicable to ordinary witnesses. 11 Bom. L.R. 1153 = 10 Cr. L.J. 530 = 4 Ind. Cas. 268.

——Ss. 114, Illus. (b) and 133—Accomplice—Evidence of.

A conviction based solely upon the evidence of the accomplices is not illegal. That an accomplice is unworthy of credit unless he is corroborated in material particulars, is a rule of practice and not of law. The High Court will not interfere in revision with a conviction merely on the ground that the said rule has not been adhered to by the Court, unless there are exceptional circumstances requiring revision in the interest of justice. 8 Bom. 197, Foll. 11 Bom .L.R. 858 = 10 Cr. L.J. 433 = 3 Ind. Cas. 963.

B. Approver—Evidence of.

——S. 114, Illus. (b)—Corroboration required—Nature and Extent.

Illus. (b) to S. 114, Evidence Act, requires corroboration in " material particulars " to rebut the presumption of untrustworthiness which ordinarily attaches to the testimony of an accomplice. The nature and extent of the corroboration would depend upon, and vary with, the circumstances of each case, particularly the nature of the offence charged, the character and antecedents of the approver and the degree of suspicion, attaching to his evidence. It is now well-settled that the minimum amount of corroboration required to make it safe to act on the testimony of an approver is that his evidence must be corroborated not only as to the *corpus delicti* but also as to the identity of the accused persons. The corroborative evidence must show or tend to show that the story of the approver that the accused committed the crime is true ; in other words, the corroborative evidence must be such which confirms not only the evidence that the crime has been committed but also the evidence that the accused committed that crime. 4 A.I. Cr. D. 551 = 52 P.L.R. 248 = A.I.R. 1950 Simla 204.

——Ss. 114, Illus. (b) and 133—Approver—Evidence—Need for corroboration.

As a matter of strict law, there would be no bar to basing a conviction on the uncorroborated testimony of an approver alone. However, it is a rule of prudence that the approver's testimony should not be acted upon unless it is corroborated not only generally, but also against each individual accused in material particulars so as to establish a connection between that accused and the commission of the offence. This is obviously a statutory rule. While dealing with a self-confessed criminal the Court has to be on its guard against possible substitutions of the guilty by the innocent or the implication of innocent persons in addition to the real delinquents. 51 Cr. L.J. 419 = A.I.R. 1950 Lah. 34.

——S. 114, Illus. (b)—Approver—Evidence of—Corroboration—Necessity—Rule as to.

An approver or an accomplice is a dangerous witness. His evidence may be relied on under S. 133, Evidence Act, but it is very unwise to do so, having regard to the wise caution indicated in Illus. (b) to S. 114, Evidence Act, without substantial corroboration. 49 Cr. L.J. 297 = A.I.R. 1948 Cal. 187.

——S. 114, Illus. (b)—Approver—Evidence—Nature of corroboration necessary—Practice.

In law, the statement alone of the approver can be taken as sufficient proof to establish the crime, but it is the invariable practice of the Courts to require in the case of an approver's statement, evidence corroborating not only the approver's own part in the crime, but the fact that the accused has been truthfully implicated. 49 P.L.R. 42 = A.I.R. 1948 Lah. 24 = 48 Cr. L.J. 967.

——S. 114, Illus. (b)—Approver—Evidence of.

Corroboration required. I.L.R. (1944) 2 Cal. 327 = 221 Ind. Cas. 547 = A.I.R. 1945 Cal. 441 = 47 Cr. L.J. 202.

——S. 114, Illus. (b)—Approver—Evidence of.

Sufficiency for conviction—Nature and extent of corroboration required. 221 Ind. Cas. 358 = 47 Cr. L.J. 159 = A.I.R. 1945 Sind 132.

——S. 114, Illus. (b)—Approver—Evidence—Corroboration necessary.

In order to base a conviction on the statement of an approver, it must be corroborated in material particulars, linking the accused with the crime with which he is charged. 42 P.L.R. 67.

——S 114, Illus. (b)—Approver — Evidence — Corroboration.

The statement of the approver must be very thoroughly scrutinized and should not be accepted unless it is corroborated by other independent evidence in the case. But no hard and fast rule can be enunciated which will govern all cases. There may be cases in which an approver has made positively false statements in respect of a particular point and yet the evidence produced in a case might go to prove beyond any doubt that in other respects, the evidence of the approver was trustworthy and was fully corroborated by the very best evidence produced. It would be wrong in that case to suggest that because the approver has made a wrong statement on a particular point, so his whole evidence should be rejected. A.I.R. 1939 All. 567=1939 A.L.J. 785 = 1939 A.W.R. 464 = 40 Cr. L.J. 856 = I.L.R. (1939) All. 736 = 184 Ind. Cas. 191.

——S. 114, Illus. (b)—Approver — Evidence — Corroboration.

A conviction cannot be sustained upon the uncorroborated testimony of the approver. 165 Ind. Cas. 144 = 1936 O.W.N. 848 = 37 Cr. L.J. 1096.

——S. 114, Illus. (b)—Approver—Evidence—Corroboration.

Even in cases where the approver otherwise appears to be a satisfactory witness, it is unsafe to base the conviction solely on his testimony unless his testimony is corroborated by independent evidence in some material particulars :

Held, that the fact that the deceased was last seen alive in the company of the accused and the approver was a strong circumstance which corroborated the testimony of the approver. 157 Ind. Cas. 626 = 37 P.L.R. 271 = 36 Cr. L.J. 1202.

——Ss. 114, Illus. (b) and 133—Approver—Evidence—Corroboration required.

An accused person can legally be convicted upon the uncorroborated evidence of an approver, whether an accused person should or should not be convicted upon such evidence is left to the prudence and good sense of the tribunal after considering all the circumstances of the case. The evidence of an approver may be corroborated by the evidence of another approver, or by the confession of a person who is being tried jointly with the accused for the same offence implicating both himself and the accused; it is the duty of the Court to scrutinize with care such corroboration as that mentioned above but whether it is to be treated as evidence

against the accused or not is to be determined by the Court having regard to the circumstances of the case. A.I.R. 1935 Cal. 513 = 62 Cal. 238 = 39 C.W.N. 744 = 36 Cr. L.J. 1115 = 157 Ind. Cas. 387 (S.B.).

——S. 114, Illus. (b)—Approver—Evidence—Necessity of corroboration.

Neither the personal conduct and antecedents of the principal approver nor absence of motive on his part or on the part of the investigating agency to implicate individual accused make the ordinary and well recognised rule of practice inapplicable to a case that a conviction ought not to be based on the testimony of the approver unless it is corroborated in material details not only with regard to the general story narrated by him but also with regard to the complicity of each accused. A.I.R. 1934 Lah. 583 = 35 Cr. L.J. 752 = 148 Ind. Cas. 745.

——S. 114, Illus. (b)—Approver—Evidence—Corroboration.

Where the prosecution evidence let in to corroborate the approver's testimony is unconvincing and interested, the witnesses being on inimical terms with some of the accused, the required corroboration cannot be said to have been supplied and the accused are entitled to acquittal. 147 Ind. Cas. 1231 = 34 P.L.R. 2 = 35 Cr. L.J. 583.

——S. 114, Illus. (b)—Approver—Evidence of—Approver implicating himself and accused—Motive established.

In order to sustain a conviction, there must be independent corroboration of the testimony of an approver, and the corroboration must be on a point material to the issue. There is a great difference between confirmation of an accomplice as to the circumstances of the felony and those which apply to the individual charged. The former only show that the accomplice was present at the commission of the offence, but the others show that the prisoner was connected with it. The testimony of the approver ought to be corroborated in some material circumstances, such circumstances connecting and identifying the accused with the offence with which he is charged.

Where the only circumstances established by the prosecution were that the accused had a motive for doing away with the deceased, that on being questioned a few days after the disappearance of the deceased, he denied commission of the offence but left the village and after his arrest, he conducted the investigating party to his field and pointed out the place wherefrom the corpse of the deceased was exhumed :

Held, that though the circumstances were compatible with the hypothesis that the accused disposed of the body after the deceased had been killed by the approver, yet apart from the testimony of the approver, there was no evidence, direct or circumstantial, which would show that the appellant was responsible, either as a principal or as an abettor, for killing the deceased, though he was guilty under S. 201, I.P.C. A.I.R. 1934 Lah. 23 (2) = 34 P.L.R. 866 = 35 Cr. L.J. 352 = 147 Ind. Cas. 215.

——S. 114, Illus. (b)—Approver—Evidence.

Statement of approver uncorroborated and unconvincing—Benefit of doubt to accused should be given. A.I.R. 1934 Lah. 21 = 36 Cr. L.J. 671 = 155 Ind. Cas. 149.

——S. 114, Illus. (b)—Approver—Evidence.

The rule that it is not safe to convict upon the uncorroborated testimony of an approver is based on long experience of the Courts of India. 142 Ind. Cas. 823 = 33 P.L.R. 13 = 34 Cr.L.J. 450.

——S. 114, Illus. (b)—Approver—Evidence—Jury trial.

In a charge to the jury, it would amount to misdirection either to omit to give the jury a suitable warning or to tell the jury that an approver's evidence against a particular accused has received independent corroboration when this is not, in fact, the case. A.I.R. 1933 Pat. 96 = 13 P.L.T. 802 = 34 Cr. L.J. 421 = 142 Ind. Cas. 809.

——S. 114, Illus. (b)—Approver—Evidence.

An approver's statement should be corroborated by independent evidence connecting each accused with the crime. A.I.R. 1932 Lah. 180 = 33 P.L.R. 16 = 33 Cr.L.J. 414 = 137 Ind. Cas. 95.

——S. 114, Illus. (b)—Approver—Evidence.

Notwithstanding provisions of Ss. 30, 114 and 133 of Evidence Act, conviction cannot be based on uncorroborated testimony of approver, however convincing that testimony may be. A.I.R. 1931 Cal. 697 = 35 C.W.N. 1270 = 33 Cr. L. J. 19 = 134 Ind. Cas. 1121 (S.B.).

——S. 114, Illus. (b)—Approver—Evidence.

The testimony of an approver being tainted requires independent corroboration in material particulars. It is necessary to see whether there is sufficient general corroboration of the approver's story implicating himself and whether the story has been sufficiently corroborated in material particulars connecting each of the accused with the crime. The rule that a conviction should not be based on the uncorroborated testimony of an approver is not, however, strictly, a rule of law but a rule of practice, dictated by prudence and the nature and degree of corroboration must vary with the particular ciscumstances of each case. A.I.R. 1932 Lah. 73 = 32 Cr. L. J. 1036 = 32 P.L.R. 792 = 133 Ind. Cas. 545.

——S. 114, Illus. (b)—Approver—Evidence—Corroboration.

An approver, on his own admission, is a man of the very lowest character who has thrown to the wolves his erstwhile associates and friends in order to save his own skin. He is a criminal himself and his evidence must be received with very great caution, if not suspicion. A.I.R. 1931 Lah. 408 = 32 Cr. L.J. 818 = 132 Ind. Cas. 185.

——S. 114, Illus. (b)—Approver—Evidence—Corroboration, extent and nature.

Where the case against accused depends on the view taken as to the corroboration of the approver's story in material particulars, and whether it is such, taken along with the other facts and circumstances, that it can be relied upon as bringing home the guilt for the crime, the corroboration of the approver's story requires most careful investigation upon the question of the identity of the accused persons as participators in the occurrence. 1930 Cr. C. 657 = A.I.R. 1930 Cal. 430.

——S. 114, Illus. (b)—Approver—Evidence—Corroboration as regards each accused—If necessary.

Per STAPLES, A.J.C.—It is true that an approver's story should be corroborated not only as regards the facts of the case but also as regards the identity of the accused, but where there are several accused and the story of the approver has been confirmed on many points, and as regards the identity of several of the accused, it should not be considered necessary that his story should be corroborated as regards the identity of the remaining accused unless there are reasons for believing that the approver has named those other accused on account of personal spite or for some other reason. The real test of the evidence of the approver is whether it has been believed or not and when it has been corroborated on many points and has not been shown to be false in any particular it should be accepted; and when once it has been accepted as a whole, corroboration as regards the identity of each of several accused should not be demanded.

Per JACKSON AND SUBHEDAR, A.J.Cs. — Even where there are several accused persons, an approver's story to be corroborated as regards a particular accused must be corroborated on some point which implicates that accused. It is not necessary that it should be corroborated on all points relating to him, but there must be some guarantee that his evidence is true as regards that particular accused. 120 Ind. Cas. 721 = 31 Cr. L.J. 153 = A.I.R. 1930 Nag. 97.

——S. 114, Illus. (b)—Approver—Evidence—Corroboration.

To use the statement of an approver in such a way as to convict an accused on its strength, care, should be taken to see that it is corroborated in material particulars so as to induce one to an inference that the accused were connected with and guilty of the offence. 114 Ind. Cas. 326 = 30 Cr. L.J. 292 = 12 A.I. Cr. R. 223 = A.I.R. 1929 Lah. 680.

——S. 114, Illus. (b)—Approver—Evidence of.

An approver's evidence is unworthy of credit unless corroborated in material particulars. And where the only corroborating evidence is that of the approver's son, who repeats parrot-like what he is tutored to say, it is not safe to convict a person. 122 Ind. Cas. 91 = 11 L.L.J. 223 = 30 P L.R. 422 = 1929 Cr. C. 149 = A.I.R. 1929 Lah. 587.

——S. 114—Illus. (b)—Approver's evidence—Corroboration—Nature of—Mere presence of person at the scene—Whether sufficient.

The corroboration that is required in connection with the approver's testimony is corroboration of the material facts which go to connect the accused with the commission of the offence. The mere presence of a person in the house is not such a corroboration. 1929 M.W.N. 698.

——S 114, Illus. (b)—Approver—Evidence of.

Where the evidence of an approver is principally on the question of conspiracy and where that evidence is sought to be corroborated by the evidence of the confessing accused, it amounts to this that one tainted piece of evidence is sought to be corroborated by another tainted piece of evidence and would not justify the conviction of co-accused. 116 Ind. Cas. 174 = 30 Cr. L.J. 586 = 12 A.I. Cr. R. 460 = 33 C.W.N. 58 = A.I.R. 1928 Cal. 745.

——S. 114, Illus. (b)—Approver—Evidence.

Numerous persons from area of 50 miles tried for dacoity—Offences continuing for over four years—Consistently correct identification is difficult—Approver failing to identify particular person on one occasion—His evidence becomes weak regarding that man, but he can be convicted if there is strong evidence besides that of approver. 112 Ind. Cas. 337 = 5 O.W.N. 760 = 29 Cr. L.J. 1009 = 11 A.I. Cr. R. 273 = A.I.R. 1928 Oudh 430.

——S. 114, Illus. (b)—Approver—Evidence.

The evidence of an approver does not differ from the evidence of any other witness save in one particular respect, namely, that the evidence of an accomplice is regarded *ab initio* as open to grave suspicion. Accordingly, if the suspicion which attaches to the evidence of an accomplice be not removed, that evidence should not be acted upon unless corroborated in some material particular and if the suspicion attaching to the accomplice's evidence is removed then that evidence may be acted upon, even though uncorroborated and the guilt of the accused may be established upon that evidence alone. The law on the point as laid down in Ss. 114, 133 and 134, Evidence Act, gives no countenance to the contention that the uncorroborated testimony of an accomplice is necessarily insufficient to establish a charge against an accused. 113 Ind. Cas. 329 = 9 P.L.T. 672 = 8 Pat. 235 = 30 Cr. L.J. 137 = 11 A.I. Cr. R. 41 = A.I.R. 1928 Pat. 630.

——S. 114, Illus. (b)—Approver—Evidence.

The evidence of an accused person's conduct may be used as corroboration of an approver's story. 111 Ind. Cas. 435 = 29 Cr. L.J. 851 = 10 Lah. 265 = 11 A.I. Cr. R. 171 = 31 P.L.R. 41 = A.I.R. 1928 Lah. 681.

——S. 114, Illus. (b)—Approver—Evidence.

It is not safe to base a conviction upon the evidence of an approver who obviously is deeply interested in putting responsibility for the offence upon shoulders other than his own, unless there is some independent evidence to corroboratehis story in material particulars. 99 Ind. Cas. 929 = 8 L.L.J. 610 = 28 P.L.R. 39 = 28 Cr. L.J. 193 = 7 A.I. Cr. R. 173 = A.I.R. 1927 Lah. 78.

——S. 114, Illus. (b)—Approver—Evidence.

The acquittal of any number of persons for want of corroboration cannot weaken the weight of the testimony of an approver. The matter would be different, if it is shown that even one accused person has been acquitted not for want of corroboration but in virtue of a finding that theaccussed person was innocent of the crime. 89 Ind. Cas. 836 = 27 O.C. 385 = 26 Cr. L.J. 1412 = A.I.R. 1925 Oudh 374.

——S. 114, Illus. (b)—Approver—Evidence.

A person who owns himself to be a scoundrel and in addition to that is also a traitor, is a person whose evidence must be received with caution. Nevertheless the law does not require the total rejection of accomplice's evidence It is enough if after considering the evidence, the Court is of opinion that the whole body of evidence put together proves the guilt of the accused person. 87 Ind. Cas. 916 = 19 S.L.R. 111 = 26 Cr. L.J. 1028 = A.I.R. 1925 Sind 295.

——S. 114, Illus. (b)—Approver—Evidence—Corroboration.

Though Illus. (b) is not imperative, the Courts *ex majore coutela* insist upon the corroboration of an approver's evidence in material particulars. 81 Ind. Cas. 881 = 19 S.L.R. 183 = 25 Cr. L.J. 1057 = A.I.R. 1925 Sind 105.

——S. 114, Illus. (b)—Approver—Evidence.

When an approver makes the contradictory statements that which seems to be pressed cannot be accepted. 77 Ind. Cas. 895 = 5 L.L.J. 572 = 25 Cr. L.J. 495 = A.I.R. 1923 Lah. 683.

——S. 114, Illus. (b)—Approver—Evidence—Corroboration.

Where there are more than one accused there should be corroboration of approver's story against each. 76 Ind. Cas. 716 = 25 Cr. L.J. 252 = A.I.R. 1923 Lah. 385.

——S. 114, Illus. (b)—Approver—Evidence.

The facts, that prior to the making of their statements previous concert between approvers was highly improbable, have to be paid regard to, in connection with illus. (*b*) to S. 114. 68 Ind. Cas. 113 = 3 Lah. 144 = 4 L.L.J. 91 = 9. P.W.R. (Cr.) 1922 = 23 Cr. L.J. 513 = A.I.R. 1922 Lah. 1.

——S. 114, Illus. (b)—Approver—Evidence.

An approver's evidence is in itself tainted evidence though in some cases it may be worthy of belief for various reasons but the uncorroborated statement of an approver taken at the end of the trial is of very little evidentiary value. 66 Ind. Cas. 187 = 4 Lah. L.J. 284 = 23 Cr. L.J. 251.

——S. 114, Illus. (b)—Approver—Evidence.

In order to support conviction the statement of an approver, especially of one whose initial statement was very long delayed, requires material corroboration

connecting each individual accused with the crime committed. 63 Ind. Cas. 612 = 22 Cr. L.J. 676.

——S. 114, Illus. (b) and 133—Approver—Uncorroborated testimony—Conviction.

Though the absence of any corroboration of the statement of an approver is not fatal to the conviction of a person named by him as one of the participators in an offence, it casts doubts upon its justice and the accused is entitled to the benefit of the doubt. 20 Cr. L.J. 561 = 52 Ind. Cas. 49 (All.).

——S. 114, Illus. (b)—Approver—Evidence—Corroboration—Necessity.

A conviction based on the uncorroborated testimony of an approver is illegal. 52 P.L.R. 1918 = 9 P.W.R. (Cr.) 1918 = 19 Cr. L.J. 439 = 44 Ind. Cas. 967.

——Ss. 114, Illus. (b) and 133—Approver—Corroboration—Lower class accused.

Courts should not ordinarily depart from the well recognized practice of accepting the evidence of an approver only when it is corroborated in material particulars. This is the more necessary where the accused belongs to a lower class and it is a matter of no difficulty for any one to include his name as an accused and as it is difficult for him to establish his innocence. In exceptional cases Courts might be right if for reasons stated they act upon the evidence of an approver as a whole though uncorroborated in material particulars. 17 Cr. L.J. 220 = 31 P.W.R. (Cr.) 1916 = 34 Ind. Cas. 332.

——S. 114, Illus. (b)—Approver—Evidence.

The question of the value to be attached to the statements of an accomplice or approver must be decided in every case upon the particular and peculiar circumstances of the case. 7 P.W.R. (Cr.) 1916 = 17 Cr. L.J. 97 = 32 Ind. Cas. 833.

——S. 114, Illus. (b)—Approver—Evidence—Corroboration.

The mere production by the accused of stolen property from a place within his possession is not sufficient corroboration of the approver's testimony to have a conviction thereon. 16 Cr. L.J. 634 = 26 P.W.R. (Cr.) 1915 = 30 Ind. Cas. 458.

——S. 114, Illus. (b)—Approver—Evidence of—Conviction based on.

A conviction based upon the evidence of an approver alone unless it is corroborated by reliable independent evidence is bad. 12 Cr. L.J. 240 = 10 Ind. Cas. 284.

——Ss. 114, Illus. (b) and 133—Approver—Evidence of, civil suit for damages.

In a suit for damages for dacoity, the confession and the deposition of the defendant as approver in the criminal case for the dacoity, are admissible against him though the Sessions Court did not convict the accused upon those materials. 13 C.W.N. 501 = 4 Ind. Cas. 523.

——S. 114, Illus. (b)—Approver—Evidence—Corroboration—Necessity.

Evidence given by the approver must be corroborated in material particulars as regards each accused in order to sustain a conviction on the evidence. 9 Cr. L.R. 29 (All.).

(*c*) **Bribe-giver.**

——S. 114, Illus. (b)—Bribe-giver—Corroboration.

A person who offers a bribe to a public officer is an accomplice and his eveidence requires corroboration. A.I.R. 1948 Nag. 245 = 1947 N.L.J. 310 = 49 Cr. L.J. 331.

——S. 114, Illus. (b)—Bribe-giver — Corroboration—What amounts to.

The mertis of the case to decide which in favour of the bribe-giver, a Judge accepts the illegal gratification, are a sufficient corroboration of the former who is really an accomplice. 3 P.W.R. (Cr.) 1919.

——S. 114, Illus. (b)—Bribe-giver—Corroboration.

It is generally unsafe to convict an accused person on the testimony of his accomplices, unless they are corroborated in material particulars connecting the accused with the offence. But this rule does not apply to all persons who technically come within the category of accomplices. The particular circumstances of each case will affect its application, and no general rule can be laid down on this point. 26 B. 193, Approved. When the accomplices were persons who paid the bribe to a public servant accused under S. 161 of the I.P.C. not of their free will but rather of necessity, and particularly, when they did not strive to save themselves by throwing the blame for the offence upon the accused, and furthermore it appeared that their guilt, such as it was, was not used as an instrument to induce them to give evidence: *Held*, that their testimony, even without corroboration, might justify the conviction of the accused, At any rate their evidence would require a much slighter degree of corroboration to establish their credit than it would require if they were entirely voluntary accomplices in the offences which they spoke to. 27 C. 925, Ref. to. Witnesses to the payment of bribes are not accomplices, unless they co-operated in the payment of the bribes, or were instrumental in the negotiations for the payment. 27 C. 144, Foll. 10 C.W.N. 669 = 33 Cal. 649.

(*d*) **Co-accused.**

——S. 114—Co-accused—Corroboration, necessity of.

The Bombay High Court has laid down definitely as a rule of prudence that the evidence of an accomplice, however trustworthy it may be, should not be acted upon unless it is corroborated as against the particular accused in material respects. The case of an accused who is convicted upon his own plea and then appears as a witness against his co-accused, comes within the ambit of this rule. A.I.R. 1933 Bom. 24 = 34 Bom. L.R. 1453 = 34 Cr. L.J. 136 = 141 Ind. Cas. 347.

——S. 114, Illus. (b)—Co-accused—Retracted confession.

It is not absolute rule of law that retracted confession cannot be accepted without corroborative evidence—But where corroborative evidence does not show beyond reasonable doubt that accused is guilty he should be given benefit of doubt. A.I.R. 1930 Pat. 289 = 126 Ind. Cas. 902.

——S. 114, Illus (b)—Co-accused—Confession

Confession implicating a co-accused requires corroboration if a co-accused is to be convicted on it. 38 Cal. 559; 15 Bom. 66 and 38; Bom. 156, Ref. 123 Ind. Cas. 393 = 31 Cr. L.J. 492 = 1930 Cr. C. 767 = A.I.R. 1930 Pat. 385.

——S. 114, Illus. (b)—Co-accused—Retracted confession—Rule as to.

In a proper case a Court may act upon retracted confession alone, but the rule of prudence and safety is to require generally that such confessions should be corroborated in material particulars by some reliable evidence before an accused person is convicted. 116 Ind. Cas. 770 = 8 Pat. 289 = 10 P.L.T. 549 = 30 Cr. L.J. 675 = 1929 Cr. C. 62 = 13 A.I. Cr. R .143 = A.I.R. 1929 Pat. 275.

——S. 114, Illus. (b)—Co-accused—Confession.

Although a confession of one co-accused may be taken into consideration against another under the provisions of S 30, it would be unsafe, if not illegal, to rely on it without further corroboration in material particulars. 115 Ind. Cas. 1 = 30 Cr. L.J. 385 = A.I.R. 1929 Lah. 338.

——S. 114, Illus. (*b*)—Co-accused—Confession.

Where there is nothing against an accused person but a confession made by a co-accused from the dock at the trial, a conviction cannot be supported. 118 Ind. Cas. 512 = 1929 M.W.N. 391 = 2 M. Cr. C. 76 = 30 Cr. L.J. 932 = A.I.R. 1929 Mad. 285.

——S. 114, Illus. (*b*)—Co-accused—Confession.

Where the accomplice makes his confession and sticks to it, and he actually allows himself to be convicted upon it, no doubt to that extent, there is some sort of guarantee of its truthfulness, but he remains an accomplice with all the suspicion attaching to an accomplice, and his evidence must be viewed with all the suspicion which ordinarily attaches to the evidence of an accomplice. A.I.R. 1928 Cal. 233.

——S. 114, Illus. (*b*)—Co-accused—Confession—Retracted confession.

Where a confession does not appear to have been tutored nor made under the influence of drugs or fear but is one which adds to the knowledge which was then available as to the cause of death in many particulars and has not been contradicted by anything and thus appears to be in the evidence a true confession, it is sufficient, without any corroborative evidence, for the conviction of the maker though retracted. A.I.R. 1927 Oudh 17, Foll.

Such a confession is not alone sufficient evidence to justify a conviction of a co-accused but that confession if unrebutted is admissible in evidence against a co-accused. 114 Ind. Cas. 771 = 6 O.W.N. 159 = 30 Cr. L.J. 360 = A.I.R. 1929 Oudh 167.

——S. 114, Illus. (*b*)—Co-accused—Confession.

Confessing co-accused's evidence is practically that of an approver, and must be treated as such especially where the confession was not free from inducement. 10 O.L.J. 280 = A.I.R. 1924 Oudh 65.

——S. 114, Illus. (*b*)—Co-accused—Retracted confession.

It seems quite beyond question that the retracted confessions practically uncorroborated by anything in the prosecution evidence, do not afford anything like a satisfactory basis for the conviction of the accused. 73 Ind. Cas. 497 = 24 Cr. L.J. 109 = 20 A.L.J. 669 = A.I.R. 1922 All. 266.

(*e*) Corroboration.

——S. 114, Illus. (*b*)—Corroboration.

The mere fact that the approver produced a spear and a dang from a field and he stated that the spear was used by the accused is not corroboration of the approver's story ; so also the fact that the accused was stained with human blood, does not corroborate the approver's story. 99 Ind. Cas. 929 = 8 L.L.J. 610 = 28 P.L.R. 39 = 28 Cr. L.J. 193 = 7 A.I. Cr. R. 173 = A.I.R. 1927 Lah. 78.

——S. 114, Illus. (*b*)—Corroboration.

The production of stolen property by an accused person even from a place which is not in his own possession may be accepted as material corroboration of the evidence of an accomplice who has deposed that the accused joined him in committing the burglary or theft : A.I.R. 1923 Lah. 335, Foll. 111 Ind. Cas. 447 =29 Cr. L.J. 863 = 11 A.I. Cr. R. 198.

——S. 114, Illus. (*b*)—Corroboration—Existence of a motive for the offence is not sufficient.

The existence of general hostility, general enmity and a desire, however strong, or a motive, however effective, to procure the death of another person may be a piece of circumstantial evidence, but is not corroboration of a sworn statement of participation in a particular crime. Corroboration must point indubitably to the identification of the person charged with the particular act with which the direct evidence connects him. 95 Ind. Cas. 74 = 48 All. 409 = 24 A.L.J. 410 =7 L.R.A. Cr. 105 = 27 Cr. L.J. 746 = A.I.R. 1926 All. 377.

——S. 114, Illus. (*b*)—Corroboration.

Evidence of motive is not corroboration of any of the incidents of the crime. 77 Ind. Cas. 439 = 25 Cr. L.J. 391 = A.I.R. 1925 Oudh 295.

——S. 114, Illus. (*b*)—Corroboration.

Where an approver gave evidence that the deceased had been put to death by the accused and himself for the sake of his ornaments, and a witness deposed that the accused was seen talking to the deceased on the evening on which he disappeared.

Held, that the deposition of the witness did not amount to a material corroboration of the approver's statement. 88 Ind. Cas. 453 = 7 L.L.J. 528 = 26 Cr. L.J. 1141 = 26 P.L.R. 295 = A.I.R. 1925 Lah. 600.

——S. 114, Illus. (*b*)—Corroboration—Dacoity.

In a dacoity case, where an approver gives evidence, the fact that on some day previous to the dacoity, the accused were seen together at a place other than that at which the dacoity took place is not such corroboration of the approver's evidence as to justify the conviction of the accused. Stolen property being found in possession of accused is sufficient corroboration. 86 Ind. Cas. 69 = 26 Cr. L.J. 693 = 26 P.L.R. 40 = A.I.R. 1925 Lah. 426.

——S. 114, Illus. (*b*)—Corroboration.

DIscovery of articles is sufficient corroboration of approver's statement. 76 Ind. Cas. 819 = 25 Cr. L.J. 259 = A.I.R. 1923 Lah. 389.

——S. 114, Illus. (*b*)—Corroboration.

Where some common things were found in the search and some other things found, claimed by the accused to be their own, were not mentioned in the first report and a gun and a sword were found which were proved to belong to complainant but which were concealed because the complainant did not hold a license.

Held, that there was no sufficient corroboration of approver's story to justify conviction. 76 Ind. Cas. 716 = 25 Cr. L.J. 252 = A.I.R. 1923 Lah. 385.

——S. 114, Illus. (*b*)—Corroboration by other accomplices is useless—Corroboration must be of commission of offence.

Where the evidence of witnesses relied on to corroborate the approver does not go beyond stating that the accused wanted to kill the deceased and with that object got information from them of the deceased's movements on the night in question.

Held, this is not inconsistent with the possibility that they might depute the approver only to do the foul deed. Even if these statements did furnish any kind of corroboration they cannot be used for that purpose, where the witnesses who corroborate are themselves accomplices, according to their own showing and their evidence would require corroboration before it could be relied upon, especially when they have retracted their statements. 68 Ind. Cas. 821 = 23 Cr. L.J. 597 = A.I.R. 1923 Lah. 76.

——S. 114, Illus. (*b*)—Corroboration.

No hard and fast rules can however be laid down to regulate the extent and nature of corroboration, this being dependent entirely on the circumstances of each case. The fabrication of a false defence cannot be regarded as sufficient to corroborate an approver. 68 Ind. Cas. 113 = 4 L.L.J. 91 = 3 Lah. 144 = 9 P.W.R. 1922 = 23 Cr. L.J. 513 = A.I.R. 1922 Lah. 1.

——S. 114, Illus. (*b*)—Corroboration.

Confirmation (corroboration) does not mean that there should be independent evidence of that which the accomplice relates, otherwise his testimony would be unnecessary. But one accomplice's evidence is not corroboration of the testimony of another accomplice.

Evidence in corroboration must be evidence which implicates the accused, *i.e.*, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.

The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. Were the law otherwise, many crimes which are usually committed between accomplices in secret, such as incest, offences with females, etc., could never be brought to justice. 67 Ind. Cas. 343 = 6 N.L.J. 52 = 23 Cr. L.J. 391 = A.I.R. 1922 Nag. 172.

——S. 114, Illus. (*b*)—Corroboration—Material and general.

There is a difference between general and material corroboration of an approver, which means evidence concerning participation of his companion in committing the crime. Being found in the company of the approver shortly after the offence is very strong indication of the fellowship of crime. 21 P.W.R. 1917 Cr. = 18 Cr. L.J. 852 = 41 Ind. Cas. 820.

——S. 114, Illus. (*b*)—Corroboration.

The discovery of blood in the convict's house and on his finger nails, and his suspicious conduct on the day of murder, furnish an adequate corroboration of the approver's testimony. 4 L.L.J. 405 = A.I.R. 1921 Lah. 392.

——Ss. 114, Illus. (*b*) and 133—Corroboration.

Previous statements of an accomplice may mean corroboration. S. 133 of the Evidence Act contains the rule of law and S. 114, Illus. (*b*) a rule of guidance for the assistance of Courts. 18 Cr. L.J. 29 = 2 P.R. 1917 Cr. = 36 Ind. Cas. 861.

——S. 114, Illus. (*b*)—Corroboration—What is.

Evidence showing that the co-accused or some of them were seen in the company of the approver at or in the vicinity of the place at which, he says, dacoities were to be committed is not sufficient corroboration in support of his statement. 2 P.W.R. (Cr.) 1916 = 17 Cr. L.J. 107 = 32 Ind. Cas. 843.

(*f*) Duty of Judge.

——S. 114, Illus. (*b*)—Duty of Judge.

In a jury trial, it is the duty of the Judge to point out to the jury the position in law affecting the evidence of an accomplice. If such a warning has been given and nevertheless, the jury choose to convict the accused in the absence of such corroborative evidence, the conviction will not generally be quashed. Where a Judge is sitting without a jury, he must apply the same rule by treating himself as a jury. A.I.R. 1934 Cal. 114 = 37 C.W.N. 934 = 35 Cr. L.J. 551 = 147 Ind. Cas. 1172.

——S. 114, Illus. (*b*)—Duty of Judge.

Court should exercise judicial discretion and have regard to facts of case in considering whether an accomplice is or is not worthy of credit. 113 Ind. Cas. 329 = 9 P.L.T. 672 = 8 Pat. 235 = 30 Cr. L.J. 137 = 12 A.I. Cr. R. 41 = A.I.R. 1928 Pat. 630.

Illustration (*c*).

——S. 114, Illus. (*c*)—Promissory-note renewed—Presumption that creditor kept old pro-note with him.

In case of a promissory-note executed in lieu of a previous promissory-note, no presumption can legally be made that the creditor kept the previous promissory-note in his possession in order to prove the consideration of the latter promissory-note. A.I.R. 1942 Oudh 332 = 1942 O.W.N. 202 = 17 Luck. 677 = 1942 A.W.R.C.C. 145 = 1942 A.W.R. Rev. 69 = 200 Ind. Cas. 164.

——S. 114—Illus. (*c*)—Presumption.

The 'special rules of evidence' laid down in S. 118 of the Negotiable Instruments Act, apply only as between the parties to the instrument or those claiming under them. In other cases the presumption will only be in the terms in S. 114, Evidence Act, which, by the usual expression may presume' leaves it to the Court to apply the presumption or not according to circumstances. A.I.R. 1937 Mad. 182 = 1936 M.W.N. 1167 = 44 L.W. 784 = (1937) 1 M.L.J. 543 = I.L.R. (1937) Mad. 299 = 167 Ind. Cas. 819.

——S. 114, Illus. (*c*)—Expl.—Rule laid down by, whether affected by S. 118, Negotiable Instruments Act.

S. 114 was enacted in 1872, and then came the Negotiable Instruments Act nine years later. What was merely permissible in 1872 was converted into a statutory obligation in 1881. In these circumstances, it can be inferred from the later modification of the rule laid down in illus. (*c*) to S. 114, that the subsequent alteration was intended to replace the previous enactment. Moreover, while illus. (*c*) to S. 114 is confirmed to the acceptance or endorsement of a bill of exchange, S. 118, Negotiable Instruments Act, applies to the making or drawing of it also.

All that the explanation to illus. (*c*) to S. 114, Evidence Act, lays down is that while applying the maxim enacted in illus. (*c*), the Court shall duly consider the fact that the acceptor of a bill of exchange was completely under the money-lender's influence. In other words, the explanation merely sounds a warning that the rule laid down in illus. (*c*) was not intended in any way to override the general provisions of law that a contract entered into under undue influence was bad. A.I.R. 1935 Lah. 599 = 17 Lah. 107 = 38 P.L.R. 552 = 159 Ind. Cas. 61.

——S. 114, Illus (*c*)—Expl.—Whether exhaustive.

The explanation added to Illus. (*c*), S. 114, Evidence Act, only indicates the principle and is not meant to be exhaustive of its application. Its operation is not necessarily limited to cases where the creditor is a professional money-lender or excluded in cases where the borrower has a vested right in property as distinguished from a mere *spes*. The presumed or proved necessity of the borrower and the inequality of position between the lender and the borrower constitute the reason of the rule. If such consideration can justify the Court in refusing to draw the presumption, they must equally operate to help to rebut the presumption drawn under S. 118, Negotiable Instruments Act.

In dealing with rebuttable presumptions, it is common knowledge that the Court is often obliged to rely more upon circumstances than upon direct or definite evidence negativing the fact presumed.

Even in suits on negotiable instruments, it has been recognised, that the debtor can press in to his service, facts and circumstances disclosed by the plaintiff's evidence as well. A.I.R. 1935 Mad. 769 = 1935 M.W.N. 528 (2) = 42 M.L.W. 321 = 58 Mad. 841 = 160 Ind. Cas. 768.

——S 114, Illus. (*c*)—Presumption.

Any presumption as to quantum of consideration as distinguished from the mere existence of consideration has to be drawn, not by virtue of S. 118, Negotiable Instruments Act, or even under S. 114, Evidence Act, but only from the recitals, if any, that the instrument may contain. A.I.R. 1935 Mad. 769 = 1935

M.W.N. 528 (2) = 42 M.L.W. 321 = 58 Mad. 841 = 160 Ind. Cas. 768.

——S. 114, Illus. (*c*)—Presumption—Difference between S. 114, Evidence Act, and S. 118, Negotiable Instruments Act.

The difference between S. 114, Evidence Act, and S. 118, Negotiable Instruments Act, is that under the first the Court has a discretion to make the presumption or not, whereas under the second, Court is bound to start with the presumption ; but once the presumption is made, there is no difference between the two cases in the manner of displacing the presumption or disproving the "presumed" fact. A.I.R. 1935 Mad. 769 = 1935 M.W.N. 528 (2) = 42 M.L.W. 321 = 58 Mad. 841 = 160 Ind. Cas. 768.

——S. 114, Illus. (*c*)—Pro-note—Consideration.

Suit on a pro-note—Defendants pleading that they had affixed their signature to a blank paper—Judge framing issue throwing the burden of proof on plaintiff :

Held, Court ought to have made a presumption that the pro-note was made for consideration and erred in throwing the burden of proof on plaintiff. A.I.R. 1932 All. 164 = 54 All. 375 = 135 Ind. Cas. 241.

——S. 114, Illus. (*c*)—Consideration.

When a registered document contains a recital that consideration has passed, it is evidence, against the person executing, of passing of consideration unless rebutted. 104 Ind. Cas. 518 = 39 M.L.T. 198 = A.I.R. 1927 Mad. 1107.

——S. 114, Illus. (*c*)—Consideration—Presumption—Endorsement.

An endorsement of satisfaction of a mortgage-deed need not necessarily import receipt of consideration, since the English method of procedure by deed, on the principle that a deed imported consideration, has no application in India. 20 Bom. L.R. 77 = 44 Ind. Cas. 926.

——S. 114, Illus. (*c*)—Presumption of consideration.

When both parties adduce evidence on the question of consideration for the pro-note the presumption of consideration does not arise. 8 M.L.T. 463 = 9 Ind. Cas. 79.

ILLUSTRATION (*d*).

——S. 114, Illus. (*d*)—Continuance of possession.

When evidence of acts of ownership cannot reasonably be expected, it can be presumed that the owner's possession, once proved, was continuous. 7 S.L.R. 169 = 24 Ind. Cas. 813.

——S. 114, Illus. (*d*)—Continuation of relationship of Landlord and tenant.

In a suit for arrears of rent, a decree for rent obtained by the landlord in a prior suit against the same defendants is not merely an item of evidence but is conclusive as to the relationship of landlord and tenant at the time to which the previous suit referred., S. 114, Illus. (*d*) does not compel but certainly permits the Court to make a presumption as to the continuance of the state of things. 43 Cal. 170 = 20 C.W.N. 48 = 29 Ind. Cas. 694.

——S. 114, Illus. (*d*)—Court of fact cannot be compelled to raise presumption in favour of any party.

The presumption mentioned in S. 114 (*d*), is a permissive presumption. A Court of fact cannot be compelled to raise the presumption mentioned in that section in favour of either party. A.I.R. 1941 Pat. 536 = 7 B.R: 767 = 194 Ind. Cas. 428.

——S. 114, Illus. (*d*)—Insanity—Presumption of.

It by no means follows that because the man is of unsound mind one year after the incidence he was also insane at the time of the offence nearly a year previously. A.I.R. 1944 Pat. 373 = 23 Pat. 278 = 11 B.R. 356 = 46 Cr. L.J. 546 = 219 Ind. Cas. 255.

——S. 114, Illus. (*d*)—Lunacy—Continuance.

Where a person has been found to be a lunatic under the Lunacy Act the presumption is that he continues to be of unsound mind until the contrary is shown. 3 L.W. 290 = 19 M.L.T. 243 = 33 Ind. Cas. 578.

——S. 114, Illus. (*d*)—Presumption—Presumption cannot be backward.

The rule of evidence is in favour of presuming the continuity of things shown to exist at a prior date. There is no rule of evidence by which one can presume backwards. A.I.R. 1934 Cal. 707 = 38 C.W.N. 763 = 153 Ind. Cas. 170.

——S. 114, Illus. (*d*)—Profligacy.

The proof of the general profligacy of a person raises a presumption under S. 114 of the Evidence Act that it continued during his life time. 9 S.L.R. 196 = 34 Ind. Cas. 504.

——S. 114, Illus. (*d*)—Use of flat as brothel—Continuance.

Flat not used as brothel by accused until inmate *S* brought there—Flat, however, used for employing other girls as prostitutes and *S* encouraged and then compelled to follow their example—Though no presumption under S. 373, Expl. (1), I.P.C. yet presumption arises under Evidence Act, Ss. 14, 15 and 114. A.I.R. 1943 Bom. 150 = 45 Bom. L.R. 281 = 44 Cr. L.J. 534 = 206 Ind. Cas. 592 (F.B.).

——S. 114, Illus. (*d*)—Scope—State of things found to exist at particular time—Presumption backwards, whether exists.

There is a presumption that a state of things found to exist at a particular point of time continues, but there is no rule of evidence by which one can presume backwards. A.I.R. 1935 Cal. 702 = 62 C.L.J. 49 = 40 C.W.N. 115 = 63 Cal. 155 = 159 Ind. Cas. 1101.

——S. 114, Illus. (*d*)—Scope.

Things continuous in nature may be presumed to have continued until contrary is shown. 66 Ind. Cas. 287 = 34 C.L.J. 205 = A.I.R. 1921 Cal. 661.

——S. 114, Illus. (*d*)—Scope.

A given fact whose existence at a particular time is once established is presumed to continue to exist as long as such fact usually exists. 71 Ind. Cas. 849 = 36 C.L.J. 336 = A.I.R. 1923 Cal. 247.

ILLUSTRATION (*e*).

(*a*) Acquisition of land.
(*b*) Acts of Court.
(*c*) Attachment.
(*d*) Authority of agent.
(*e*) Batwara proceedings.
(*f*) Certified copy.
(*g*) Collections' books.
(*h*) Confession.
(*i*) Documents filed in Court.
(*j*) Execution proceedings
(*k*) Foreclosure
(*l*) Guardian *ad litem*.
(*m*) Identification parade.
(*n*) Judicial Acts.
(*o*) Legislature—Presumption that it acts *intra vires*.

(*p*) Oath.
(*q*) Official Acts.
(*r*) Orders.
(*s*) Partition proceedings.
(*t*) Port mark
(*u*) Presumption—Nature of.
(*v*) Procedural Law.
(*w*) Receipt of revenue inspector.
(*x*) Registration.
(*y*) Revenue records.
(*z*) Revenue sale.
(*aa*) Rule in England.
(*bb*) Sanction.
(*cc*) Scope.
(*dd*) Search.
(*ee*) Service of notice.
(*ff*) Service of process.
(*gg*) Thak and survey map.
(*hh*) Wajib-ul-arz.
(*ii*) Warrant of attachment. *See* EVIDENCE ACT, S. 114, Illus. (*c*)—ATTACHMENT.
(*jj*) Warrants.

(*a*) Acquisition of land.

——S. 114, Illus. (*e*)—Acquisition of land.

Failure of a District Board to prove the actual acquisition and possession and the actual delivery of certain land to it by the Government—Intention of the Government to acquire the land and its taking some necessary steps in pursuance thereof proved—It was held to be not wrong to presume that necessary steps for the acquisition of the land and for the transfer of the same to the public body were taken. 113 Ind. Cas. 24 = 32 C.W.N. 396 = A.I.R. 1928 Cal. 485.

(*b*) Acts of Court.

——S. 114, Illus. (e)—Acts of Court.

There is a presumption that the acts of a Court have been regularly carried out unless the contrary is shown. 96 Ind. Cas. 591 = A.I.R. 1926 All. 691.

(*c*) Attachment.

——S. 114, Illus. (*c*)—Attachment—Presumption.

When a bailiff in the witness-box deposes that the attachment was carried out according to law, his statement *prima facie* covers all the formalities required by O. 21, R. 54, Civil P.C., and it is for the party who alleges that a particular formality was not complied with, to establish it either by putting questions to bailiff or by leading evidence on the point. 40 P.L.R. 142.

[On appeal from A.I.R. 1938 Lah. 16 = 39 P.L.R. 870 = 175 Ind. Cas. 400.]

——S. 114, Illus. (*e*)—Attachment—Attachment proved—Presumption is that all formalities were duly observed—Onus lies on the party seeking to rebut this to prove that the proceedings of the attaching Court are vitiated in any manner. 37 P.L.R. 53.

——S. 114, Illus. (*e*)—Attachment—Presumption.

Where there is no reference in the order under O. 38, R. 5 to O. 21, R. 54 or to publication of the order there can be no presumption under S. 114, that attachment was properly made. A.I.R. 1937 Cal. 375 = 65 C.L.J. 329=173 Ind. Cas. 711.

——S. 114, Illus. (*e*)—Attachment—Presumption regarding formalities.

In accordance with S. 114, when it is proved that an attachment has been made, in the absence of any evidence to the contrary, it ought to be presumed that all necessary formalities were complied with. A.I.R. 1935 All. 436 = 1935 A.L.J. 390 = 1935 A.W.R. 512 = 36 Cr. L.J. 1094 (2) = 157 Ind. Cas. 178 (2).

——S. 114, Illus. (*e*)—Attachment.

Where there is no positive evidence that the attachment which was ordered was not effected in accordance with law and no such contention was raised in the lower Court, the Court should give effect to the presumption regarding the regularity of official acts and proceed on the view that there was a valid attachment duly effected. A.I.R. 1931 Cal. 763 = 58 Cal. 598 = 134 Ind. Cas. 561.

——S. 114, Illus. (*e*)—Attachment—Notice of—Presumption.

No presumption arises that attachment of a decree took place at the earliest period of the day since it is not a judicial act. 33 Mad. 429 = 7 M.L.T. 143 = 20 M.L.J. 330 = 5 Ind. Cas. 92.

——S. 114, Illus. (*e*)—Attachment—Warrant of.

It is in the ordinary course of official business in the Courts of the Central Provinces that a copy of every warrant of attachment is issued for posting in the Office of the Collector, and it is fairly safe to assume that this was done in the present case according to the maxim that all official acts are presumed to have been duly and correctly performed. 69 Ind. Cas. 563 = A.I.R. 1923 Nag. 78.

——S. 114, Illus. (*e*)—Attachment—Warrant—Presumption of regularity.

The burden of proving that a warrant of attachment signed by the Sheristadar but not by the presiding Judge of the Court, is illegal on the ground of want of authority in the Sheristadar is on the person alleging it. The Court will presume that all acts done in connection with an official document were properly performed. 3 Pat. L.J. 636 = 20 Cr. L.J. 139 = 49 Ind. Cas. 171.

(*d*) Authority of agent.

——S. 114, Illus. (*e*)—Authority of agent.

Where a petition signed by an agent on behalf of a party comes out of a public office the presumption is that the officer was satisfied about the agent's authority to sign on the party's behalf. 25 Ind. Cas. 852 (Cal.).

(*e*) Batwara proceedings.

——S. 114, Illus. (*e*)—Batwara proceedings.

Presumption of regularity applies only to form and procedure followed and not to representation made to the official concerned. 63 Ind. Cas. 226 = 1921 P.H.C.C. 343 = A.I.R. 1921 Pat. 275.

(*f*) Certified copy.

——S. 114, Illus. (*e*)—Certified copy—Stamp—Compromise petition—Creating mortgage filed in Court—Original lost—Certified copy.

Where the original of a compromise petition creating a mortgage and filed in Court is missing and a certified copy of the petition is filed the presumption is that the compromise petition was duly stamped. 38 All. 494 = 5 L.W. 153 = 18 Bom. L.R. 904 = 14 A.L.J. 1099 = 20 M.L.T. 44 = 24 C.L.J. 504 = (1916) 2 M.W.N. 548 = 21 C.W.N. 265 = 1 Pat. I.W. 90 = 43 I.A. 264 = 39 Ind. Cas. 11 (P.C.).

——S. 114, Illus. (*e*)—Certified copy—Presumption of genuineness.

Under S. 114, a certified copy of a will supplied under the ordinary copyist rules may be presumed to be a correct copy of the original will which was in Court at the time when the copy was made. 19 M.L.T. 1 = 32 Ind. Cas. 50.

(g) Collectors' books.

——S. 114, Illus. (e)—Collectors' books.

Entries in the books of the collectorate may be presumed to be correct and such books must be examined to arrive at a finding as to whether there were arrears or not. A.I.R. 1932 Cal. 153 = 35 C.W.N. 912 = 59 Cal. 186 = 136 Ind. Cas. 129.

(h) Confession.

——S. 114, Illus. (e)—Confession—Presumption of voluntary nature.

In case of confessions duly certified it may be fairly assumed that the Magistrate did his best to assure himself that the statements were voluntary, and that if he had left any suspicion he would not have placed them upon record. A.I.R. 1931 Mad. 42 = 1930 M.W.N. 350 = 59 M.L.J. 114 = 32 Cr. L.J. 262 = 32 M.L.W. 285 = 129 Ind. Cas. 229.

(i) Document filed in Court.

——Ss. 114, Illus. (e), 58—Documents filed in Court, whether can be presumed to be documents referred to n order of sanction by Governor-General.

The Court should not presume that the documents referred to in the order of sanction by the Governor-General were documents in question and that they were only forwarded by the Governor-General and reached the complainant through the usual channel, unless there be any indication on the face of the questioned documents to show that they were the annexures to the order of sanction. In the absence of any such indication it would be a violent presumption to raise that these were the documents mentioned in the order sanctioning prosecution. A.I.R. 1935 Nag. 90 = 36 Cr. L.J. 744 = 155 Ind. Cas. 450.

(j) Execution proceedings.

——S. 114, Illus. (e)—Execution proceedings.

The presumption is that all proceedings taken by the Court in execution are in proper form and if anybody wants to challenge, he must advance and prove the facts on which he wishes to rely. 99 Ind. Cas. 33 = 24 M.L.W. 484 = 28 Cr. L.J. 2.

——S. 114, Illus. (e)—Execution proceedings—*Ex parte* entries of service in reference to execution proceedings.

Ex parte entries in the order sheet of a Court neither prove their correctness nor raise a presumption of their being false. A party therefore who contends that they do not correctly state events must start his case. But the position is different in the case of one who is not a party to the execution proceedings and who is affected by such entry. 21 C.W.N. 945 = 26 C.L.J. 109 = 37 Ind. Cas. 66.

(k) Foreclosure.

——S. 114, Illus. (e)—Foreclosure—No presumption that the notices were served.

In a suit to redeem a mortgage the mortgagee alleged that the mortgage was a *Bai-Bilwafa* and that under foreclosure proceedings the mortgage had turned into an out and out sale. *Held*, that as the records of foreclosure proceedings were burnt, it cannot be presumed that those were regular. 121 P.W.R. 1915 = 57 P.L.R. 1916 = 30 Ind. Cas. 817.

(l) Guardian *ad litem*.

——S. 114, Illus. (e)—Guardian *ad litem*.

The presumption that judicial acts have been regularly performed applies to the Acts of the Court alone. Where, therefore, a minor defendant was represented by a guardian *ad litem* it might be presumed that the necessary notices were issued and that a formal order appointing the guardian *ad litem* was drawn up, but not that the person who was named as the guardian *ad litem* was a fit person to be appointed guardian. 87 Ind. Cas. 238 = A.I.R. 1925 Oudh 633.

——S. 114, Illus. (e)—Guardian *ad litem*—Appointment of by Court.

There is a presumption of regularity and validity of an appointment of a guardian *ad litem* for a minor by the Court. 32 All. 287 = 37 I.A. 77 = 11 C.L.J. 557 = 12 Bom. L.R. 439 = 14 C.W.N. 744 = 8 M.L.T. 57 = 20 M.L.J. 591 = 13 O.C. 123 = 6 Ind. Cas. 788 (P.C.).

(m) Identification parade.

——S. 114, Illus. (e)—Identification parade.

It is to be presumed no doubt under S. 114 that every official Act is properly performed but this presumption is hardly sufficient to satisfy a Court that such precautions have been taken as to render an identification truly valuable, *e.g.*, mixing the accused in a large number of men dressed all alike. 67 Ind. Cas. 721 = 4 L.L.J. 448 = 23 Cr. L.J. 449 = A.I.R. 1922 Lah. 31.

(n) Judicial Acts.

——S. 114, Illus. (e)—Judicial acts.

The Privy Council will always assume that High Court has followed the proper practice unless something appears which proves the contrary. A.I.R. 1945 P.C. 151 = 1945 M.W.N. 560 (1) = 58 M.L.W. 481 = (1945) 2 M.L.J. 362 = 47 Cr. L.J. 1 = 50 C.W.N. 1 = 27 P.L.T. 5 = 221 Ind. Cas. 56 (P.C.).

——S. 114, Illus. (e)—Judicial acts—Preliminary decree passed by Court—Presumption.

Where it is admitted that a preliminary decree for partition was passed by the Civil Court, the presumption is that it was passed in accordance with the procedure laid down in O. 28, R. 18, Civil P.C. A.I.R. 1945 Oudh 1 = 1944 O.W.N. 416 = 1944 A.W.R. (C.C.) 265.

——S. 114, Illus. (e)—Judicial acts.

Section 114, is not mandatory, but surely enables the Court to make a certain presumption in certain circumstances. Hence if O. 11, Civil P.C., is not complied with, the Court is not bound to make a presumption under S. 114, Evidence Act. A.I.R. 1943 Pat. 69 = 21 Pat. 735 = 8 Cut. L.T. 105 = 9 B.R. 220 = 205 Ind. Cas. 294.

——S. 114, Illus. (e)—Judicial acts—Judgment.

Presumption is that judicial acts have been regularly performed. Where, therefore, a person contends that the judgment was irregular because no evidence was given, it is for him to rebut the presumption. A.I.R. 1943 Cal. 42 = 75 C.L.J. 271 = 205 Ind. Cas. 85.

——S. 114, Illus. (e)—Judicial acts—Presumption regarding knowledge of fact by judicial officer.

There can be no presumption as regards knowledge of a fact which a judicial officer would not have unless that fact was intimated to him. A.I.R. 1940 All. 202 = 1940 A.W.R. 48 = 1940 A.L.J. 85 = 188 Ind. Cas. 281.

——S. 114, Illus. (e)—Judicial acts.

Where the Magistrate applies his mind to the evidence and in finding that the accused had caused mischief to the complainant he must be taken to have been

satisfied that the ingredients of the offence defined in S. 425, Penal Code, were present. A.I.R. 1941 Cal. 185 = 72 C.L.J. 104 = 42 Cr. L.J. 490 = I.L.R. (1941) 1 Cal. 67 = 44 C.W.N. 1114 = 194 Ind. Cas. 38.

——S. 114, Illus. (*e*)—Judicial acts.

Magistrate, on proper information sufficient to lead him to believe that a certain room was used as a common gaming house issuing a search warrant under S. 5, Madras Gaming Act, 1930—Presumption raised under S. 114, Illus. (*e*), Evidence Act, that judicial and official acts have been regularly performed should be applied. A.I.R. 1938 Mad. 705 = 47 M.L.W. 643 = 1938 M.W.N. 421 = (1938) 2 M.L.J. 266 = 39 Cr. L.J. 1003 = 178 Ind. Cas. 123.

——S. 114, Illus. (*e*)—Judicial acts.

There is a strong presumption in favour of the judicial proceedings being carried out according to law. This presumption can be displaced only by exceptionally strong evidence. 171 Ind. Cas. 296 = 1937 O.W.N. 1096 = A.I.R. 1937 Oudh 517.

——S. 114, Illus. (*e*) Judicial acts—Proceedings of a Court.

The normal presumption is that the proceedings of a Court are conducted regularly in accordance with law. A.I.R. 1934 Pesh. 3 = 147 Ind. Cas. 837.

——S. 114, Illus. (*e*)—Judicial acts—Presumption that decree is in accordance with judgment.

Where the Judge signs a decree the presumption is that he satisfied himself that it had been prepared in accordance with the judgment. A.I.R. 1933 Oudh 529 = 10 O.W.N. 1087 = 9 Luck. 162 = 147 Ind. Cas. 961.

——S. 114, Illus. (*e*)—Judicial acts—Legality and correctness of Court's proceedings.

A presumption arises under S. 114, as to legality and correctness of a Court's proceedings. A.I.R. 1933 Oudh 466 = 10 O.W.N. 884 = 9 Luck. 90 = 146 Ind. Cas. 310.

——S. 114, Illus. (*e*)—Judicial acts—Discretion—Exercise of—Presumption.

Where a Judge purports to exercise the discretion vested in him by law, the presumption is that the exercise of the discretion must have proceeded on judicious lines unless the contrary is made to appear from the record. A.I.R. 1933 Sind 331 (1) = 27 S.L.R. 183 = 150 Ind. Cas. 258.

——S. 114, Illus. (*e*)—Judicial acts—Non-compoundable case.

Where there is no evidence that a non-compoundable offence was compounded, it is to be presumed that the criminal Court acted according to law, and the presumption is that the criminal case was withdrawn and not compounded. 116 Ind. Cas. 749 = A.I.R. 1929 All. 456.

——S. 114, Illus. (*e*)—Judicial acts—Judgment.

Where a point is definitely raised in the grounds of appeal and the Court makes no mention thereof in its judgment, it must still be presumed to have performed the judicial act of writing a judgment regularly and properly. A.I.R. 1928 Lah. 94.

——S. 114, Illus. (*e*)—Judicial acts.

Where a decree was executed as a rent-decree, it must, in the absence of evidence to the contrary, be presumed that the plaint was drawn up in such manner as to warrant a rent-decree and all was properly done. 101 Ind. Cas. 382 = A.I.R. 1927 Pat. 414.

——S. 114, Illus. (*e*)—Judicial acts.

Where sums are paid before the presiding officer of the Court at the time when a receipt was given for them, the presumption under S. 114 of the Indian Evidence Act is that the ordinary course of business was followed in the case in question. A.I.R. 1923 Lah. 566.

——S. 114, Illus. (*e*)—Judicial acts.

If it be the duty of a Court to do a particular thing it must be assumed that the Judges of that Court did their duty. 68 Ind. Cas. 740 = A.I.R. 1923 Lah. 124.

——S. 114, Illus. (*e*)—Judicial acts.

All judicial proceedings are to be presumed to have been duly performed until the contrary is proved. 66 Ind. Cas. 620 = 8 O.L.J. 343 = A.I.R. 1921 Oudh 259.

——S. 114, Illus. (*e*)—Judicial acts.

There is a presumption that the proceedings of the Court were regular until the contrary is shown. 66 Ind. Cas. 642 = 8 O.L.J. 358 = A.I.R. 1921 Oudh 176.

——S. 114, Illus. (*e*)—Judicial acts—Presumption—Rebuttal of.

The presumption under S. 114, Evidence Act, as to the legality and correctness of a Court's proceedings can only be overturned by exceptionally strong evidence. 5 O.L.J. 179 = 46 Ind. Cas. 52.

——S. 114, Illus. (*e*)—Judicial acts—Presumption.

An auction sale of several properties situated in several villages was sought to be set aside on the ground that the sale proclamations were not duly served in all the villages. The record of the service of the proclamations was destroyed by fire which broke out in the Court house. *Held*, that the burden of disproving the *prima facie* presumption that official acts were rightly carried out rests with the persons challenging the sale. But if it is proved that proclamations alleged to have been served in specific modes in some of the villages could never have been so served, that does not leave the other cases unaffected but the whole story of the service of the proclamations completely breaks down and becomes a series of concocted falsehoods prepared for deliberately misleading the Court.

The party on whose behalf this evidence had been prepared should be associated with the scheme of deceit which it was designed to carry out and such association should be regarded as an important element in determining whether his defence was honest and just. 21 C.W.N. 897 = (1917) M.W.N. 518 = 6 L.W. 437 = 42 Ind. Cas. 527 (P.C.).

——S. 114, Illus. (*e*)—Judicial acts—Presumption of regularity.

The Collector is a revenue officer though he may at times have to perform judicial functions. His acts like those of all other executive officers are presumed to be regular. If he has certified in the order sheet that he has duly served in certain notices to annul encumbrances, a Judge is not entitled without evidence to conclude otherwise. 27 Ind. Cas. 447 (Cal.).

——S. 114, Illus. (*e*)—Judicial acts—Acts following a Judicial Act.

A presumption under S. 114 of the Act can be raised even in regard to proceedings that follow a Judicial Act.

The filing of a process fee for the issue of an order of attachment of immovable property is not sufficient proof of such service. 1 O.L.J. 549 = 26 Ind. Cas. 204.

——S. 114, Illus. (*e*)—Judicial acts—Presumption.

Although there is no presumption of law that a particular act to be performed has been done, yet, judicial acts must be presumed to have been regularly performed. 17 C.W.N. 565 = 16 C.L.J. 404 = 17 Ind. Cas. 936.

——S. 114, Illus. (*e*)—Judicial acts—Presumption as to provision under which a court passes an order.

Where it does not appear under what provision a court passed an order and if some provision in law can be found under which the court has acted, the presumption should be made that the court acted under that provision. 1903 A.W.N. 4 = 25 A. 183.

——S. 114, Illus. (*e*)—Judicial acts—Legality of orders of Court—Statutory law.

An action of the court should be presumed to have been done in pursuance of the statutory law whenever it is possible to do so, and it does not matter if the court did not act or purport to act under it or that there was an error in procedure in so doing. 27 B. 162 = 4 Bom. L.R. 980.

——S. 114, Illus. (*e*)—Judicial acts—Performance of duty imposed on Court—Presumption. *See* 29 C. 580.

(*o*) Legislature—Presumption that it acts intra vires.

——S. 114, Illus. (*e*)—Legislature—Presumption that it acts intra vires.

There is a presumption that a Legislature acts *intra vires*. A.I.R. 1939 Cal. 736 = 43 C.W.N. 1192 = 185 Ind. Cas. 587.

(*p*) Oath.

——S. 114, Illus. (*e*)—Oath—Presumption of administering.

The ordinary presumption is that an oath was duly and properly administered. 35 All. 575 = 11 A.L.J. 933 = 15 Cr.L.J. 19 = 22 Ind. Cas. 163.

(*q*) Official Acts.

——S. 114, Illus. (*e*)—Official Acts—Presumption as to—When to be drawn—Offence of contravention of valid order—Validity of order—If can be presumed.

S. 114, Evidence Act is not mandatory but leaves it to the Court in any particular case to raise a presumption as to the validity of official acts. The Court cannot raise a presumption as to a very essential ingredient constituting an offence in a case where the liberty of the subject is either restricted or taken away. Where the offence consists in the contravention of a valid order, the validity of the order contravened has itself to be established by the prosecution and the prosecution cannot ask the Court to presume that the order is valid. 52 Bom. L.R. 223 = 4 A.I.Cr.D. 146 = A.I.R. 1950 Bom. 330.

——S. 114, Illus. (*e*)—Official Act.

When Government officers exercise a discretion vested in them, they do so in their official capacity, and there is a presumption under S. 114, Evidence Act, that official acts are regularly performed. 50 Bom. L.R. 728 = A.I.R. 1949 Bom. 109.

——S. 114, Illus. (*e*)—Official acts—Presumption.

The presumption under Illus. (*e*) to S. 114, Evidence Act, is that of the regularity of the official acts whether judicial or executive, and not that of the acts themselves being done. Where a notification is issued under the power given by law, there is a presumption that it was regularly published and promulgated in the manner it was required to be done. But there is no presumption that it was issued according to the terms of the section which empowers it. Where the Central Government issues a notification under S. 14 of the Hoarding and Profiteering Prevention Ordinance, empowering the Controller-General of Civil Supplies to sanction a prosecution for an offence under that Ordinance, it cannot be presumed that the Controller-General is given a rank not below the rank of a District Magistrate as required by S. 14. The fact that the officer is of a rank not below that of a District Magistrate must be proved by the prosecution, and it cannot be presumed by recourse to S. 114, Illus. (*e*) Evidence Act. I.L.R. (1946) Bom. 762 = 226 Ind. Cas. 324 = 47 Cr.L.J. 900 = 48 Bom. L.R. 379 = A.I.R. 1946 Bom. 492.

——S. 114, Illus. (*e*)—Official acts—Tauzi ledgers—Kist dates mentioned in—Presumption of correctness.

Tauzi ledgers being official documents, the Courts repose great confidence on their fidelity and accuracy as being official papers kept in due course of business, properly and regularly. There is therefore a presumption that the *kist* dates mentioned in them are the correct dates, and the onus is on a party disputing the same to prove the contrary. 226 Ind. Cas. 393 = A.I.R. 1947 Cal. 283.

——S. 114, Illus. (*e*)—Official acts.

S. 114, Evidence Act, permits the presumption of the regular performance of official acts apart from other proof of the performance itself. S. 114, however, is of course, permissive. A.I.R. 1946 Sind 67 = I.L.R. (1945) Kar. 439.

——S. 114, Illus. (*e*)—Official acts—Certificates to be filed in office—Proof of.

When a statute directs a document to be filed in an office, the direction involves no formal or technical procedure. All that is required is that the document should be preserved in the office in such condition that it can be produced when required. Where, therefore, the certificate in question is stated on the face of it, to have been filed, and particulars of it were registered under R. 79 of the Rules framed under the Bengal Public Demands Recovery Act and it has been produced by the office, it must be held to be sufficiently proved that the Certificate Officer caused the certificate to be filed in his office and it is not necessary to have recourse to the presumption arising under S. 114, Illus. (*e*) of the Evidence Act.

Where the name of the certificate-holder as the Secretary of State for India is qualified by the words "On behalf of Income-tax Officer," the addition of the words "on behalf of the Income-tax Officer" does not in any way alter or qualify the name of the certificate-holder which is given as the Secretary of State. The words do no more than indicate the nature of the demand for which the certificate is held, information more appropriate to be stated in col. 5, than in col. 2, but the inclusion of the words has no effect whatever on the validity of the certificate. A.I.R. 1945 P.C. 62 = 72 I.A. 114 = 49 C.W.N. 334 = 26 P.L.T. 149 = 80 C.L.J. 13 = 11 B.R. 456 = 219 Ind. Cas. 417 = I.L.R. (1945) 2 Cal. 1 (P.C.).

——S. 114, Illus. (*e*)—Official acts—Carbon copies of a copy produced—Genuineness, if can be presumed.

The mere fact that on a carbon copy which is a copy of a copy of the sanction, somebody has written the words "true copy" and put down his signature, would not make that paper admissible; nor would it be sufficient to prove the sanction of the Provincial Government. Similarly, if only one copy of the sanction was sent to the District Magistrate and he could not file that copy in all the four cases for the prosecution of which the sanction had been accorded, the Courts cannot overlook the provisions of the Evidence Act and receive a copy of a copy as admissible in evidence and raise a presumption as to its genuineness. A.I.R. 1945 All. 90 = 1945 A.L.J. 151 = 46 Cr.L.J. 472 = 1945 A.W.R. (H.C.) 160 = I.L.R. (1945) All. 540 = 219 Ind. Cas. 87.

——S. 114, Illus. (*e*)—Official acts—Notification under Defence of India Rules.

The meaning of S. 114, Illus. (*e*) is that, if an official act is proved to have been done, it will be presumed to have been regularly done and that it does not raise any presumption that an act was done of which there is no evidence and the proof of which is essential to the case.

The burden of proving the manner which, in the opinion of the authority issuing the notification under Defence of India Rules, was best adopted to inform the persons concerned was on the prosecution and if that burden is not discharged, the prosecution cannot take advantage of S. 114, Evidence Act. A.I.R. 1945 Bom. 368 = 47 Bom. L.R. 431 = 47 Cr.L.J. 123 = I.L.R. (1945) Bom. 681 = 221 Ind. Cas. 239.

——S. 114, Illus. (*e*)—Official acts—Challenging of the order of Crown—Affidavit, whether necessary—Applicability of general presumption in S. 114 (e).

It cannot be laid down as a general principle that no affidavit is necessary where the *bona fides* of the order of the Crown are challenged. There might be cases where the affidavits of the petitioner disclosed specific circumstances casting a real doubt on the *bona fides* of the orders, In ordinary circumstances, the Crown is entitled to rely upon the production of orders themselves. Ordinarily, the general presumption, *omniaocta rite esse praesumuntu* which is embodied in S. 114 (*e*), Evidence Act, is applicable. Governors and Chief Secretaries are entitled to expect that when they say a thing plainly, they shall be taken to mean what they say and to have said it honestly. A.I.R. 1945 Pat 44 = 23 Pat. 968 (F.B.).

——S. 114, Illus. (*e*)—Official acts.

A presumption under S. 114 (*e*), that official acts have been regularly performed can attach to orders under Defence of India Rules, where the orders are regular on the face of them and unobjectionable in any way. But whether a presumption should or should not be made, must depend upon the particular circumstances of each case. A.I.R. 1944 Lah. 33 = 45 Cr. L.J. 580 = I.L.R. (1944) Lah. 245 = 212 Ind. Cas. 321 (F.B.).

——S. 114, Illus. (*e*)—Official acts.

Any order passed by the District Magistrate under R. 81, Defence of India Rules cannot bind the person concerned unless it is published in accordance with R. 119 of the same rules. It is incumbent on the prosecution to prove that this statutory obligation was duly discharged and the prosecution cannot merely rely on presumption under S. 114, Evidence Act, that the making of the order and the direction to publish notice of it were official acts. A.I.R. 1944 Nag. 40 = 1943 N.L.J. 605 = 45 Cr.L.J. 250 = 1944 A.W.R. 7 Sup. = I.L.R. (1944) Nag. 150 = 211 Ind. Cas. 29.

——S. 114, Illus. (*e*)—Official acts.

Where the Advocate-General has given sanction under S. 107, Insurance Act to the Provincial Government and the complaint is presented by Public Prosecutor, it is not necessary that Public Prosecutor should produce any letter of authority to him from the Secretary to the Court to whom the Advocate-General wrote conveying sanction. Under S. 114, Evidence Act, it may be presumed that official acts have been regularly performed unless there is reason to think otherwise. A.I.R. 1944 Oudh 147 = 1943 O.W.N. 339 = 45 Cr.L.J. 333 = 19 Luck. 385 = 211 Ind. Cas. 220.

——S. 114, Illus. (*e*)—Official acts.

Where it is not disputed that the Assistant Collector was appointed as the sale officer by the Collector and that the sale-deeds were executed with his permission, a presumption can be made under S. 114 (*e*), that the Collector had delegated to the sale officer the power to grant permission to private sales. A.I.R. 1944 Oudh 60 = 19 Luck. 463 = 1943 O.W.N. 488 = 1943 A.W.R. (C.C.) 180 = 214 Ind. Cas. 39.

——S. 114, Illus. (*e*)—Official acts.

Where mode has been prescribed under the Governor-General's Order No. 179 of 1836 as to how cantonment sites should be dealt with, it must be presumed that particular site was granted under the provisions of that Order. A.I.R. 1944 Pesh. 34 = 46 P.L.R. 266 = 1944 Pesh. L.J. 34 = 219 Ind. Cas. 81.

——S. 114, Illus. (*e*)—Official acts.

Before any presumption under S. 114, Illus. (*e*), can arise, it must be shown that the orders are, on the face of them, regular and conform to the provisions of the rule under which they purport to have been made. A.I.R. 1943 F.C. 75 = 1943 M.W.N. 612 = (1943) 2 M.L.J. 468 = 24 P.L.T. 332 = 48 C.W.N. F.C. 1 = 45 Cr.L.J. 341 = 10 B.R. 394 = (1943) F.L.J. N.C. 151 = I.L.R. (1943) Kar. (F.C.) 103 (Sup.) = (1944) 6 F.C.R. 1 = 211 Ind. Cas. 241 (F.C.).

——S. 114, Illus. (*e*)—Official acts—No order produced—Presumption is that order was not passed.

The courts cannot presume that powers vested in one person on August 21, had been transferred to another person by September 15, when no order is produced. The only natural presumption from the failure to prove the making of an order is that no such order was passed. A.I.R. 1943 Bom. 314 = 45 Bom. L.R. 572 = 45 Cr.L.J. 361 = 211 Ind. Cas. 273.

——S. 114, Illus. (*e*)—Official acts.

Individual notice under S. 81, Bombay Municipal Boroughs Act, proved—Presumption as to official or legal acts under S. 114, Evidence Act should be raised that notice under S. 80 was properly given. A.I.R. 1940 Sind 42 = 41 Cr.L.J. 401 (2) = 187 Ind. Cas. 127.

——S. 114, Illus. (*e*)—Official acts.

Publication of notification under S. 6, Bengal Embankment Act—Crown can rely on presumption under S. 114, Illus. (*e*) and (*f*), Evidence Act. A.I.R. 1937 Pat. 14 = 38 Cr.L.J. 266 = 3 B.R. 214 = 166 Ind. Cas. 699.

——S. 114, Illus. (*e*)—Official acts—Notification under S. 6 (2), Bengal Criminal Law Amendment Act, 1930—Opinion of the Local Government recited therein—Court is entitled to presume that judicial and official acts have been performed. 164 Ind. Cas. 285 = 62 C. 1041 = 40 C.W.N. 255=37 Cr.L.J. 922.

——S. 114, Illus. (*e*)—Official acts.

Presumption against accused that ordinary official procedure has not been carried out is not proper. 39 P.L.R. 629.

——S. 114, Illus. (*e*)—Official acts.

S. 114, includes, but is not limited to the presumption of "regularity." A.I.R. 1936 Cal. 1 = 160 Ind. Cas. 332.

——S. 114, Illus. (*e*)—Official acts.

The presumption in favour of official acts being properly done, is destroyed when it has been established that the Investigation Officers have not acted in a straightforward manner and have clearly made false statements in Court. A.I.R. 1936 Lah. 409 = 37 Cr.L.J. 732 = 38 P.L.R. 1128 = 162 Ind. Cas. 969.

——S. 114, Illus. (*e*)—Official acts.

There is no presumption under S. 114, Illus. (*e*) that the order was published as required by S. 222 of the Bengal Municipal Act. A.I.R. 1932 Cal. 833 = 36 C.W.N. 823 = 139 Ind. Cas. 134.

——S. 114, Illus. (*e*)—Official acts.

An action taken by a properly constituted authority should always be held to be legal unless it is demonstrably not so. A.I.R. 1932 Mad. 508 = 1932 M.W.N. 720 = 33 Cr.L.J. 655 = 138 Ind. Cas. 583.

——S. 114, Illus. (*e*)—Official acts.

A report made to the Police Officer relating to the commission of an offence being entry in a public record made by a public servant in the discharge of his duties is admissible under S. 35 even if the person who made it was alive and not called as a witness. Under S. 114, Evidence Act the Court is entitled to presume that such an entry was properly made. A.I.R. 1932 Oudh 137 = 8 O.W.N. 1228 = 135 Ind. Cas. 387.

——S. 114—Official acts.

Ordinarily, it may be presumed that a Government Notification purporting to have been published in a Gazette of a certain date, was, in fact, so published. But where the interval between the issue of a notification and action taken on it is very short, a Court might require stricter proof that all the formalities requiste to the act of notifying, or, in other words, publishing the notification, had actually been carried out. A.I.R. 1931 Bom. 132 = 55 Bom. 356 = 33 Bom. L.R. 82 = 32 Cr.L.J. 572 = 130 Ind. Cas. 577.

——S. 114, Illus. (*e*)—Official acts.

Where a Committing Magistrate writes at the foot of the deposition that the cross-examination is being reserved, he does not mean that it is being reserved by him and the accused has not been given an opportunity for cross-examination. All official acts must be presumed to nave been done properly and it is difficult to suppose that Magistrate who must be presumed to have known the law did not give the accused an opportunity of cross-examination to which he was entitled by S. 208, Cr.P. Code. 120 Ind. Cas. 524 = 1930 Cr.C. 70 = 31 Cr.L.J. 121 = A.I.R. 1930 Sind 54.

——S. 114, Illus. (*e*)—Official acts.

Official acts are to be presumed to be legally performed. Where the jurisdiction of the Assistant Settlement Officer was not questioned in the Trial Court, it was presumed in second appeal, where only the question was raised, that he acted within his jurisdiction in passing the particular order deciding the dispute as to the boundary line. 66 Ind. Cas. 471 = 1922 P.H.C.C. 114 = 3 P.L.T. 617 = A.I.R. 1923 Pat. 96.

——S. 114, Illus. (*e*)—Official acts—Presumption—Rebuttal.

The principle that acts of a Court are presumed to have been regularly done does not apply if an examimination of the record shows that a party has not been properly served. 1 U.P.L.R. (J.C.) 1 = 22 O.C. 124 = 52 Ind. Cas. 162.

——S. 114, Illus. (*e*)—Official acts—Deputy Commissioner acting under Bengal Regulation 17 of 1806.

The action of Deputy Commissioner under Regulation 17 of 1836, is purely ministerial. His acts, therefore are Official Acts and the presumption in S. 114, illus. (*e*) of the Evidence Act applies to them. 6 O.L.J. 3 = 1 U.P.L.R. (J.C.) 20 = 49 Ind. Cas. 402.

——S. 114, Illus. (*e*)—Official acts—Regularity of.

Under S. 114 of the Evidence Act there is a presumption that an Official Act has been regularly performed ; but where an applicant before the Court is attempting to rebut that presumption it is not for the Court itself to give assistance to the other side or to deal with the matter otherwise than impartially. 4 Pat. L.W. 296 = 44 Ind. Cas. 661.

——S. 114, Illus. (*e*)—Official acts—In connection with S. 167 of the Bengal Tenancy Act.

Under S. 114 of the Evidence Act it must be presumed that all acts in connection with S. 167 of the Bengal Tenancy Act are done in accordance with law and are valid. 1 Pat. L.W. 440 = 39 Ind. Cas. 943.

——S. 114, Illus. (*e*)—Official acts—Revenue Sale Law—Commissioner.

The ordinary presumption is that an act done by a Public Officer in his public capacity is rightly done and the person alleging the contrary has to prove the allegation. The presumption was applied to the acts of a Commissioner acting under the Bengal Land Revenue Sale Law. 18 C.L.J. 97 = 21 Ind. Cas. 354.

——S. 114, Illus. (*e*)—Official acts—Presumption of.

Where the record of a resolution by a Municipality is lost and no secondary evidence of it is given under S. 65 the presumption of the regularity of official acts under S. 114 of the Evidence Act could not supply the deficiency in proof. 17 C.W.N. 531 = 14 Cr.L.J. 91 = 18 Ind. Cas. 651.

——S. 114, Illus. (*e*)—Official acts—Presumption of accuracy of statement.

An official statement made in the ordinary course of official business by a public officer must be presumed to be accurate. 22 M.L.J. 393 = 14 Ind. Cas. 1007.

(*r*) Orders.

——S. 114, Illus. (*e*)—Orders—Sheristadar signing for the Collector with his order is valid.

The Collector is not bound to sign every order that is issued to third persons and there is nothing wrong in the Collector delegating his power of signing the order to the Sheristadar and such an official act of the Sheristadar is presumed to have been done properly until the contrary is proved. 107 Ind. Cas. 130 = 39 M.L.T. 628 = 27 M.L.W. 42 = A.I.R. 1928 Mad. 205.

——S. 114, Illus. (*e*)—Orders—Warrant signed by Sheristadar "by order"—Must be presumed to be legal.

Where a *Sheristadar* signed the warrant by "order" it was held that the statement that appeared on the face of the warrant that the *Sheristadar* signed "by order" can be presumed to be true and that in the absence of anything to suggest to the contrary it was held that he was actually the officer appointed by the Court to sign processes as required by R. 24 (2) of O. 21, C. P. C. 73 Ind. Cas. 328 = 37 C.L.J. 331 = 27 C.W.N. 1042 = 24 Cr.L.J. 584 = A.I.R. 1923 Cal. 584.

——S. 114 (*e*)—Orders—Warrant signed by Sheristadar of a court—Presumption he was entitled to sign.

From the mere fact that the warrant for arrest of a Judgment-debtor bore the signature of the *sheristadar*, it cannot be presumed under S. 114, Ill. (*e*), Indian Evidence Act, that the *sheristadar* had been duly appointed to sign warrants. Evidence of the fact of appointment is necessary. Per **Harington, J.**—S. 144, Ill. (*e*), Indian Evidence Act, authorizes the presumption that the particular judicial or official act has been performed regularly, but it does not authorize the presumption, without any evidence that the act has been performed. 6 C.W.N. 845.

——S. 114, Illus. (*e*)—Order in Gazette—Date of election.

Where a notification fixing the election is published in the Gazette, it is proof of the order of Government fixing that election. Under S. 78 and under S. 114, there is a presumption that this act of publication was done regularly, namely, in accordance with the rules. 106 Ind. Cas. 144 = 39 M.L.T. 367 = 26 M.L.W. 569 = A.I.R. 1927 Mad. 980 = 53 M.L.J. 603.

——S. 114, Illus. (*e*)—Orders.

There is a presumption in favour of any order of an official being legal until the contrary is proved. 91 Ind. Cas. 56 = 27 Cr.L.J. 24 = A.I.R. 1926 All. 264.

(*s*) Partition proceedings.

——S. 114, Illus. (*e*)—Partition proceedings.

A presumption should be made of the regularity of the proceedings of an officer conducting a partition. The mere absence of the certificate of local publication of a record of rights is not sufficient to show that there was no publication. 13 C.W.N. 93 = 4 Ind. Cas. 316.

(*t*) Post mark.

——S. 114, Illn. (*e*)—Post mark—Presumption.

A post mark is presumed to be genuine and is evidence that the cover bearing it was stamped on the date the impression bears and that the office mentioned therein was the place where it was affixed. But the date of the letter is not necessarily the date of posting. When the addressee of a letter pledges his oath that a certain cover did not reach him or was never tendered to him, the regularity of official business cannot be treated as conclusive against him. 20 C.L.J. 455 = 19 C.W.N. 489 = 26 Ind. Cas. 962.

(*u*) Presumption—Nature of.

——S. 114, Illus. (*e*)—Presumption—Nature of.

The real meaning of Illus. (*e*), S. 114 is that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done of which there is no evidence and the proof of which is essential to the case raised. A.I.R. 1934 Rang. 207 = 151 Ind. Cas. 337.

——S. 114, Illus. (*e*)—Presumption—Nature of.

S. 114 authorizes the presumption that a particular judicial or official act which has been performed has been performed regularly, but it does not authorize the presumption without any evidence that the act has been performed. 111 Ind. Cas. 797 = 8 Pat. 1 = 9 P.L.T. 523 = A.I.R. 1928 Pat. 600.

——S. 114, Illus. (*e*)—Presumption—Nature of.

The meaning of S. 114 is that if an official act is proved to be done it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of it is essential. 115 Ind. Cas. 196 = 7 Pat. 733 = 9 P.L.T. 484 = A.I.R. 1928 Pat. 459.

——S. 114, Illus. (*e*)—Persumption under, is optional.

The Court is not bound to make presumption under Illus. (*e*) and the counter Illus. (*e*) itself indicates a case in which the Court would not draw it, *e.g.*, where there are some exceptional circumstances surrounding the doing of the act. A.I.R. 1942 Lah. 214 = 44 P.L.R. 300 = 43 Cr.L.J. 791 = 202 Ind. Cas. 15.

——S. 114, Illus. (*e*)—Presumption under—Rebuttable.

The presumption that official acts are duly performed is a rebuttable presumption. A.I.R. 1934 Pat. 83 = 148 Ind. Cas. 918.

(*v*) Procedural Law.

——S. 114, Illus. (*e*)—Procedural law—Mandatory and enabling provisions.

In the case of mandatory provisions of the procedural law, in the absence of any evidence to the contrary, the Court would presume that all rules and legal forms were complied with as a tribunal is presumed not to deviate from the rules and forms laid down for its guidance. But where the provisions are only enabling and not mandatory, such a presumption does not arise. 107 Ind. Cas. 625 = 51 Mad. 128 = 27 M.L.W. 216 = A.I.R. 1928 Mad. 77 = 54 M.L.J. 8 (F.B.).

(*w*) Receipt of revenue inspector.

——Ss. 114, Illus. (*e*) and 35—Receipt by Revenue Inspector reciting that delivery of property was effected in pursuance of Revenue Court's order—Order, if can be presumed to be true.

A receipt given by a Revenue Inspector reciting that delivery of property was effected in pursuance of the Court's order being a report of an officer made in the discharge of his duty, it must be presumed that what he stated therein was true. A.I.R. 1942 Mad. 698 = 1942 M.W.N. 543 = 55 M.L.W. 548 = (1942) 2 M.L.J. 305 = 204 Ind. Cas. 382.

(*x*) Registration.

——S. 114, Illus. (*e*)—Registration—Certificate of Registrar.

Power-of-attorney executed in executant's office and signed next day before Registrar at time of registration—Register of authenticated powers showing it was executed on one date and registered on next date—Difference in date, held was not sufficient to overthrow the inference to be drawn from certificate of Registrar as to execution of power before him. A.I.R. 1937 Rang. 293 = 172 Ind. Cas. 613.

——S. 114, Illus. (*e*)—Registration—Document accepted by Sub-Registrar as duly presented.

When a document is accepted by the Sub-Registrar as duly presented, there is an initial presumption that the document was duly presented and that the person presenting it was duly authorised to do so. A.I.R. 1934 Lah. 452 (2) = 15 Lah. 694 = 36 P.L.R. 525 = 148 Ind. Cas. 209.

——S. 114, Illus. (*e*)—Registration.

Registration is a solemn act and all things done before the Registrar in his official capacity and verified by his signature will be presumed to be done duly and in order. A.I.R. 1932 Pat. 89 = 10 Pat. 812 = 13 P.L.T. 521 = 135 Ind. Cas. 103.

——S. 114, Illus. (*e*)—Registration—Presumption of regular and due presentation.

The fact that the Sub-Registrar accepted a document from the executant and duly registered it is *prima facie* proof that the executant was not in an intoxicated condition when he presented it for registration. A.I.R. 1931 Sind 78 = 136 Ind. Cas. 525.

(*y*) Revenue records.

——S. 114, Illus. (*e*)—Revenue records—Settlement proceedings—Demarcation—Presumption.

If an official act is proved to have been done, it must be presumed to have been regularly done. The mere fact that there is no evidence to show that certain land which is the subject-matter of a settlement in a *touzi* was demarcated, does not give rise to a presumption that there was no demarcation. A.I.R. 1939 Pat. 364 = 5 B.R. 864 = 20 P.L.T. 677 = 182 Ind. Cas. 982.

——S. 114, Illus. (*e*)—Revenue records—Later records, if to be preferred to older ones—Change surviving for long period—Presumption—Rebuttal of.

When settlements differ, the records of the later settlement should be preferred. This is based on the well-known fact that the later settlements are carried out more carefully. Settlements of the last fifty years or so have all been very careful, but on the maxim *omni proesumuntur rite esse acta*, it must be held, in

the absence of any evidence to the contrary, that a change in the Revenue Records is not made without good reason, especially if the change survives over a long period of years. This presumption may be rebutted, if, for example, the records of an enquiry are produced and show no satisfactory reason, or even if a plausible explanation is suggested. A.I.R. 1937 Lah. 410 = 39 P.L.R. 668 = 173 Ind. Cas. 768.

——S. 114, Illus. (*e*)—Revenue records—Statements in mutation proceedings—Oudh Land Revenue Act (17 of 1876), S. 62.

Statements made by a *purdanashin* lady in documents coming before officers conducting mutation proceedings who act upon them and order mutation of names are admissions by her to which weight should be attached, on the principle of '*praesumuntur recta esse acta*.' 38 All. 627 = 6 L.W. 378 = 31 M.L.J. 607 = 14 A.L.J. 1248 = 19 O.C. 192 = 18 Bom. L.R. 1037 = 21 C.W.N. 130 = (1916) 2 M.W.N. 577 = 21 M.L.T. 40 = 1 P.L.W. 157 = 4 O.L.J. 22 = 25 C.L.J. 363 = 10 Bur. L.T. 140 = 43 I.A. 212 = 36 Ind. Cas. 104 (P.C.).

——S. 114, Illus. (*e*)—Revenue records—Settlement papers—Entries in.

Entries in the present settlement papers must be presumed to be correct, until the contrary is proved. 2 O.L.J. 127 = 28 Ind. Cas. 239.

——S. 114, Illus. (*e*)—Revenue records—Burden of proof.

A statutory presumption is made in favour of the correctness of the revenue records and the onus is on the party who disputes their correctness to show that they are incorrect. 48 P.W.R. 1915 = 124 P.L.R. 1915 = 26 Ind. Cas. 481.

——S. 114, Illus. (*e*)—Revenue records—Record of rights—Entry in, if conclusive.

An entry in the column of the record of rights that the tenure was under temporary settlement for 30 years is conclusive evidence that the settlement was made under the Regulation. 9 C.L.J. 265 = 13 C.W.N. 235 = 4 Ind. Cas. 49.

(*z*) Revenue sale.

——S. 114, Illus. (*e*)—Revenue sale—Sale, irregularity and legality of—Onus of proof in revenue sale—Arrears of Government revenue.

In the case of a sale for arrears of Governmentt revenue the presumption under S. 114, Cl. (*e*) of the Evidence Act would arise in respect to the service of notices, etc., and the onus of proving that there has been irregularity in the preparation, service or posting of notice rests on the person who asserts it. No such presumption would arise in regard to sales held by landlords for rent or loss due to them, and the onus of proving due observance of all formalities will be upon the landlord, even if the other side gives no evidence in support of their plea of non-service. 30 C.1.= 6 C.W.N. 688.

(*aa*) Rule in England.

——S. 114, Illus. (*e*)—Rules in England.

Decisions of English Courts as regards the distinction between Courts of Record and other Courts have very little relevancy, in considering the validity of judicial and official acts of Indian Courts and Officers. 62 Ind. Cas. 87 = 13 M.L.W. 172 = A.I.R. 1921 Mad. 107.

(*bb*) Sanction.

——S. 114, Illus. (*e*)—Sanction—Name of accused appearing on back of paper.

While sanctioning the prosecution of accused for an offence under Penal Code, S. 294-A the name of the accused was shown on the back of the paper instead of in the body of the sanction merely because there was not sufficient space left on the front side.

Held, that the initial presumption was that all the official acts were done in a regular manner and hence the sanction was valid. 124 Ind. Cas. 347 = 1930 Cr.C. 97 = A.I.R. 1930 Lah. 81.

(*cc*) Scope.

——S. 114, Illus. (*e*)—Scope—*See* C.P. CODE, O. 21, R. 54—ORDER OF ATTACHMENT. (1947) 2 M.L.J. 310=A.I.R. 1948 Mad. 191.

——S. 114, Illus. (*e*)—Scope—Principle does not apply to acts of private persons.

Per Ashworth, A.J.C.—The principle that everything must be held to have been performed duly and in order may apply to the acts of a Court but it will not apply to the acts of private persons. 95 Ind. Cas. 680 = 2 O.W.N. 796 = A.I.R. 1926 Oudh 169.

——S. 114, Illn. (*e*)—Scope of.

Illus. (*e*) of S. 114 of the Evidence Act is not exhaustive and the general language of the section applies to all acts or proceedings which might be presumed to have been done in the usual course of business. 31 M.L.J. 311 = (1916) 2 M.W.N. 133 = 20 M.L.T. 228 = 35 Ind. Cas. 421.

(*dd*) Search.

——S. 114, Illus. (*e*)—Search—Presumption that witnesses were properly chosen.

From the presence in the Police party of several senior officers of Police, when the witnesses for search were chosen, it may be concluded, in the absence of any suggestion to the contrary, that the witnesses were properly chosen. A.I.R. 1935 Rang. 233 = 36 Cr.L.J. 1228 = 157 Ind. Cas. 798.

(*ee*) Service of notice.

——S. 114, Illus. (*e*)—Service of notice.

Mere entry raises no presumption under S. 114, Evidence Act, that a notice had, in fact, been served, but when the fact of the service of the notice is proved, there would be a presumption under that section about the regularity of the service, namely that at the time of the service all the formalities required by the rules framed under the Public Demands Recovery Act, namely, Rr. 2 to 8 of Sch. II, had been observed. A.I.R. 1943 Cal. 114 = 76 C.L.J. 17 = I.L.R. (1943) 1 Cal. 22 = 46 C.W.N. 967 = 205 Ind. Cas. 523.

——S. 114, Illus. (*e*)—Service of notice.

Where publication of a notification under S. 99, Bengal Cess Act was proved, the Court is entitled to presume that the publication which was made was made regularly and in due conformity with the provisions of the statute A.I.R. 1941 Cal. 353 = 45 C.W.N. 44 = 195 Ind. Cas. 691.

——S. 114, Illus. (*e*)—Service of notice.

When there is nothing to indicate that the Court had not satisfied itself of the service of notice it must be presumed that the Court was so satisfied. 102 Ind. Cas. 12 = A.I.R. 1927 Lah. 506.

——S. 114, Illus. (*e*)—Service of notice.

Plaintiff purchased property after the attachment and after a prohibitory order was served on judgment-debtors not to sell the same. In the Court auction which followed, a part thereof was purchased by defendant. In a suit by plaintiff three years after the attachment, the record of the Court not being available, it was not proved that service of notice was effected in the other modes described in O. 21, R. 54 (2), C.P. Code.

Held, that the Court below should have applied the presumption that official acts were regularly performed and that in view of the fact that a material portion of the record is no longer in existence the Court was wrong in throwing on the defendant the burden of proving by definite evidence the due service of the notice. 83 Ind. Cas. 878 = 46 All. 741 = 22 A.L.J. 703 = 5 L.R.A. Civ. 525 = A.I.R. 1924 All. 747.

——S. 114, Illus. (*e*)—Service of notice.

Where it is found that the Court after ordering issue of notices did bring on the record representatives of the deceased defendant it must be presumed that they had been properly served. The fact that the order sheet does not specifically mention service having been effected does not mean that it was not so effected. Service of summons is merely a ministerial act. The Judicial act of the Court is the step of bringing the legal representatives on the record and it is to this that the presumption of regularity applies. 72 Ind. Cas. 142 = 10 O.L.J. 185 = A.I.R. 1924 Oudh 17.

——S. 114, Illn. (*e*)—Service of notice.

When a revenue sale has been confirmed and a certificate of sale issued to the purchaser ; the notices under the sale law must be taken to have been duly served but that is only to set aside the sale on the ground of irregularity in the service of the notices. So far as the actual notice to the parties is concerned, the Court is entitled to see if the notices were really served so as to fix knowledge of them upon the plaintiff who sought to set aside the sale. 15 C.W.N. 776 = 7 Ind. Cas. 772.

(*ff*) Service of process.

——S. 114, Illus. (*e*)—Service of process — Court peon's return—Presumption, when may be raised.

The Court must be satisfied that a Court peon's return is genuine before a presumption can be raised under S. 114, Evidence Act that all things had been done properly. 54 C.W.N. 810.

——S. 114, Illus. (*e*)—Service of Judicial process.

It must be assumed that a process, issued by the Court and accepted by the Court as having been duly served was served in the manner provided by law.

Where the report of the process-server shows that symbolical possession was given and that the matter was made known at the spot, it must be presumed that the warrant was duly affixed at the spot in the absence of proof to the contrary. 132 Ind. Cas. 181 = 31 P.L.R. 1001.

——S. 114, Illus. (*e*)—Service of process.

Where the record shows that a process has been served there is a presumption that the process was rightly and duly served. A.I.R. 1932 Cal. 627 = 36 C.W.N. 242 = 140 Ind. Cas. 732.

——S. 114, Illus. (*e*)—Service of process.

It must be assumed that a process, issued by the Court and accepted by the Court as having been duly served, was served in the manner provided by law and with all the formalities laid down for the service thereof. Therefore, the burden of proving that the formalities required by law were not complied with at the time when formal possession was given to the plaintiff is on the defendant and not on the plaintiff. 109 Ind. Cas. 561 = A.I.R. 1928 Lah. 910.

(*gg*) Thak and Survey map.

——S. 114, Illn. (*e*)—Thak and survey map—Presumption of accuracy.

Thak and survey maps may be presumed to have correctly delienated the boundaries of the village and furnish valuable evidence of persons in possession at the time they were made and consequently also of title. The presumption may be rebutted. 19 C.W.N. 1280 = 21 C.L.J. 157 = 27 Ind. Cas. 954.

(*hh*) Wajib-ul-arz.

——S. 114, Illus. (*e*)—Wajib-ul-arz.

In the absence of any reliable evidence it must be held that the public officials engaged in the preparations of a *wajib-ul-arz* did not fail in the discharge of their duty. It must be held that the maxim *omnia presumuntur rite esse acta* applies and the consent of all co-sharers must be presumed to have been obtained in the preparation. 82 Ind. Cas. 92 = 11 O.L.J. 319 = A.I.R. 1924 Oudh 382.

(*ii*) Warrant of attachment.

——S. 114, Illus. (*e*)—Warrant of attachment—*See* EVIDENCE ACT, S. 114, ILLUS. (*e*)—ATTACHMENT WARRANT OF.

(jj) Warrants.

——S. 114, Illus. (*e*)—Warrants.

Search warrant issued by authority specified in S. 5, Punjab Gambling Act, on face of it regular—Presumption under S. 114, Illus. (*e*), Evidence Act, that authority acted on credible information can be drawn so as to attract S. 6 of the Act—Presumption is rebuttable on good cause being shown. A.I.R. 1946 Lah. 26 = I.L.R. (1945) Lah. 119 = 223 Ind. Cas. 137.

——S. 114, Illus. (*e*)—Warrants.

When a warrant under S. 47, Calcutta Police Act, issued by a competent authority recites the fact that an information on oath had been received and that an enquiry had been made and then states that that authority had reason to believe that the place sought to be searched is a common gaming house, the presumption attaching to the regularity of official acts would be attracted. A.I.R. 1936 Cal. 788 = 41 C.W.N. 123 = 38 Cr.L.J. 449 = I.L.R. (1937) 1 Cal. 610 = 167 Ind. Cas. 771.

——S. 114, Illus. (*e*)—Warrants—Presumption of existence.

Under S. 114, it may be presumed that a warrant once signed and issued remains actually in existence until it has been destroyed. A.I.R. 1933 Lah. 159 = 34 Cr.L.J. 679 (2) = 144 Ind. Cas. 67.

——S. 114, Illus. (*e*)—Warrants.

Under S. 114, Illus. (*e*) it may be presumed that the officer issuing the warrant has performed his duty correctly and until the presumption is displaced, it is not necessary for the officer to give any evidence in the matter. A.I.R. 1933 Bom. 79 = 34 Bom. L.R. 1447 = 34 Cr.L.J. 137 (2) = 141 Ind. Cas. 346.

——S. 114, Illus. (*e*)—Warrants—Calcutta Police Act —No presumption.

S. 114, Illus. (*e*) of Evidence Act cannot be relied upon in order to presume the regularity of warrants under S. 46, Calcutta Police Act, and unless the law expressly says that proof shall be required, evidence ought to be required in every cases of this description that the essential preliminaries precedent to the issue of such a warrant have been complied with. 96 Ind. Cas. 264 = 53 Cal. 718 = 30 C.W.N. 713 = 27 Cr.L.J. 920 = A.I.R. 1926 Cal. 966.

ILLUSTRATION (*f*).

——S. 114, Illus. (*f*)—Account books may be admissible under section 32 (2) read with S. 114—Presumption as to correctness of entries.

There is no reason why a Court should not invoke the aid of S. 114, in proper cases and raise a presumption as to the genuineness of old accounts under that section even when they are unsigned if they come from proper custody and appear to have been kept regularly

regard being had to the common course of private business. Consequently, old account books may be relevant and admissible in evidence under S. 32 (2) read with S. 114 but there is no presumption as to the correctness of the entries therein which may be proved to be false. A.I.R. 1944 Lah. 58 = 45 P.L.R. 441 = 212 Ind. Cas. 416.

——S. 114, Illus. (*f*)—Applicability.

Where a notice to the tenant under S. 106, T.P. Act, is properly addressed and sent by registered post, there is a presumption of law in favour of effective service unless proved to the contrary. A.I.R. 1938 All. 388 = 1938 A.L.J. 511 = 1938 A.W.R. 328 = 176 Ind. Cas. 393.

——S. 114, Illus. (*f*)—Applicability.

It is for the Court of fact to determine whether the presumptions referred to under S. 114, Illus. (*f*) of the Evidence Act are to be drawn in a particular case or not. 17 N.L.R. 25 = A.I.R. 1921 Nag. 116.

——S. 114, Illus. (*f*)—Certificate of posting—Presumption arising from.

Where a certificate of posting is put in evidence, the Court should presume that the letter was posted and that it reached its destination unless something is shown to the contrary. It is entirely wrong for the Court to work on the presumption that the certificate of posting is a forgery. A.I.R. 1940 Cal. 227 = 190 Ind. Cas. 533.

——S. 114, Illus. (*f*)—Course of business must be proved or admitted.

Under S. 114, the Court may presume that the ordinary course of business is followed. This presumption, however, cannot arise unless the course of business has been proved or admitted. A.I.R. 1942 Cal. 412 = 46 C.W.N. 759 = I.L.R. (1942) 1 Cal. 100 = 203 Ind. Cas. 548.

——S. 114, Illus. (*f*)—Injunction.

Where an injunction was granted and the question was whether it was executed or not.

Held, that it should be presumed as executed. 79 Ind. Cas. 609 = A.I.R. 1924 Nag. 385.

——S. 114, Illus. (*f*)—Letter by lawyer.

When a member of the Bar writes a letter purporting to be instructed by a client, it is to be presumed, until the contrary is proved, that the letter is written under instructions. A.I.R. 1933 Rang. 147 = 144 Ind. Cas. 996.

——S. 114. Illus. (*f*)—Letter sent by post.

Court can take judicial notice that registered letter reaches the destination 24 hours later than an ordinary letter. 99 Ind. Cas. 622 = A.I.R. 1927 All. 215.

——S, 114, Illus. (*f*)—Letter—No presumption of its being sent by the person by whom it purports to be written.

When a letter is duly posted there may be a presumption that it reaches the addressee in the ordinary course of business. But the mere fact that a letter has been received through post raises no presumption that it was despatched by the person on whose behalf it purports to have been written. If however it were proved that a previous letter was sent through post and a reply thereto was duly received by the sender through post purporting to come from the addressee the Court may under certain circumstances presume that it was a reply despatched on behalf of the addressee though not necessarily in his own handwriting. 89 Ind. Cas. 22 = 23 A.L.J. 961 = 6 L.R.A. Civ. 553 = A.I.R. 1926 All. 161.

——S. 114, Illus. (*f*)—Letter sent by post—Posting of letter proved—Letters bearing note by postman that it was refused by addressee—Presumption that it was so refused arises. 94 Ind. Cas. 103 = A.I.R. 1926 Lah. 520.

——S. 114, Illus. (*f*)—Letter sent by post.

The presumption is that a letter which is proved to be posted and posted to the right address is in fact received by the recipient. 79 Ind. Cas. 809 = 47 Mad. 215 = 19 M.L.W. 54 = 33 M.L.T. 217 = A.I.R. 1924 Mad. 214 = 45 M.L.J. 817.

——S. 114, Illus. (*f*)—Letter sent by post—Presumption.

Where a notice to quit is properly addressed and posted, the presumption is that it reached the addressee. If the letter is registered the presumption is stronger. Acknowledgment of receipt signed by person other than the addressee is not sufficient to prove that letter did not reach the addressee. 46 Cal. 458 = 9 L.W. 148 = 16 A.L.J. 969 = 35 M.L.J. 707 = 29 C.L.J. 117 = 23 C.W.N. 77 = 25 M.L.T. 159 = 21 Bom. L.R. 522 = (1919) M.W.N. 471 = 1 U.P.L.R. 56 = 45 I.A. 222 = 48 Ind. Cas. 277 (P.C.).

——S. 114, Illus. (*f*)—Letter sent by post—Presumption.

Proof of the fact of a letter correctly addressed having been posted and not received back may raise a presumption that it has been delivered to the addressee but proof of the fact of a letter duly sent and returned to the sender does not justify the presumption that the letter has been refused by the addressee. The presumption mentioned in S. 114 of the Act is a presumption of fact, not of law. As to fixing the date of its tender to the addressee, the usual course of mail, and the place of receipt, it is matter purely of evidence. 20 C L.J. 455 = 19 C.W.N. 489 = 26 Ind. Cas. 962.

——S. 114, Illn. (*f*)—Notice sent by registered post returned with endorsement of refusal — Postman not examined—Presumption of service.

If a notice sent by registered post is returned to the sender with an endorsement of a refusal made by the postman mere proof of posting and production of the registered letter itself bearing the endorsement of refusal without examination of the postman is *prima facie* good and sufficient evidence of service. When the posting of a registered letter is proved, the statutory presumption under S. 28 of the Bengal General Clauses Act, carries the proof up to due service. Although

there may be no evidence of tender and refusal, that gap may be filled, when the endorsement is there, by invoking Illus. (*f*) to S. 114 of the Evidence Act, that is to say, by presuming that the common course of business was followed and the postman did tender the letter to the addressee and did write the endorsement on refusal by the addressee to accept delivery. If the refusal does not come within the ambit of "common course of business," surely the tender does and that itself is sufficient to constitute service, or it may even be said that the writing of the endorsement comes within "the common course of business" of the postman, and, therefore, involves the presumption that it was properly written after a refusal by the addressee. The fact that the letter came back does not in itself rebut the presumption that it was tendered and, therefore, served. 52 C.W.N. 659.

——**S. 114, Illus. (*f*)—Notice sent by registered post returned with endorsement "refused"—Presumption as to its tender.**

If a notice sent by registered post is returned with the endorsement "refused", the Court is entitled to presume that it was tendered. But the presumption is rebuttable. 82 C.L.J. 9 = A.I.R. 1948 Cal. 63.

——**S. 114, Illus. (*f*)—Notice sent by registered post—Service—Presumption.**

If a notice was sent by registered post, the presumption is that the notice was served at the time when it would be delivered in the ordinary course of post. The presumption is however rebuttable. A.I.R. 1950 Cal. 256.

——**S. 114, Illus. (*f*)—Notice sent by registered post—Return as refused—If evidence of actual refusal by addressee.**

Where a post card registered and sent by post but returned as refused is relied on as evidence of notice having been given to the addressee, there must be evidence of the fact that it was so refused. In the absence of the evidence of the postal peon in question the registered post card cannot be accepted as evidence to show that it was actually refused. 26 Pat. 582 = A.I.R. 1948 Pat. 337.

——**S. 114, Illus. (*f*)—Notice sent by registered post—Return as refused—Presumption — Posting of letter, whether proves delivery.**

The question whether a presumption can be drawn as to the due delivery of a letter by post must depend on the particular circumstance of each case.

As regards service of a notice by post, although a presumption that the due course of business has been followed may be drawn, it cannot be held that the posting of the letter proves delivery, it being a matter of common knowledge that postal servants are not always diligent, and it is at least a possibility that the notice was returned by some postal peon, who was unable to find the addressee. A.I.R. 1933 Rang. 76 = 146 Ind. Cas. 422.

——**S. 114, Illus. (*f*)—Notice—Registered letter—Registered post-card returned to sender—Presumption is either addressee refused it or was not found.**

17 N.L.R. 25 = A.I.R. 1921 Nag. 116.

——**S. 114, Illn. (*f*)—Notice sent by registered post.**

Where defendant denies receipt of a notice sent by registered post, plaintiff has to prove by calling the post peon that the post card was tendered and refused by the defendant. 48 Ind. Cas. 904 (Nag.).

——**S. 114, Illn. (*f*)—Notices—Refusal of addressee to accept.**

Where on registered a cover proved to have been posted and produced by the plaintiff in Court there is an endorsement by an officer of the post office stating the refusal by the defendant addressee to receive the cover it is sufficient to prove the service of the notice. 17 C.W.N. 1073 = 20 Ind. Cas. 363.

——**S. 114, Illn. (*f*)—Notice—Service by post—Refusal to accept.**

A notice to quit was given by a registered post but the letter containing the notice was returned to the Post Office, the addressee having refused to accept it.

Held, that under S. 114 of the Evidence Act the Court was entitled to presume that the letter containing the notice reached the defendant. 24 C.W.N. 478 = 23 C.W.N. 319 = 54 Ind. Cas. 5.

——**S. 114, Illus. (*f*)—Notice—Service by post.**

There is no presumption that a letter, which was posted, was properly addressed, and the presumption that the letter reached the addressee has no application till it is established that the letter was properly addressed. The presumption that a notice sent by post was duly served is not a conclusive presumption of law; it is merely a presumption of fact; and whether it arises in a particular case or not depends upon all the circumstances. 7 C.L.J. 251.

——**S. 114, Illus. (*f*)—Presentation of application.**

Where the facts of a particular case can form a foundation for a fair presumption that an application was made, then the Court would be entitled to presume that it was made. 89 Ind. Cas. 228 = 27 Bom. L.R. 671 = A.I.R. 1925 Bom. 443.

——**S. 114, Illus. (*f*)—Presumption under—Second appeal.**

Where upon the evidence, a presumption of fact under S. 114, Illus. (*f*), is drawn by an Appellate Court such presumption is, binding upon a Court of second appeal. 53 Ind. Cas. 62 (Nag.).

——**S. 114, ILLUSTRATION (*g*).**

Synopsis.

(*a*) Account books not produced.
(*b*) Best evidence should be produced.
(*c*) Burden of proof.
(*d*) Collection of rents.
(*e*) Criminal trial.
(*f*) Document not produced.
(*g*) Evidence not produced.
(*h*) Failure of party to call witness.
(*i*) Murder case.

(j) Non-appearance of party as witness.
(k) Preliminary enquiry.
(l) Road cess returns.
(m) Scope.
(n) Settlement record—Non-production by Government.

(a) Accounts books not produced.

——S. 114, Illus. (g)—Account books—Non-production.

Where Hindu sons bring a suit to declare that certain alienations effected by their father of family properties, and certain decrees obtained by creditors against him are not binding on themselves or on the joint family properties, alleging that there was enormous income from the properties held by their father and that there was no necessity for incurring loans for the family, ought to produce the account books to prove the income and expenditure. But when they deliberately suppress the account books whose existence is proved by their own witnesses, the Court is justified in concluding that those account books, if produced in Court, would not support the case of the plaintiffs. Though the onus of proving the binding nature of the alienations and of the decrees is on the alienees and the creditors, the onus shifts on to the plaintiffs on account of the presumption arising against them on account of omission to produce the accounts in their possession. No party should be allowed to take advantage of an abstract doctrine, *viz.*, burden of proof, and conceal from the Court the evidence, which is shown to be in his possession. No party should be allowed to take advantage of an abstract doctrine, *viz.*, burden of proof, and conceal from the Court the evidence, which is shown to be in his possession and which would assist the Court in arriving at a correct decision. I.L.R. (1946) Nag. 844 = 227 Ind. Cas. 345 = 1947 N.L.J. 86 = A.I.R. 1947 Nag. 129.

——S. 114, Illus. (g)—Account books—Non-production.

When a party admitted that his father kept accounts and left *bahi khatas* but the opposite party did not call for them, inference against the former party cannot be made for the non-production of the account books. A.I.R. 1944 All. 130 = 1944 A.L.J. 121 = 1944 A.W.R. (H.C.) 99 = 215 Ind. Cas. 138.

——S. 114, Illus. (g)—Accounts book—Account's maintained but not produced.

When accounts are actually kept and not produced, it is legitimate for the Court to draw strong inferences from such conduct. A.I.R. 1944 Nag. 314 = I.L.R. (1945) Nag. 331 = 1944 N.L.J. 339.

——S. 114, Illus. (g)—Account books—Non-production.

If a partner has books of account in his possession and will not produce them, an account may nevertheless be arrived at by presuming everything against him. The principle applies in a case where accounts are to be taken between a financer who keeps accounts and his debtor-contractor. A.I.R. 1944 Sind 73 = I.L.R. (1943) Kar. 429 = 214 Ind. Cas. 256.

——S. 114, Illus. (g)—Account books—Non-production—Joint family—Money borrowed on mortgage by managing member of trading family for payment of debts—Suit on mortgage—Mortgagee trying his best to procure evidence regarding nature of debts—Defendants deliberately withholding documentary evidence in form of account books—Circumstances, held sufficient to raise presumption that mortgage was for payment of antecedent debts by managing member and was binding on family property. A.I.R. 1940 Lah. 501 = 42 P.L.R. 631 = I.L.R. (1941) Lah. 632 = 192 Ind. Cas. 814.

——S. 114, Illus. (g)—Account books—Non-production.

Where a party to a partition suit suppresses his accounts or has falsified them, the Court will make unfavourable presumptions against him.

Where the defendant suppressed his accounts and the arbitrators have no means of ascertaining the exact nature of the outstandings, they will be justified in directing the defendant to pay the plaintiff's share of the estimated value of the outstandings without dividing the assets between them. A.I.R. 1935 Mad. 152 = 41 M.L.W. 104 = 1935 M.W.N. 572 = 69 M.L.J. 558 = 155 Ind. Cas. 1059.

——S. 114, Illus. (g)—Account books—Non-production.

From the failure of a person to produce accounts in his possession showing the amount of expenses he has incurred, this fact being proved by other evidence, it may be presumed that he was exaggerating the expenses incurred. But from the non-production, it cannot be concluded that no expenses had been proved. A.I.R. 1934 All. 71 = 3 A.W.R. 263 = 154 Ind. Cas. 434.

——S. 114, Illus. (g)—Account books—Failure to produce.

If the surviving partners do not produce account books or destroy them before the matter is finally settled the Court will presume every thing most unfavourably to them consistent with established facts. 11 C.L.J. 658 = 14 C.W.N. 1106 = 6 Ind. Cas. 63.

——S. 114, Illus. (g)—Account books.

If a partner has books of accounts in his possession and will not produce them, an account may nevertheless be arrived at by presuming everything against him. 108 Ind. Cas. 873 = 23 S.L.R. 313 = A.I.R. 1928 Sind 133.

——Ss. 114, Illus. (g) and 106—Account books—Burden of proof.

The plaintiff mortgagee alleged that the mortgage debt was borrowed to pay off debts due by the defendant's ancestral business of trading. The allegations were denied by the defendants. They denied that the debts related to their business and though they maintained account books relating to their business, they did not produce them to prove that the debts alleged by the plaintiff to exist at the time of the mortgage were not due by their business :

Held, that the Court could conclude that the production of the account books would not have supported the case of the defendants and the fact that the burden of proof was not on them did not matter :

Held, also that S. 106, applied. A.I.R. 1942 Nag. 39 = 1942 N.L.J. 121 = I.L.R. (1942) Nag. 543 = 200 Ind. Cas. 166.

——**S. 114, Illus. (*g*)**—Account books—Non-production—Joint-family trade—Manager for himself and on behalf of his minor brother executing mortgage to pay off trade debts—Suit to enforce mortgage—Manager and his brother summoned to produce account books—Both filing affidavits that account books were not with them nor did they know in whose possession they were—Evidence acquiesced in by plaintiff and no further steps taken—No adverse inference held could be drawn by non-production of account books. A.I.R. 1941 P.C. 43 = 54 L.W. 1 = 1941 M.W.N. 654 = 7 B.R. 694 = 22 P.L.T. 566 = 193 Ind. Cas. 657 (P.C.).

[Reversing A.I.R. 1937 Mad. 816 = (1937) 2 M.L.J. 559].

——S. 114, Illus. (*g*)—Account books—Plaintiff, whether can be allowed to produce them after conclusion of arguments in appeal against dismissal of suit.

In a suit on a handnote, the plaintiff stated that the details of the claim will be apparent from his account books but failed to produce the same on the allegation that they were missing. The trial Court drew an adverse inference against the plaintiff from the non-production of the account books.

Held, that the trial Court was justified in drawing the inference it did against the plaintiff :

Held, also that the plaintiff could not be allowed to produce the account books after the conclusion of the arguments in the appeal. A.I.R. 1941 Pat. 433 = 20 Pat. 130 = 8 B.R. 8 = 196 Ind. Cas. 220.

——S. 114, Illus. (*g*)—Account books—Non-production.

It is for a party to prove his case by the best evidence available. Where, a money-lender is examined by a party wishing to prove a money transaction but fails to get his account books produced the Court is entitled to draw an adverse inference against him. A.I.R. 1941 Pat. 130 = 21 P.L.T. 973 = 7 B.R. 604 = 193 Ind. Cas. 411.

——S. 114, Illus. (*g*)—Account books—Non-production.

The deliberate withholding of books of account by a party will lead the Court to suspect that the books, if produced, would have supported plaintiff's case ; it would be a legitimate inference to draw that the books, if produced, would have destroyed his case. A.I.R. 1934 Cal. 414 = 38 C.W.N. 33 = 151 Ind. Cas. 268.

——S. 114, Illus. (*g*)—Account books—Non-production.

Unless the existance of accounts is proved, no adverse inference under Illus. (*g*) can be drawn from their non-production. 1934 M.W.N. 1182.

——S. 114, Illus. (*g*)—Account books—Non-production.

Accused charged under S. 408, I.P.C.—Contention that period during which the offence was alleged to be committed exceeded one year—Complainant not producing account books and papers relating the offence though in his possession :

Held, it was a legitimate inference that if they had been produced, they would not have supported the allegation made in complaint that defalcations covered a period of only one year. A.I.R. 1934 Pat. 132 = 35 Cr.L.J. 693 = 15 P.L.T. 647 = 148 Ind. Cas. 519.

——S. 114, Illus. (*g*)—Account books—Non-production.

In a copyright case, if the defendants fail to produce their account books after notice, there is a fair presumption that the account books have been deliberately suppressed by the defendants in order to conceal the actual profits realised by the sale of the books and the Court is entitled to make every presumption against the defendants. A.I.R. 1933 All. 474 = 1933 A.L.J. 791 = 55 All. 564 = 148 Ind. Cas. 127.

——S. 114, Illus. (*g*)—Account books—Non-production.

No presumption can be drawn against a party because his witness did not produce the account books particularly when the witness did not state any fact which was expected to be confirmed by anything to be found in the account books. A.I.R. 1933 Nag. 379 = 29 N.L.R. 298 = 149 Ind. Cas. 1200.

——S. 114, Illus. (*g*)—Account books—Non-production.

Where, in a suit, the non-production of accounts on either side is plausibly explained, no inference can be drawn against either one side or the other from that circumstance. A.I.R. 1933 Oudh 412 = 10 O.W.N. 827 = 146 Ind. Cas. 31.

——S. 114, Illus. (*g*)—Account books—Non-production—Income-tax proceedings.

Where, during the course of the enquiry the Income-tax Officer is not going to make the assessment to the best of his judgment owing to want of materials but proceeds to make an enquiry as regards the truth or otherwise of the allegations made by the assessee in his return there is nothing to prevent the Income-tax Officer from requiring the assessee to produce any evidence including accounts. And on non-production of the account books the case will be governed by S. 114, Illus. (*g*) and (*h*). 31 M.L.W. 738 = A.I.R. 1930 Mad. 209 = 58 M.L.J. 260 (F.B.).

——S. 114, Illus. (*g*)—Account books.

Failure by a party to produce account books raises a strong presumption that their evidence would confirm in a conclusive manner the other documentary evidence against him. 111 Ind. Cas. 596 = 10 L.L.J. 93 = A.I.R. 1928 Lah. 397.

——S. 114, Illus. (*g*)—Account books.

Where the account books have not been produced to prove payments of certain sums, and there is no explanation as to why they have not been produced it is a legitimate inference that had these books been produced they would have gone against the party alleging payments. 91 Ind. Cas. 917 = 1 Luck. 7 = 13 O.L.J. 178 = 3 O.W.N. 25 = A.I.R. 1926 Oudh 81.

——S. 114, Illus. (*g*)—Account books—Non-production.

The non-production by the plaintiffs, of all the books which they could be expected to produce raises adverse presumption against them. 91 Ind. Cas. 265 = 27 Bom. L.R. 267 = A.I.R. 1925 Bom. 294.

——S. 114, Illus. (*g*)—Account books—Non-production.

The non-production of account books by a party when such account books would throw much light on the case, raises adverse presumption. 86 Ind. Cas. 122 = 6 L.R.P.C. 111 = 27 Bom. L.R. 760 = 29 C.W.N. 941 = 23 A.L.J. 97 = 2 O.W.N. 229 = A.I.R. 1925 P.C. 93 = 49 M.L.J. 162 (P.C.).

——S. 114, Illus. (*g*)—Accounts—Oudh Rent Act.

Where in a suit for profits under Oudh Rent Act the *lambardar* failed to file accounts and he was found to be literate, a decree was passed against him on gross rental. 80 Ind. Cas. 441 = 5 L.R. Oudh 82 = A.I.R. 1924 Oudh 347.

——S. 114, Illus. (*g*)—Account books—Non-production.

Where certain parties who were money-lenders did not produce account books,

Held, that it was unlikely that they did not keep account books as they were money-lenders and that the presumption was that if they produced them they would have gone against him. 78 Ind. Cas. 547 = 11 O.L.J. 275 = A.I.R. 1925 Oudh 11.

——S. 114, Illus. (*g*)—Account books—Non-production.

Withholding of account books—Presumption is that entries therein are contrary to plea of party withholding. 76 Ind. Cas. 553 = A.I.R. 1923 Lah. 585.

——S. 114, Illus. (*g*)—Account books—Non-production.

Where account books were in the possession of a party and he did not produce it or explain why they were not produced,

Held, that a presumption should be drawn against him to the effect that, if produced, they will be unfavourable to him. 74 Ind. Cas. 563 = 10 O.L.J. 141 = 26 O.C. 266 = A.I.R. 1923 Oudh 227.

——S. 114—Illus. (*g*)—Account books—Non-production—Pro-note repudiated by defendant—Suit filed on last day of limitation—Plaintiff alleging to be businessman but not producing account books—Inference must be drawn against plaintiff. A.I.R. 1922 P.C. 378 (P.C.).

——S. 114—Illus. (*g*)—Account Books—Non-production—Inference.

Per Das, J.,—The inference drawn from the non-production of the books is that, if produced, they would support the other side. 65 Ind. Cas. 882 = 3 P.L.T. 653 = A.I.R. 1922 Pat. 619.

——S. 114—Illus. (*g*)—Account books.

Where the creditors of a family *prima facie* established that a purchase by the manager was for the benefit of the family but the defendants asserted that the property was not yielding a proper income and that therefore it was an improvident transaction.

Held, it was for the defendants to establish their case by production of their account books, when they are sought to be suppressed every presumption consistent with facts must be made against the defendants. 63 Ind. Cas. 625 = 3 P.L.T. 149 = A.I.R. 1922 Pat.122.

——S. 114, Illus. (*g*)—Account books—Non-production of.

If a party persistently omits to produce his books of account there is a justifiable presumption that they do not support his case. 56 Ind. Cas. 129 (Nag.).

——S. 114, Illus. (*g*)—Accounts—Non-production of—Effect of.

In a suit for accounts the non-production of account books by the party who has custody of them, justified the presumption under S. 114 (*g*) of the Evidence Act that they have been withheld, because if produced they would have been unfavourable to his case. If he is the plaintiff and is claiming accounts though withholding papers his suit is liable to be dismissed. If it is the defendant who is liable to render accounts, the Court will proceed on the footing of the evidence furnished by the plaintiff, and in doing so may make all reasonable presumptions against him. If the Court is satisfied that the defendant has contumaciously refused or omitted to comply with the order for production of the papers, the Court may enforce obedience by imprisonment or by attachment of property or by both. 24 C.W.N. 110 = 30 C.L.J. 417 = 54 Ind. Cas. 636.

——S. 114, Illus. (*g*)—Account books—Failure to produce.

If a party fails to produce the best available evidence, *i.e.*, his accounts though summoned, the onus of proof shifts on to him, though it initially lay on the other side. So held in a suit by a creditor to enforce a debt of the manager against members of the joint family. 42 Mad. 629 = 9 L.W. 547 = 36 M.L.J. 568 = 1919 M.W.N. 301 = 50 Ind. Cas. 775.

——S. 114, Illus. (*g*)—Accounts—Failure to produce—Presumption—Benami.

When a party whose business it is to produce or account for the non-production of certain books of account, relevent to the subject-matter in dispute in a case, fails even after an order for discovery has been made upon him, to produce the same or give evidence of diligent search and of failure to find them even if the fact and date of their destruction cannot be proved, two consequences would follow, *viz.*, (1) the opposite party can give secondary evidence of their contents and (2) the presumption arises that the contents of the books not accounted for are as regards the issues in dispute unfavourable to the party in default. 32 M.L.J. 468 = 15 A.L.J. 329 = 1 Pat. L.W. 490 = 25 C.L.J. 581 = 19 Bom. L.R. 471 = 21 C.W.N. 929 = 22 M.L.T. 10 = (1917) M.W.N. 464 = 6 L.W. 92 = 39 Ind. Cas. 964 (P.C.).

——S. 114, Illus. (*g*)—Account books—Non-production of—Necessity—Burden of proof.

A bad practice has grown in Indian procedure of parties in possession of important documents or information lying by, trusting to the abstract doctrine of onus of proof and failing to furnish the Courts with the best material for decision. Where a mortgage of *mutt* property is attacked as not binding on the *mutt* if those in charge of the accounts of the *mutt* do not produce them to confirm their statements an inference adverse to them can be drawn from the omission. 40 Mad. 402 = 44 I.A. 98 = 21 M.L.T. 288 = 32 M.L.J. 369 = 15 A.L.J. 281 = 1 Pat. L.W. 457 = 5 L.W. 759 = 21 C.W.N. 761 = 19 Bom. L.R. 456 = 25 C.L.J. 589 = (1917) M.W.N. 487 = 39 Ind. Cas. 659 (P.C.).

——S. 114, Illus. (*g*)—Accounts—Non-production of—Adverse inference when drawn.

It is open to a litigant to refrain from producing any documents, not forming part of his case, that he considers irrelevant ; if the other litigant is dissatisfied, it is for him to apply for their production and inspection and to exhibit them as evidence in the cause if he thinks proper. If he fails to do so neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents. 37 All. 557 = 42 I.A. 202 = 19 C.W.N. 1207 = 29 M.L.J. 335 = 2 L.W. 830 = 18 M.L.T. 248 = 13 A.L.J. 991 = 17 Bom. L.R. 1006 = 22 C.L.J. 516 = (1915) M.W.N. 757 = 30 Ind. Cas. 299 (P.C.).

——S. 114, Illus. (*g*)—Account books—Summoned not produced.

The non-production by a mortagee in a suit on a mortgage bond, when the defence was discharged of the debt, of his account books when summoned for by the mortgagor justifies the presumption under S. 114, Illus. (*g*) of the fact that if produced they would have been unfavourable to the mortgagee. The fact that a careful money lender took no steps during his life-time to recover his money after the amount rose above the value of the mortgaged property, cannot be believed. 1 O.L.J. 426 = 25 Ind. Cas. 749.

——S. 114, Illus. (*g*)—Accounts—Non-production of—Absence of notice.

No presumption can be drawn against a party for non-production of accounts when the notice to produce them is insufficient. 241 P.W.R. 1912 = 73 P.L.R. 1913 = 18 Ind. Cas. 746.

——S. 114, Illus. (*g*)—Accounts—Non-production of.

Non-production of account books by the party in possession thereof raises a presumption against him, that if produced they would have been against him. 18 P.W.R. 1913 = 16 P.L.R. 1912. (Supp.) = 18 Ind. Cas. 604.

——S. 114, Illus. (*g*)—Account book—Not produced on demand—Presumption.

An account book prepared by plaintiff and relied on by defendant was not produced by plaintiff when demanded by the Court. *Held* the Court was justified in drawing an inferenc that it was against the plaintiff. It makes no difference that the plaintiff is minor and the guardian is female. 16 Ind. Cas. 25 (All.).

——S. 114, Illus. (*g*)—Accounts—Non-production of.

The onus of proving an adoption was held not discharged as the accounts of the ceremony admitted to exist were not produced. 32 All. 104=37 I.A. 1 = 14 C.W.N. 285 = 11 C.L.J. 172 = 7 M.L.T. 57 = (1910) M.W.N. 8 = 12 Bom. L.R. 244 = 20 M.L.J. 182 = 5 Ind. Cas. 549 (P.C.).

——S. 114, Illus. (*g*)—Account books—Failure to get third persons to produce—Effect.

It is often impossible for a creditor to compel third parties to produce their account books, to prove that money is actually due to them and the suit cannot fail because the third parties did not produce the account books. 70 Ind. Cas. 226 = 1 Pat. 715 = A.I.R. 1923 Pat. 71.

(*b*) Best evidence should be produced.

——S. 114, Illus. (*g*)—Best evidence should be produced.

The ordinary rule of evidence is that every disputed fact must be proved by the best evidence, and the consequential presumption is that the evidence which could be produced, and is not, would not be favourable to the party who withholds it. A.I.R. 1935 Sind 196 = 158 Ind. Cas. 707.

(*c*) Burden of proof.

——S. 114, Illus. (*g*)—Burden of proof—Defendant's failure to produce accounts raises no presumption in his favour.

When a plaintiff sues on a contract he must support his case by conclusive proof of the contract to the Court's satisfaction. On the plaintiff's failure to prove his case, there can be no presumption that his case would have been supported by certain account books of the defendant, which in fact were not produced by the defendant. 37 Ind. Cas. 967 (Pat).

(*d*) Collection of rents.

——S. 114, Illus. (*g*)—Collection of rents—Absence of evidence of—Suit for profits.

If in a suit for profits of land the recorded collections are suspiciously low, and the defendant does not produce evidence to show what was collected, the Court may presume that the full amount of the rents had been collected and the profits assessed on the basis of the gross rental. 7 O.L.J. 278 = 56 Ind. Cas. 751.

(*e*) Criminal trial.

——S. 114, Illus. (*g*)—Criminal trial—When an important witness is not produced in the witness-box, the presumption is that he was not prepared to support the prosecution. 46 P.L.R. 283.

——S. 114, Illus. (*g*)—Criminal trial—Failure of prosecution to examine certain witnesses.

It is not the imperative duty of the prosecutor to put in the witness-box all the possible eye-witnesses of the offence (dacoity) failing which an inference

adverse to the prosecution must necessarily be drawn. It is a matter dependent on the particular circumstances of each case. A.I.R. 1942 Pat. 481 = 21 Pat. 258 = 8 B.R. 879 = 43 Cr.L.J. 817 = 202 Ind. Cas. 331.

——S. 114, Illus. (g)—Criminal trial—Duty of prosecution.

The prosecution is not bound to produce any particular witness. It is open, however, to the jurors to draw inference unfavourable to the prosecution for the non-examination of the witnesses. A.I.R. 1938 Cal. 625 = 67 C.L.J. 45 = 39 Cr. L.J. 964 = 177 Ind. Cas. 929.

——S. 114, Illus. (g)—Criminal trial.

Theft of consignment—Evidence of servants and guard necessary—Evidence of guard not submitted.

Held, that a presumption can be raised that the guard's evidence, if produced, would be unfavourable to the defendant and that, in consequence, misconduct by complicity in the theft of some servant may be fairly inferred. A.I.R. 1937 P.C. 152 = 3 B.R. 461 = 41 C.W.N. 837 = 46 M.L.W. 180 = I.L.R. (1937) Bom. 375 = 31 S.L.R. 326 = 39 Bom. L.R. 946 = 1937 M.W.N. 904 = 1937 O.W.N. 1045 = 18 P.L.T. 767 = 64 I.A. 176 = (1937) 2 M.L.J. 689 = 1937 A.L.J. 1117 = 1937 A.W.R. 1159 = 168 Ind. Cas. 1 (P.C.).

——S. 114, Illus. (g)—Criminal trial.

Where there are witnesses who are in a position to give relevant evidence but the prosecution deliberately withholds their evidence without establishing the slightest reason for the suggestion that they had been won over by the defence, the prosecution must face the inference arising from their conduct in withholding evidence. The mere fact that their evidence is expected to be inconsistent with the prosecution story does not justify refusal to examine them as witnesses. A.I.R. 1937 All. 182 = 1938 A.W.R. 1065 = 38 Cr. L.J. 401 = 167 Ind. Cas. 676.

——S. 114, Illus. (g)—Criminal trial—Failure to call necessary witness.

Where a person is charged with criminal misappropriation but the accounts show that the amount in question is paid to some person, and the prosecution contends that the amount has not been paid to him but does not call him as witness, the presumption arises that if he were called, he would not support the prosecution case. A.I.R. 1937 Rang. 280 = 38 Cr. L.J. 887 = 170 Ind. Cas. 257.

——S. 114, Illus. (g)—Criminal trial.

Independent witnesses named in first information report—Witnesses not called by prosecution—Assumption that they would give evidence against prosecution is warranted. 171 Ind. Cas. 906 = 39 Cr.L.J. 7 = 40 P.L.R. 17.

——S. 114, Illus. (g)—Criminal trial.

In Sessions Court, Crown not calling prosecution witness examined by it in committing Magistrate's Court—It is open to Court to draw an adverse inference against Crown. A.I.R. 1935 Sind 60 = 36 Cr.L.J. 869 (2) = 29 S.L.R. 422 = 155 Ind. Cas. 1114.

——S. 114, Illus. (g)—Criminal trial—Prosecution witness suppressing truth.

If it is once found that the prosecution witnesses deliberately suppressed the part played by the deceased, there is every justification to rely on the statement of the accused person in this respect especially when from the very first he had told the same story and which, in spite of the efforts of the Police to the contrary, has subsequently been corroborated by the medical evidence. A.I.R. 1934 Lah. 696 = 35 P.L.R. 725 = 36 Cr.L.J. 305 = 153 Ind. Cas. 209.

——S. 114, Illus. (g)—Criminal trial.

Failure to examine a material witness justifies the inference that the witness if examined, would have deposed against the prosecution. 36 Pun. L.R. 527.

——S. 114, Illus. (g)—Criminal trial.

On the mere fact that the prosecution does not call certain witnesses, the Court need not draw the presumption under S. 114, Illus. (g).

It cannot be said because certain witnesses have not been called, the Judge is not exercising his discretion judicially because he refuses to draw the presumption. A.I.R. 1933 Cal. 600 = 37 C.W.N. 1098 = 35 Cr.L.J. 33 (2) = 60 Cal. 1361 = 146 Ind. Cas. 378.

——S. 114, Illus. (g)—Criminal trial. Omission to examine all witnesses.

Where the prosecution have examined sufficient witnesses to prove their case, the mere fact that they had not examined other witnesses who could have given evidence is not a point of sufficient gravity for setting aside the conviction, especially where there is nothing to show that the evidence of the witnesses who had not been called could have been contrary to or inconsistent with the evidence already given. A.I.R. 1932 Cal. 871 = 36 C.W.N. 1038 = 34 Cr.L.J. 181 = 60 Cal. 149 = 141 Ind. Cas. 636.

——S. 114, Illus. (g)—Criminal trial—Prosecution, whether bound to examine all witnesses mentioned.

Mere failure of prosecution to examine certain witnesses mentioned in first information report does not give rise to the presumption under S. 114, Illus. (g). The only witnesses whom the prosecution need call are those who know the facts and are able and willing to give truthful evidence which is relevant to the charge and those who have to decide whether a particular witness knows the fact or not, must be those who conduct the case for the prosecution primarily, the Police. Failure to examine such a witness may give rise to the presumption mentioned in Illus. (g). A.I.R. 1932 Cal. 118 = 58 Cal. 1335 = 33 Cr.L.J. 135 = 135 Ind. Cas. 443.

——S. 114, Illus. (g)—Criminal trial—Suppression of real facts by prosecution.

Where, in a criminal case, the complainants choose to suppress the real facts and give false or unreliable

evidence in order to implicate their enemies, the only result is that the persons who are probably guilty have to be acquitted. 139 Ind. Cas. 740 = 9 O.W.N. 145 = 33 Cr.L.J. 932.

——S. 114, Illus. (g)—Criminal trial.

Non-production of witnesses cited by prosecution when their evidence was unnecessary cannot justify adverse inference when there is nothing else on record to justify it. 120 Ind. Cas. 606 = 1930 Cr.C. 171 = 31 Cr.L.J. 131 = A.I.R. 1930 Lah. 163.

——S. 114, Illus. (g)—Criminal trial—Non-summoning of material witness.

Where a witness is not called by the prosecution which it was the duty of the prosecution to call what happens is at the most there arises a presumption that if the witnesses had been called he would not have supported the prosecution case. 1929 Cr.C. 379 = A.I.R. 1929 Pat. 651.

——S. 114, Illus. (g)—Criminal trial.

Failure of prosecution to examine a material witness justifies the inference that the witness, if examined, would have deposed against the prosecution. 107 Ind. Cas. 100 = 29 P.L.R. 14 = 29 Cr.L.J. 212 = 9 A.I.Cr.R. 505 = A.I.R. 1928 Lah. 125.

——S. 114, Illus. (g)—Criminal trial—All witnesses not called—Principle explained.

If the witnesses called by the prosecution are otherwise worthy of credit, the Court is not entitled to disbelieve them simply because some persons, who could have thrown light upon the case, have not been put before the Court by the prosecution. The proposition that it is the duty of the prosecution to call all the witnesses who prove their connection with the transactions connected with the prosecution and who must be able to give important information, and if such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution, is too wide, if the police consider a witness to be a false witness or that his evidence is unnecessary, they would be justified in not sending up that witness for the prosecution and his absence at the trial ought not to be a reason for disbelieving the prosecution witnesses if they are otherwise worthy of credit. It is of course not for the police or for the Public Prosecutor to champion a particular theory and to suppress the evidence of a reliable witness simply because his testimony is inconsistent with it. 74 Ind. Cas. 705 = 2 Pat. 309 = 1 Pat. L.R. Cr. 236 = 24 Cr.L.J. 801 = A.I.R. 1923 Pat. 413.

——S. 114, Illus. (g)—Criminal trial.

The non-summoning of a witness alleged to have taken part in the proceedings on which the trial is founded raises adverse presumption. 86 Ind. Cas. 475 = 4 Bur. L.J. 2 = 26 Cr.L.J. 827 = A.I.R. 1925 Rang. 205.

——S. 114, Illus. (g)—Criminal trial.

Where two eye-witnesses sent up by the police were not heard by the Court.

Held, that there must be some limit to the number of witnesses which a Court is asked to hear and no inference favourable to the accused can be drawn from the fact that these two witnesses had not been called. 74 Ind. Cas. 434 = 10 O.L.J. 68 = 24 Cr.L.J. 770 = A.I.R. 1923 Oudh 217.

——S. 114, Illus. (g)—Criminal trial.

Where the prosecution fails to produce an important witness the Court makes the presumption that if he were produced his evidence would not be favourable to the prosecution. 20 Cr.L.J. 519 = 51 Ind. Cas. 679.

——S. 114, Illus. (g)—Criminal trial—Prosecution—Omission to examine eye-witnesses.

Where the prosecution does not call all available eye-witnesses, the Court may properly draw an inference adverse to the prosecution. 42 Cal. 422 = 16 Cr.L.J. 170 = 19 C.W.N. 28 = 27 Ind. Cas. 554.

——S. 114, Illus. (g)—Criminal trial—Witness not produced.

Where an eye-witness is not produced before the committing Magistrate, the natural presumption is that he would not support the case for the prosecution. 17 Cr.L.J. 267 = 39 P.W.R. 1916 = 12 P.R. 1916 Cr. = 34 Ind. Cas. 987.

(f) Document not produced.

——S. 114, Illus. (g)—Document not produced—Inference against party, if can be drawn.

It is open to a litigant to refrain from producing any document which he considers irrelevant and if the opposing litigant is dissatisfied, it is for him to apply for an affidavit of documents and he can so obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails to do so, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such document. A.I.R. 1946 Pat. 66 = 24 Pat. 541 = 1946 P.W.N. 66.

——S. 144, Illus. (g)—Document not produced—Inference.

It is only if the party did not produce certain documents after being called upon to do so that the Court is justified in drawing an adverse inference against him. A.I.R. 1945 Pat. 453 = 24 Pat. 379.

——S. 114, Illus. (g)—Documents not produced—No certainty of relevancy.

Although S. 114 permits a Court to presume that evidence, which could be and is not produced, would if produced, be unfavourable to the person who withholds it, it does not allow any such presumption to be made in the case of papers about which there is no certainty that they would even have been relevant

evidence in the case with which the Court is dealing. A.I.R. 1944 All. 5 = 1943 A.W.R. (H.C.) 256 = 1944 A.L.J. 9 = 1944 O.W.N. (H.C.) 10 = I.L.R. (1944) All. 9 = 210 Ind. Cas. 540.

——S. 114, Illus. (g)—Document not produced by plaintiff—Presumption.

Application by a party to Commissioner appointed to ascertain mesne profits, requiring the other party to produce documents is not sufficient compliance with O. 11, Civil P.C. The proper procedure is to get summons or notice issued to the other party through Court. Hence the adverse presumption cannot be drawn against the other party for non-production of the documents specified in the application to the Commissioner. A.I.R. 1943 Pat. 69 = 21 Pat. 735 = 9 B.R. 220 = 205 Ind. Cas. 294.

——S. 114, Illus. (g)—Document not produced.

Where a person does not produce certain document proved to be in his possession, the only reasonable inference to be drawn from that fact is, that, if produced, it would show something which would be adverse to him. A.I.R. 1942 Rang. 52 = 199 Ind. Cas. 110.

——S. 114, Illus. (g)—Documents not produced.

Even if the burden to prove something does not lie on a party, the Court can draw an adverse inference if such party having important documentary evidence in his possession throwing light on the fact withholds it from Court. A.I.R. 1941 Rang. 108 = 1940 Rang. L.R. 659 = 194 Ind. Cas. 270.

——S. 114, Illus. (g)—Document not produced.

Where a document relied upon by a party is in his possession but not produced, the inference is that the document, if produced, would go against him. A.I.R. 1940 Lah. 350 = 43 P.L.R. 612 = I.L.R. (1941) Lah. 246 = 190 Ind. Cas. 699.

——S. 114, Illus. (g)—Document not produced.

Where a party to a suit abstains from producing a material document, it is open to the Court to draw an adverse conclusion. A.I.R. 1935 Mad. 310 = 1935 M.W.N. 405 = 41 M.L.W. 298 = 157 Ind. Cas. 278.

——S. 114, Illus. (g)—Documents not produced by litigant and not pressed by other party—Presumption, if any, arises.

It is open to a litigant to refrain from producing any documents that he considers irrelevant. If the other litigant is dissatisfied, it is for him to apply for an affidavit of document and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails to do so, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents. 154 Ind. Cas. 48 = 1 B.R. 300.

——S. 114, Illus. (g)—Documents not produced.

Before an adverse inference can be drawn under S. 114, Illus. (g), the Court must be satisfied that the documents are in existence and could be produced. A.I.R. 1933 P.C. 87 = 37 C.W.N. 657 = 37 L.W. 521 = 64 M.L.J. 413 = 1933 M.W.N. 357 = 57 C.L.J. 222 = 35 Bom. L.R. 500 = 142 Ind. Cas. 220 (2) (P.C.).

——S. 114, Illus. (g)—Document not produced.

Discovery of a party's title-deeds cannot be ordered upon what may be a mere fishing application. But where he has laid a foundation for it, a presumption may be available to him against the defendants from non-production of title deeds in some cases. A.I.R. 1931 Pat. 426 = 10 Pat. 630 = 13 P.L.T. 405 = 135 Ind. Cas. 85.

——S. 114, Illus. (g)—Document not produced—Promissory-note—Loss not accounted for—Adverse presumption.

Where the plaintiff did not account for non-production of the promissory note on which he sued and the defendant contended that nothing was due under the note and that it contained the endorsement 'excused.'

Held, that under those circumstances the Court could presume that the note if produced would be to the detriment of the plaintiff. 1930 M.W.N. 417.

——S. 114, Illus. (g)—Document not produced.

Where one of the parties to a suit refuses to produce the documents in his possession though ordered by the Court to do so, whatever suspicion may be cast upon his conduct by this refusal cannot alter conclusions which really turn upon the construction of documents which are before the Court. 27 Bom. L.R. 746 = A.I.R. 1925 P.C. 177 (P.C.).

——S. 114, Illus. (g)—Document not produced—Defeasance in it can be presumed.

Every deed being the best evidence of its own contents, its non-production raises the presumption that it contains some defeasance ; in other words, there is some endorsement on the document which the plaintiff does not like. 97 Ind. Cas. 82 = 49 All. 78 = 24 A.L.J. 964 = A.I.R. 1926 All. 741.

——S.114, Illus. (g)—Document not produced—Inference.

Where relevant documents in possession of a party is not produced, the Court cannot but draw an inference adverse to that party. 71 Ind. Cas. 849 = 36 Cr.L.J. 336 = A.I.R. 1923 Cal. 247.

——S. 114, Illus. (g)—Document not produced—Possession of document denied—Old document—No presumption.

Where the defendants deny that the deed is in their possession and there is nothing to establish that the denial is false :

Held, in the case of a very old mortgage the possibility of its having been lost and being no longer in existence is naturally much greater than in the case of a mortgage of recent date, and under the circumstances it is not safe to draw the inference that the deed is in possession of the defendants and if produced, it would go against them. 71 Ind. Cas. 654 = A.I.R. 1923 All. 441.

——S. 114, Illus. (g)—Document not produced.

It is difficult to distinguish between failure to produce evidence and the non-production of it in time, for the purpose of drawing an inference. To hold that no adverse inference could be drawn against a party who had offered to produce evidence at a late stage would often be tantamount to giving him the advantage of having produced it in time. When documents are not produced in time the Court may infer either that they do not exist or would not support the party who should have produced them. *De non apparentibus et non existentibus eadem est ratio.* 70 Ind. Cas. 278 = 25 O.C. 286 = A.I.R. 1923 Oudh 59.

——S. 114, Illus. (g)—Documents—Non-production.

Non-production of documents affords presumption against the defaulting party. 71 Ind. Cas. 887 = 4 P.L.T. 285 = 1923 P.H.C.C. 33 = A.I.R. 1923 Pat. 218.

——S. 114, Illus. (g)—Document not produced.

Where in a case where the question is whether a lease is a permanent or a temporary one, the lessee does not produce the lease deed though it is in his possession, the inference to be drawn is that the lease was only a temporary one. 68 Ind. Cas. 653 = 3 P.L.T. 485 = A.I.R. 1923 Pat. 111.

——S. 114, Illus. (g)—Document not produced.

If the original title-deed of the plaintiff is not produced in the first Court in a suit for recovery of possession the appellate Court may draw an inference adverse to the plaintiff. 62 Ind. Cas. 697 (Cal.).

——S. 114, Illus. (g)—Document not produced.

A document though not produced in a previous criminal case between the same parties may be produced in a subsequent suit, but its previous non-production affects its value. 57 Ind. Cas. 949 (Cal.).

——S. 114, Illus. (g)—Document not produced—Inference.

Plaintiff kept back certain books and documents relating to the matters in controversy but there had been no 'order for discovery'. *Held*, that the suit could not be dismissed though an adverse inference may be drawn from the non-production of documents. 38 All. 5 = 13 A.L.J. 831 = 30 Ind. Cas. 525.

——S. 114, Illus. (g)—Document not produced because privileged—No adverse inference should be drawn. 40 Cal. 898 = 18 C.W.N. 185 = 23 Ind. Cas. 25.

——S. 114, Illus. (g)—Document not produced—Suppression of will.

It may be presumed as against a person who is in a position to produce a will but does not do so, that the will if produced, would be unfavourable to him. But the Courts will not make any presumption as to actual contents of the will or as to the legacies under it and persons claiming the benefit of such provisions must prove them. 25 Mad. 367 ; 29 I.A. 76, foll. 16 Ind. Cas. 815 (Mad.).

——S. 114, Illus. (g)—Document not produced.

Where a party does not produce a document in his possession the court may presume that its production will damage his case. S. 4 of the Evidence Act renders it a judicial discretion to decide in each case whether the fact which under S. 114 may be presumed by the non-production of the document has been proved by virtue of that presumption. Circumstances may, however, induce the Court to call for confirmatory evidence. 1 A.L.J. 121.

——S. 114, Illus. (g)—Document produced at late stage.

Court refusing documents produced by party as too late—Party opposing their production cannot ask Court to draw adverse inference from non-production. A.I.R. 1940 Mad. 273 = 1939 M.W.N. 841.

(g) Evidence not produced.

——S. 114, Illus. (g)—Evidence not produced.

Where in a suit by a member of a joint Hindu family challenging an alienation made by the manager for the discharge of certain alleged debts, proof about the non-existence and the non-payment of those debts is in possession of the joint family of which the plaintiff is a member, he cannot be allowed to take advantage of the abstract doctrine as to the onus of proof and conceal from the Court the evidence which should have been in his possession and which would assist the Court in arriving at a correct decision. A.I.R. 1950 E.P. 272.

——S. 114, Illus. (g)—Evidence not produced—Presumption.

When the evidence is available and is not produced, it must be held that it is being withheld with a motive. A.I.R. 1945 Lah. 293 = 47 Cr.L.J. 277 = 222 Ind. Cas. 234.

——S. 114, Illus. (g)—Evidence not produced.

Adverse inference from non-production of evidence is one of the strongest presumptions known to law and the law allows it against the party who, by his tortious acts, withholds the evidence by which the nature of his case would be manifested. That presumption is applied in India.

It is open to a litigant to refrain from producing any evidence, not forming part of his case, that he considers irrelevant ; if the other litigant is dissatisfied, it is for him to apply for its production and inspection as evidence in the cause if he thinks proper ; if this is not done, the Court is not entitled at his suggestion to draw an adverse inference, and the presumption will not arise when there is sufficient explanation. A.I.R. 1935 Cal. 39 = 61 Cal. 711 = 154 Ind. Cas. 479.

——S. 114, Illus. (g)—Evidence not produced.

A theory propounded by the defence which could easily have been supported by evidence which the defence deliberately failed to produce cannot be accepted A.I.R. 1933 All. 939 = 35 Cr.L.J. 464 = 147 Ind. Cas. 676 (2).

——S. 114, Illus. (g)—Evidence not produced.

Where a party does not produce certain books saying that they have been destroyed and the matter dealt by the books could be easily proved by secondary evidence which is admittedly in the possession or power of the party and which it does not attempt to place on the record, the opposite party is entitled to the presumption that these books if produced would have gone against the contentions of the party not producing them. 120 Ind. Cas. 615 = A.I.R. 1930 Lah. 364.

——S. 114, Illus. (g)—Evidence not produced.

Best evidence not produced though available raises adverse presumption. Inconsistent pleas and not proving pleas raised, indicate falsity of defence. 114 Ind. Cas. 592 = 1929 A.L.J. 261 = 49 C.L.J. 308 = 33 C.W.N. 430 = 29 M.L.W. 501 = 6 O.W.N. 423 = 31 Bom. L.R. 721 = 11 P.L.T. 101 = A.I.R. 1929 P.C. 95 = 57 M.L.J. 565 (P.C.).

——S. 114, Illus. (g)—Evidence not produced—Adverse inference.

In appraising the value to be given to conflicting oral testimony the Court ought to attach due weight to the fact that documentary evidence which might have concluded the case one way or another and for the custody of which one of the parties is responsible, has not been brought before it. Such an omission weakens seriously the case of the party who is or ought to be in possession of such evidence. 43 Cal. 707 = 43 I.A. 73 = 20 C.W.N. 802 = 14 A.L.J. 621 = (1916) 1 M.W.N. 406 = 31 M.L.J. 1 = 18 Bom. L.R. 490 = 3 L.W. 556 = 24 C.L.J. 116 = 20 M.L.T. 267 = 33 Ind. Cas. 583 (P.C.).

——S. 114, Illus. (g)—Evidence not produced.

A person need not keep careful proof of matters, which he is not bound by law to prove. 25 P.W.R. 1910 = 24 P.W.R. 1910 = 5 Ind. Cas. 891.

(h) Failure of party to call witness.

——S. 114, Illus. (g)—Failure of party to call principal witness—Adverse inference.

Where a party fails to call as his witness the principal person involved in the transaction who is in a position to give a first-hand account of the matters of controvesy and throw light on them and who can refute all the allegations of the other side, it is legitimate to draw adverse inference against the party who has not produced such principal witness. 47 C.L.J. 222, relied on. 83 C.L.J. 338 = A.I.R. 1949 Cal. 457.

——S. 114, Illus. (g)—Failure to examine witness.

The omission of a party on whom the onus lay, to examine a particular witness gives rise to a presumption adverse to him. A.I.R. 1940 Nag. 293 = I.L.R. (1940) Nag. 446 = 1940 N.L.J. 685 = 193 Ind. Cas. 473.

——S. 114, Illus. (g)—Failure to examine witness.

Tort—Defamation—Imputation of bad character towards step-daughter—Defence of truth—Plaintiff not examining step-daughter :

Held, that no presumption could be drawn against the plaintiff. A.I.R. 1936 Rang. 332 = 164 Ind. Cas. 385.

——S. 114, Illus. (g)—Failure to call witness.

As an attesting witness to a document produced by a party, it is the duty to tender him as a witness and when he keeps him out of the witness-box, it would necessarily be presumed against the party that if he had been produced in Court the witness would not have supported the party. A.I.R. 1933 Nag. 379 = 29 N.L.R. 298 = 149 Ind. Cas. 1200.

——S. 114, Illus. (g)—Failure to call witness.

The failure of the prosecution to take any steps in regard to any person connected intimately with the alleged crime is a circumstance which raises an inference adverse to the prosecution. A.I.R. 1931 Lah. 408 = 32 Cr.L.J. 818 = 132 Ind. Cas. 185.

——S. 114, Illus. (g)—Failure to call witness.

Failure to examine one's own assistants who might have spoken in one's favour was held to justify the forming of adverse presumptions. 84 Ind. Cas. 274 = 3 Bur. L.J. 203 = A.I.R. 1924 Rang. 356.

——S. 114, Illus. (g)—Failure to call witness—Presumption—Rebuttal of.

If a party wishes not to have a presumption raised against him by the fact that an important witness has not been called ; he should exhaust to the utmost of his power every means to bring that witness before the Court. 68 Ind. Cas. 993 = 35 C.L.J. 175 = 49 Cal. 345 = A.I.R. 1923 Cal. 63.

——S. 114, Illus. (g)—Failure to call witness.

When a fact can be proved by a witness who can be called and is not called, a party is not entitled to rely on an inference which, however plausible and probable, is not the only possible inference. 67 Ind. Cas. 761 = 24 Bom. L.R. 513 = A.I.R. 1923 Bom. 155.

——S. 114, Illus. (g)—Failure to call witness.

No inference should be drawn against a party for not producing a material witness where the question of the absence of such witness was not raised at the trial. 41 All. 63 = 21 O.C. 328 = 23 C.W.N. 577 = 6 O.L.J. 168 = (1919) M.W.N. 490 = 45 I.A. 284 = 49 Ind. Cas. 540 (P.C.).

——S. 114, Illus. (g)—Failure to call witness.

The presumption in S. 114, Illus. (g), applies where a counsel in a case ought to have been called as a witness but is not so called. Where a document is privileged, no adverse inference should be drawn from its non-production. 40 Cal. 898 = 18 C.W.N. 185 = 23 Ind. Cas. 25.

——S. 114, Illus. (*g*)—Failure to call witness.

Where the evidence adduced by the plaintiff, if believed, established a strong case which it was incumbent on the defendants to meet by personal denials, and all that they did was to produce evidence on collateral matters the plaintiff was held entitled to a decree. An important witness who according to the plaintiff had carried the plaint jewels to the defendants, for safe custody, ought *prima facie* to have been called by the plaintiff. But she being a relative of the defendants having left the plaintiff's service only recently and having been summoned by the defendants it was not unnatural that the plaintiff would have left the defendants to call her. 15 C.W.N. 717 = 10 M.L.T. 216 = 10 Ind. Cas. 963 (P.C.).

(*i*) Murder case.

——S. 114, Illus. (*g*)—Murder case.

Where a wife, alleging that her husband is dead, fails to produce such evidence as she ought to know a presumption arises against her. 117 Ind. Cas. 209 = 12 N.L.J. 51 = A.I.R. 1929 Nag. 127.

(*j*) Non-appearance of party as witness.

——S. 114, Illus. (*g*)—Non-appearance of party as witness—Whether affects truth of his case.

It is the bounden duty of a party to a suit who personally knows the whole circumstances to give evidence and to submit to cross-examination. Non-appearance, as a witness, would be the strongest possible circumstance to discredit the truth of his case. A.I.R. 1949 H.P. 4 ; 7 ; 11.

——S. 114, Illus. (*g*)—Non-appearance of party as witness.

A party's failure to go into the witness-box raises a strong presumption against the truth of her case. The fact of her being a *pardanashin* lady is not a sufficient excuse for her not getting herself examined even on commission. A.I.R. 1940 Oudh 266 = 1940 O.W.N. 375 = 1940 A.W.R. 175 = 187 Ind. Cas. 317.

——S. 114, Illus. (*g*)—Non-appearance of party as witness.

Held, that the absence of the defendant from the witness-box led to inferences as to the honesty of his case which, of themselves, were well nigh fatal to the possibility of its success. A.I.R. 1938 P.C. 40 = 3 B.R. 589 = 1937 O.W.N. 641 = 1937 A.W.R 1054 = 31 S.L.R. 517 = 168 Ind. Cas. 993 (P.C.).

——S. 114, Illus. (*g*)—Non-appearance of party as witness.

Party's failure to go in witness-box raises a strong presumption against the truth of its case. The fact that the party is a *pardanashin* lady is not a sufficient excuse. 1937 O.W.N. 1022.

——S. 114, Illus. (*g*)—Non-appearance of party as witness.

Where the widow in a suit for dower does not go into the witness-box to prove her case, this should not be treated as a circumstance against her. A.I.R. 1936 Lah. 183 = 38 P.L.R. 337 = 161 Ind. Cas. 300.

——S. 114, Illus. (*g*)—Non-appearance of party as witness.

Where a person has been performing the worship in an institution and is the best informed person about its nature, his failure to give an account of the nature of the worship may be taken as an indication that he could say nothing convincing to support the case that Sikh worship was not conducted by him during his term of office. A.I.R. 1934 Lah. 398 = 36 P.L.R. 280 = 151 Ind. Cas. 32.

——S. 114, Illus. (*g*)—Non-appearance of party as his own witness.

If a party appears as a witness of opposite party, the Court, before proceeding to record his statements, should ask him or the Counsel if he does not propose to appear as his own witness. If not, the Court may be left to draw any adverse inference, which may justifiably be drawn from his refusal to appear in witness-box, and subject himself to cross-examination. If the party, however, insists on examining the opposite party as his own witness, the Court should be careful not to allow him to cross-examine his own witnesses because, unless the witness is declared hostile, the party producing the witness has no rights to cross-examine his own witness. A.I.R. 1934 Lah. 126 = 35 P.L.R. 28 = 148 Ind. Cas. 1040.

——S. 114, Illus. (*g*)—Non-appearance of party as witness.

Failure of a party bringing a case to give evidence on matters within his knowledge, his own religious beliefs and the form of worship practised by him is a weighty factor, when the value of the case put forward on his behalf is appraised. A.I.R. 1934 Lah. 63 (2) = 148 Ind. Cas. 45.

——S. 114, Illus. (*g*)—Non-appearance of party as witness.

When a party does not go into the witness-box to support his allegations regarding facts which were within his special knowledge, a strong presumption is raised against him. 138 Ind. Cas. 525 = 33 P.L.R. 207.

——S. 114, Illus. (*g*)—Non-appearance of party as witness.

The fact that a party does not appear in the witness-box is a circumstance going very strongly against him. He runs a great risk if he does not enter into the witness-box and gives evidence in his case upon facts which are directly within his knowledge and which relates to the matter in controversy. 116 Ind. Cas. 555 = A.I.R. 1930 Lah. 401.

——S. 114, Illus. (*g*)—Non-appearance of party as witness.

Where the plaintiffs are the best persons to give evidence as to the "interest" possessed by them in a religious institution to prove *locus standi* for the purposes of S. 92, Civil P.C., and they merely put the defendants into the witness-box, their failure to go into the witness-box goes strongly against them. 11 Lah. 142 = 31 P.L.R. 234 = A.I.R. 1930 Lah. 1.

——S. 114, Illus. (*g*)—Non-appearance of party as witness.

Where a party abstains from giving evidence in his own case, the presumption should be that truth lay on the other side. 112 Ind. Cas. 596 = A.I.R. 1929 Oudh 126.

——S. 114, Illus. (*g*)—Non-appearance of party as witness.

If the defendant does not choose to go into the witness-box on his own behalf, that is a matter for himself to decide, but in an ordinary case, the Court is entitled to consider that as a point against the defendant. One party is not bound to issue a summons to the other, and unless the latter gives evidence on his own behalf so as to give the former an opportunity of cross-examining him, the Court is entitled to infer everything against him. 66 Ind. Cas. 943 = 24 Bom. L.R. 115 = A.I.R. 1922 Bom. 81.

(*k*) Preliminary enquiry.

——S. 114, Illus. (*g*)—Preliminary enquiry—Defence not disclosed in earlier stages—Inference.

If neither in their examination before the Committing Magistrate, nor in that in the Sessions Court, accused disclose what their exact defence is to be, and they only enter on their defence of *alibi*, a certain presumption arises against them as to their guilt of offence. 112 Ind. Cas. 51 = 29 Cr.L.J. 963 = 11 A.I.Cr.R. 302 = A.I.R. 1929 Nag. 36.

——S. 114, Illus. (*g*)—Preliminary enquiry.

There is no duty cast upon an accused person to disclose his defence in the course of a preliminary enquiry, and no inference can be drawn against the accused for non-disclosure of his defence at that stage. 102 Ind. Cas. 899 = 28 Cr.L J. 611 = 8 P.L.T. 656 = 8 A.I.Cr.R. 297 = A.I.R. 1927 Pat. 292.

(*l*) Road Cess returns.

——Ss. 114, Illus. (*g*), 32—Road cess returns as evidence in suit for enhancement under the Bengal Tenancy Act (8 of 1885) S. 7—*See* BENGAL TENANCY ACT (8 of 1885), S. 7. 8 C.W.N. 1 = 30 C. 1033 = 30 I.A. 177 (P.C.).

(*m*) Scope.

——S. 114, Illus. (*g*)—Scope.

The presumption indicated in Illus. (*g*) to S. 114 of the Act cannot displace a contrary inference supported by adequate evidence. 63 Ind. Cas. 740 = 13 M.L.W. 293 (P.C.).

(*n*) Settlement record—Non-production by Government.

——S. 114, Illus. (*g*)—Settlement record—Non-production by Government—No presumption against them.

Where Government had to prove that certain service inam lands were excluded from the zamindari but failed to produce the record of the original settlement it cannot be suggested that it was withheld because it was against the Government. 117 Ind. Cas. 292 = A.I.R. 1929 Mad. 399.

——S. 114, Illus. (*g*)—Settlement record—Not produced—Presumption against Government.

Where permanent settlement records in the special knowledge and custody of Government are not produced, a presumption could be raised, against the claim of the Government to resume certain lands as having been excluded from assessment at the time of the permanent settlement. 38 Mad. 620 = (1913) M.W.N. 959 = 14 M.L.T. 514 = 26 M.L.J. 39 = 21 Ind. Cas. 871.

Illustration (*h*).

——S. 114, Illus. (*h*)—Refusal to answer question—Inference.

When a witness who is summoned to prove a particular fact refuses to enter the box and also challenges the other party to ask the Court to draw an adverse inference against him by reason of his non-examination, the only course open to the Court is to infer that if he had gone into the box, he would have given evidence which would prove what the other party wanted to prove. A.I.R. 1943 Mad. 641 = 56 M.L.W. 389 = 1943 M.W.N. 453 = (1943) 2 M.L.J. 110 = 212 Ind. Cas. 277.

——S. 114, Illus. (*h*)—Refused to answer question.

The fact of knowledge about the coins being counterfeit can be inferred from his refusal to give explanation of its possession and his conduct and circumstances of the case. A.I.R. 1943 Oudh 335 = 1943 O.W.N. 113 = 1943 A.W.R. 31 = 44 Cr.L.J. 542 = 206 Ind. Cas. 606.

——S. 114, Illus (*h*)—Refusal to answer question.

Persons accused of an offence may not have a very satisfactory explanation to offer for the circumstances in which they were found and they may prefer to say nothing, although the allegations of the prosecution make the case very much more serious than would the mistake, to which they might otherwise have admitted. One cannot, in all cases, draw an adverse inference from the fact that the persons accused refuse to give their account of what happened. A.I.R. 1937 Rang. 516 = 39 Cr.L.J. 187 = 172 Ind. Cas. 902.

——S. 114, Illus. (*h*)—Refusal to answer question—Inference.

Where the Assistant Sub-inspector of Police is asked to remember the date of the arrest of the accused, but he refuses to refresh his memory, the Court may draw an inference against him. A.I.R. 1936 Lah. 707 = 37 Cr.L.J. 940 = 38 P.L.R. 881 = 164 Ind. Cas. 373.

——S. 114, Illus. (*h*)—Refusal to answer question.

Where a person arrested for murder admitted to the Police during investigation that he, along with his co-accused, committed the murder and buried the ornaments missing from the person of the murdered girl, and he produced them from a place very near where the girl was murdered, but neither then nor at any other time did he give any explanation of his connection with the ornaments :

Held, that the Court was entitled to draw the reasonable inference that the accused had taken part in the murder. A.I.R. 1933 Mad. 233 = 64 M.L.J. 88 = 1932 M.W.N. 801 = 37 M.L.W. 220 = 56 Mad. 231 = 34 Cr.L.J. 481 = 143 Ind. Cas. 46.

——S. 114, Illus. (*h*)—Refusal of accused to sign—Adverse inference.

If the accused refuses to write or to give his finger impression in Court, an adverse inference may even be drawn against him in respect of the charge on which he is brought to trial. A.I.R. 1932 Bom. 406 = 56 Bom. 304 = 34 Bom. L.R. 598 = 33 Cr.L.J. 666 = 138 Ind. Cas. 708.

——S. 114, Illus. (*h*)—Refusal to give thumb impression.

Where a person was asked in Court whether he was willing to give his thumb impression and he declined,

Held, that the Court was entitled to draw an inference adverse to him upon his denial to do so. 106 Ind. Cas. 212 = 6 Pat. 623 = 8 P.L.T. 847 = 28 Cr.L.J. 1028 = 9 A.I.Cr.R. 173 = A.I.R. 1928 Pat. 103.

——S. 114, Illus. (*h*)—Refusal to answer.

Under S. 114, Illus. (*h*) if a man refuses to answer a question, which he is not compelled to answer by law, the Court may presume that the answer, if given, would be unfavourable to him. A.I.R. 1931 Lah. 178 = 32 Cr.L.J. 684 = 131 Ind. Cas. 277.

——S. 114, Illus. (*h*)—Refusal to answer—Irrelevant question.

When the question in issue was whether transfer by one *M* was nominal, he was asked what his income was and how much income-tax he paid. *M* refused to answer.

Held, that the Court need not disbelieve his evidence merely because of those answers ; nor need it presume from his refusal to answer the question as to his income, that the answer if given would have been infavourable to him ; it was too much to ask a witness what his income was in a case of this kind. 83 Ind. Cas. 856 = 25 Bom. L.R. 689 = 47 Bom. 809 = A.I.R. 1923 Bom. 305.

Illustration (*i*).

——S. 114, Illus. (*i*)—Discharge—Presumption.

The Court may presume when a document creating an obligation is in the hands of the obligor that the obligation has been discharged. A.I.R. 1928 All. 16, Rel. on. 121 Ind. Cas. 730 = 12 L.L.J. 21 = A.I.R. 1930 Lah. 443.

——S. 114, Illus. (*i*)—Discharge—Burden of proof.

The strength of the presumption, which might be raised when a document creating the obligation, is produced by the obligor, varies in different circumstances. The burden shifts as the evidence is developed; and when both the parties produce their evidence, the question on whom the initial onus lay, ceases to be of much importance. 68 Ind. Cas. 892 = 25 O.C. 125 = 10 O.L.J. 159 = A.I.R. 1922 Oudh 211.

——S. 114, Illus. (*i*)—Discharge—Mortgage deed—Possession of by obligor.

In a suit on mortgage, defendants set up a case of discharge, relying on the fact that the mortgage-deed had come into their possession and purported to bear an endorsement of discharge by the plaintiff's father. Plaintiffs alleged that the document was stolen from them. It was found that the defendants had deposited with the plaintiff's father the title-deeds of the mortgaged property at the time of the mortgage and they were still in possession of the plaintiffs.

Held, that that fact considerably weakened the presumption in favour of defendants arising from the possession of the mortgage document. 105 Ind. Cas. 263 = 29 Bom. L.R. 1388 = 46 C.L.J. 292 = 39 M.L.T. 290 = 1927 M.W.N. 709 = 9 P.L.T. 1 = A.I.R. 1927 P.C. 261 = 53 M.L.J. 295 (P.C.).

——S. 114, Illus. (*i*)—Discharge—Pro-note in the hand of maker—Presumption.

If the pro-note is in the hands of the maker thereof, there is a presumption that it has been paid off. If the drawee alleges that the maker came into possession of the note unlawfully the onus is on him to prove it. 10 L.B.R. 26 = 12 Bur. L.T. 116 = 52 Ind. Cas. 650.

——S. 114, Illus. (*i*)—Discharge—Mortgage bond produced by mortgagee.

Where a usufructuary mortgage was executed in 1876 but the mortgagee was not given possession of the property and he did not make any demand or attempt to enforce the bond until his death and in 1908 the heirs of the mortgagee sued on the bond ; *held*, that under the circumstances it must be presumed that the mortgage was satisfied, notwithstanding the fact that

the bond was produced by the plaintiff. 46 Ind. Cas 676 (Nag.).

——S. 114, Illus. (*i*)—Discharge—Bond in possession of obligor—Presumption.

If a document creating an obligation is in the hands of the obligor the obligation may be presumed to be discharged but the Court should consider that though the bond is in the possession of the obligor under the circumstances of the case he may have it stolen. (1917) P.H.C.C. 186 = 3 Pat. L.W. 335 = 39 Ind. Cas. 858.

——S. 114, Illus. (*i*)—Discharge—Burden of proof—Suit on mortgage bond—Bond in possession of defendant.

When in a suit on a mortgage bond the defendant produces the original of the mortgage bond with the endorsement of payment, the burden is cast on plaintiff of showing that the debt is outstanding. 41 Bom. 23 = 18 Bom. L.R. 779 = 36 Ind. Cas. 562.

——S. 114, Illus. (*i*)—Discharge—Original deed bearing the endorsement of payment produced by defendant—Presumption.

Where a defendant produced the original bond of mortgage with an endorsement of payment, it was for the plaintiff to prove that the debt was still outstanding. 36 Ind. Cas. 562 (Pat.).

——S. 114, Illus. (*i*)—Discharge—Bond produced by the defendant—Endorsement of discharge absent.

Illustrations (*i*) to S. 114 of the Evidence Act only refers to presumptions that may be raised. It does not follow that such presumptions would shift the onus of proof. Where in a suit on a mortgage the defendant pleaded discharge and produced the bond, but there was no endorsement of discharge written thereon and the person through whom the money was said to have been paid was not examined, the Lower Courts were right in holding that the mere production of the bond was not enough to shift the burden of proving the discharge which lay on the defendant. 2 M.L.W. 604 = 18 M.L.T. 94 = (1915) M.W.N. 638 = 30 Ind. Cas. 258.

——S. 114, Illus. (*i*)—Discharge—Mortgage deed produced by mortgagor—Presumption—Payment—Onus.

Where the mortgagor produces the mortgage document from his custody the presumption is that the bond has been discharged and the onus is on the mortgagee to prove that it was not. 20 Ind. Cas. 308 (All.).

——S. 114, Illus, (*i*)—Discharge—Production of mortgage bond by mortgagor—Presumption.

The production of the mortgage bond by the mortgagor is presumptive evidence that the debt has been paid off. 14 M.L.T. 117 = 25 M.L.J. 329 = 20 Ind. Cas. 792.

——S. 114, Illus. (*i*)—Discharge—Presumption—Burden of proof.

Suspicion though a ground for scrutiny cannot be made the foundation of decision. The production of a bond with an endorsement of payment casts upon the plaintiff the obligor the burden of proving that the debt is still outstanding, *i.e.*, that the bond came into defendant's hands by dishonest means, and that the signatures to the endorsement are either forgeries or unauthorised. 34 All. 511 = 39 I.A. 68 = 12 M.L.T. 392 = 15 O.C. 278 = 14 Bom. L.R. 1073 = 10 A.L.J. 373 = 17 C.W.N. 49 = 16 C.L.J. 629 = (1912) M.W.N. 1052 = 23 M.L.J. 741 = 17 Ind. Cas. 396 (P.C.).

——S. 114, Illus. (*i*)—Discharge—Document in the custody of mortgagor.

Where defendant pleads discharge of a mortgage and the document is found to have been tampered with and is in possession of the mortgagor, and the mortgagee is not able to account satisfactorily for the mortgagor's possession, the Court would be entitled to draw a presumption of discharge. The presumption, however, may be rebutted. 16 Ind. Cas. 439 (Mad.).

——S. 114, Illus. (*i*)—Discharge—Mortgage—Presumption.

The presumption, of English law, that the mortgage debt should be considered as paid if 20 years have passed since the date of mortgage, does not apply in India. 6 N.L.R. 20 = 5 Ind. Cas. 701.

——S. 114, Illus. (*i*)—Discharge—Promissory note and security in the hands of the debtor—Presumption.

When an instrument of debt is in the hands of the debtor, the presumption is strong that the debt has been discharged, but it can be rebutted by evidence. The *onus* of proof is on the creditor to show it was not discharged. 4 Bom. L.R. 378 = 6 C.W.N. 401 = 29 C. 334 = 29 I.A. 43 (P.C.).

——S. 114, Illus. (*i*)—Granting hundi for debt due is presumably only conditional payment and returning of bond for debt due does not rebut presumption.

It is a question of fact to be decided in each particular case whether the parties intended the subsequent hundi to be an absolute or a conditional payment of the original debt, and the presumption is that the effect of giving or taking of bill or note is that the debt was conditionally paid. This presumption is not rebutted by the fact that previous promissory notes for the original debt were returned : 4 Lah. 151, foll. 92 Ind. Cas. 1015 = 7 Lah. 113 = 8 L.L.J. 3 = 27 P.L.R. 75 = A.I. R. 1926 Lah. 328.

——S. 114, Illus. (*i*)—Lost document—Suit on—Defendant producing document—Onus of discharge.

In a suit for recovery of money on the basis of a lost agreement the defendant produced the agreement and alleged that the obligation had been discharged. The Court placed the burden of proof on the plaintiff to show that the agreement was lost and had not been discharged :

Held, that the presumption under S. 114, Illus. (i) was only a piece of evidence in defendant's favour, and did not shift the onus of proof which was on the defendant to show that he had discharged his obli-

gation and the burden was wrongly thrown on the plaintiff. A.I.R. 1931 Lah. 299 (1) = 134 Ind. Cas. 495 (2).

——S. 114, Illus. (*i*)—Lost bond—Loss of hundies —Obligor pleading discharge.

Where the plaintiff sued for money due upon hundis but alleged their loss, whilst defendant admitted execution but pleaded payment and subsequent destruction of the documents :

Held, that there is no presumption that the hundies have been discharged. 89 Ind. Cas. 234 = 6 Lah. 297 = 26 P.L.R. 481 = A.I.R. 1925 Lah. 521.

——S. 114, Illus. (*i*)—Lost bond—Payment pleaded—Presumption.

Where a plaintiff sues for money due upon a bond but alleges its loss, and the defendant admits its execution but pleads payment the onus lies on the defendant to prove payment, either by the production of the bond or by other evidence or both. And if the defendant does not produce the bond, the question of its loss is only material in so far as it may raise a presumption one way or other under S. 114. 2 O.L.J. 498 = 32 Ind. Cas. 349.

——S. 114, Illus (*i*)—Lost documents—Loss not proved —Scope of the section.

Where a mortgage document was lost which was relied on by one party for certain payments made by him which were endorsed upon the document and where the other party was not able to prove the loss it was *held*, that the presumption under S. 114 as regards lost documents could not be used in favour of the party relying upon it. 13 Ind. Cas. 60 (All.).

——S. 114, Illus. (*i*)—Mortgage bond in possession of mortgagor—Presumption.

Where the evidence led and the findings thereupon clearly establish that the full amount of the mortgage money was paid and not only that but the mortgage bond was produced from the custody of the mortgagor, there follows a presumption under S. 114, Evidence Act [*vide* Illus. (*i*)] that the mortgage had been discharged. A.I.R. 1942 Pat. 315 = 8 B.R. 485 = 23 P.L.T. 46 = 199 Ind. Cas. 30.

——S. 114, Illus. (*i*)—Mortgage deed produced by mortgagor with stamp cancelled—Presumption.

When a mortgage-deed is produced by the mortgagor with the stamps punched in the ordinary way, though the production will raise a presumption that it had been paid up, this will not help to prove that it had been paid up before a particular date. A.I.R. 1933 Rang. 61 (2) = 144 Ind. Cas. 175.

——S. 114, Illus. (*i*)—Mortgage-deed endorsed by mortgagee as fully satisfied—Presumption.

The presumption under Illus. (*i*) would be the stronger when the instrument of obligation bears an endorsement of full satisfaction made by the mortgagee himself. Anybody dealing with the mortgagor would be perfectly justified in acting on the footing that the debtor gained the document in a perfectly honest manner by discharging his obligation. The creditor who puts the debtor in that position by his failure to take the necessary precautions against the risk of fraud being committed by the latter must bear the consequences of his own negligence. A.I.R. 1934 Nag. 29 = 30 Nag. L.R. 196 = 154 Ind. Cas. 904.

——S. 114, Illus. (*i*)—Mortgage bond in possession of mortgagor—Court believing mortgagee's evidence that debt has not been satisfied—Presumption under S. 114, Illus. (i) does not arise.

Where the Judge has believed the mortgagee's evidence that the debt has not been satisfied, and that he was unable to recover the mortgage money, there is no room for the application of a presumption under S. 114, Illus. (*i*), that the bond has been satisfied because it is in possession of the mortgagor. A.I.R. 1937 Pat. 9 = 17 P.L.T. 644 = 15 Pat. 716 = 3 B.R. 167 = 166 Ind. Cas. 451.

——S. 114, Illus. (*i*)—Obligor and obligee.

Presumption under Illus. (*i*) would arise if the contest had been between the creditor and the debtor. The presumption has much less force when raised between the debtor and the purchaser of the debt than when raised between the original creditor and the debtor. The presumption is strong when the debtor produces the instrument of obligation with an endorsement of payment on it. The strength of the presumption which might be raised when the document creating obligation is produced by the obligor varies in different circumstances. The burden shifts as the evidence is developed and when both the parties produce their evidence, the question on whom initially the onus lay ceases to be of much importance. A.I.R. 1933 Nag. 379 = 29 Nag. L.R. 298 = 149 Ind. Cas. 1200.

——S. 114, Illus. (*i*).—Where in a suit for redemption, plaintiffs filed two receipts purporting to have been executed by defendants, onus of proving that they were genuine or that they bore signatures of defendants, was on the plaintiffs when they (plaintiffs) do not set up any endorsement as regards repayment of mortgage money on the original mortgage-deed in the handwriting of the obligee. 1937 O.W.N. 326.

——S. 114, Illus. (*i*)—Theft of document—No presumption of discharge arises when circumstances led to inference of theft.

The presumption under S. 114 that when a document creating an obligation is in the hands of the obligor the obligation has been discharged is subject to the qualification that when the bond is in the possession of the obligor but the circumstances of the case are such that he may have stolen it, these circumstances are to be considered by the Court in deciding whether the maxim would apply or not. 103 Ind. Cas. 488 = A.I.R. 1927 Pat. 417.

——S. 115.

Synopsis.

1. Acquiescence.
2. Admission.
3. Alteration of position.
4. Arbitration.
5. Altestation.
6. Compromise.
7. Conduct.
8. Consent.
9. Consent decree or order.
   See also Civil P. Code, O. 23, R. 3.
10. Construction of document.
11. Contract.
12. Different subject.
13. Effect of.
14. Election.
15. Equitable estoppel.
16. Estoppel by record.
    See: Evidence Act, S. 115—Judgment.
17. Execution of decree.
18. Execution proceedings.
19. Execution sale.
    See also (1) Civ. P. Code, S. 60.
    Waiver and estoppel.
    (2) O. 21 R. 93—Estoppel.
20. Executor.
21. Fraud.
22. Ignorance of law.
23. Inconsistent pleas.
24. Interpretation.
25. Judgment.
26. Jurisdiction.
27. Laches.
28. Land acquisition.
29. Land-lord and tenant.
30. Licensor.
31. Minor.
    See also: Evidence Act, S. 115—None against law.
32. Mistake.
33. Mortgagor and mortgagee.
34. None against law.
35. None if truth known.
36. Non-production of evidence.
37. Omissions.
    See also: Evidence Act, S. 115—Conduct—Omissions.
38. Parties and privies.
39. Pleadings.
40. Plea under.
41. Pre-emption.
42. Proof of.
43. Questions of law.
44. Recitals.
45. Representations.
46. Reversioner.
47. Scope.
48. Silence.
49. Trustee.
50. Vendor and purchaser.
51. Waiver.
52. Miscellaneous.

1. Acquiescence.

——S. 115—Acquiescence—Transposition of defendant as plaintiff on payment of costs—Contesting defendants accepting costs—If precluded from pleading limitation.

Where in a suit a defendant is transposed to the category of the plaintiff on payment of costs to the contesting defendants, the effect of the acceptance of the costs by the latter would preclude them from challenging the order for transposition, and not from pleading that the suit by the transposed plaintiff is barred by limitation. I.L.R. (1949) 1 Cal. 85.

——S. 115—Acquiescence—Estoppel against statute by conduct and estoppel against pleading, fact entitling person to benefit of statute.

It is true that there can be no estoppel against statute but this does not imply that there can be no estoppel even against a plea of fact which has to be established before the application of the statute can be invoked. A man may not estop himself by any conduct of his, from pleading that an alienation made by him is in contravention of a provision of the Punjab Alienation of Land Act. He may, however, estop himself by such conduct from pleading that he is a member of a tribe to which protection is afforded by the Act. A.I.R. 1946 Lah. 73=47 P.L.R. 385.

——S. 115—Acquiescence—Evidence—Admissibility of document—Objection to.

Where no objection was raised to the admissibility of a document on the score that it was a copy of a copy when the witness who was produced to prove its dontents deposed about it, it cannot be raised at the stage of Letters Paten appeal. A.I.R. 1941 Lah.9=45 P.L.R. 339=211 Ind. Cas. 366.

——S. 115—Acquiescence—Evidence — Admissiblity of document—Objection to.

If once a document is admitted without any objection, no objection can be raised to its admissibility at any later stage of the case. A.I.R. 1944 Lah. 1=45 P.L.R. 325=211 Ind. Cas. 145.

——S. 115—Acquiescence—Ex-parte decree set aside subject to payment of costs—Counsel for plaintiff accepting costs.

The **ex-parte** decree was set aside on payment of costs. The plaintiff's Counsel was not authorized to accept the costs so as to conclude the plaintiff company's right of filing an application for revision:

Held, that unless a conscious decision to abandon the plaintiff's right of filing the application for revision had been taken by the Counsel after a full comprehension of all the facts, the mere fact of his receiving costs mechanically would not have the effect of concluding the plaintiff. A.I.R. 1944 Nag. 161=1944 N.L.J. 134=I.L.R. (1944) Nag. 436=216 Ind. Cas. 184.

——S. 115—Acquiescence—Sufficiency of.

Where a grantee of an **abadi** site creates a usufructuary mortgage and goes out and the mortgagee enters into possession of the site and the house built thereon by the grantee and continues as such for many years when the **lambardar,** sues for possession, the fact that the **labmardar,** with the knowledge of his rights, stands by, without suing for such a long time as would show laches, or would show that he is slow to exercise his remedies, is not sufficient to raise an effective defence of acquiescence. A.I.R. 1939 Nag. 163=1939 N.L.J. 136=182 Ind.Cas. 527=I.L.R. (1941) Nag. 337.

——S. 115—Acquiescence—Abandonment—Rights granted by decree sold by decree-holder—Purchaser purchasing with eyes open and subject to results of pending appeal—Decree reversed and rights becoming worthless—Purchaser cannot say that sale is without consideration.

Where a person under a purchase obtains what he desires, he cannot later be heard to say that as those rights were worth little or nothing, the transaction is void for want of consideration. Consequently where rights granted

by a decree are sold by the decree-holder and the purchaser purchases them with his eyes open and subject to the results of the pending appeal from the decree, he cannot subsequently say that the sale is without consideration, if the decree is reversed in appeal and the rights have become worthless. A.I.R. 1941 Pat. 233 =22 P.L.T. 12=7 B.R. 955=195 Ind. Cas. 664.

——**S. 115—Acquiescence—Abandonment—Act of building not** bona fide—**Plea, if available.**

Where an act of a person of building upon the land is not **bona fide**, he cannot avail himself of the plea of estoppel by acquiescence. A.I.R. 1940 Oudh 164=1940 O.W.N. 462=15 Luck 619=1940 A.W.R. 207=185 Ind. Cas. 467.

——**S. 115 — Acquiescence — Relinquishment of rights with full understanding—If could subsequently be asserted.**

The person relinquishing his right may be prevented from asserting it on the ground of estoppel, if understanding by the executants has been proved. A.I.R. 1939 All. 348=1939 A.L.J. 642=1939 A.W.R. 889= 182 Ind. Cas. 801 (2).

——**S. 115 —Acquiescence—Document admitted in** trial Court without objection—Objection, if can be raised in appeal.

The proper time to object to the admissibility of evidence is at the trial when the evidence is tendered. Where a document is admitted in evidence in the trial Court without any objection, the party is precluded from objecting to its admissibility in appeal. A.I.R. 1939 All. 61=1938 A.L.J. 128=1938 A.W.R. 776= 179 Ind. Cas. 974.

——**S. 115—Acquiescence—Abandonment—Person expending money on another person's land—Essentials for estoppel.**

Where a person expends money on another's land essentials to constitute acquiescence which would estop the true owner, explained. A.I.R. 1938 Lah. 88= I.L.R. (1938) Lah. 296=41 P.L.R. 51=177 Ind. Cas. 198.

——**S. 115—Acquiescence—Abandonment.**

Where the accused does not expressly wish that the examination-in-chief of the witnesses recorded by the previous Magistrate should be treated as part of the record of a subsequent **de novo** trial by the second Magistrate, the accused is not estopped from raising the plea of the illegality of the trial by reason of his acquiescence in the procedure adopted by the Magistrate. A.I.R. 1938 Nag. 493=40 Cr.L.J. 73=1938 N L. J. 309=I.L.R. (1941) Nag. 496=178 Ind. Cas. 465.

——**S. 115 — Acquiescence—Government letting out land to defendant's ancestors for building purposes on monthly ground-rent** — Defendant occupying land for more than 70 years—**Pucca** building built—No intervention by Government—Suit by Government for ejectment.

Defendant's ancestors erected **pucca** building with a great cost on certain **nazul** land let out to them by Government for the purpose of building houses on a monthly ground-rent. There was no Government intervention for 70 years of their occupation. Land was similarly let out in town as well to different people. Suit was brought by the Government against the defendant for arrears of rent and ejectment. The Government was found to have been collecting rent for the land from the defendant for a long period before the suit:

Held, that where such houses were of a permanent nature and not mere temporary huts, the natural presumption would be that the Secretary of State allowed the erection of those houses on understanding that the person who erected the houses would remain in possession as long as the houses stood. It was altogether unreasonable to argue that the inference to be drawn from these circumstances was that the parties acquiesced in an arrangement by which the person erecting the houses of a valuable nature could be dispossessed by a notice of 15 days terminating with a month.

Held, further that from the facts proved the Secretary of State must be taken to have acquiesced in the constructions made by the defendants. A.I.R. 1937 All. 512=1937 A.W.R. 597=1937 A.L.J. 783= 170 Ind. Cas. 944.

——**S. 115—Acquiescence—Essentials.**

The question whether a person has made constructions on a **bona fide** belief that he had good title to the property will depend upon the circumstances of each case. Acquiescence, in order to deprive a man of his rights, must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as to make it fraudulent for him to set up those rights. The plea of acquiescence cannot, therefore, be held as established on the ground that no objection was raised by the plaintiff when a building was constructed on his land and there was long delay in enforcing his rights in respect of the land. When the plaintiff is not aware of his rights it is not his duty to stop the constructions. A.I.R. 1937 Oudh 226=1937 O.W.N. 330=1937 O.L.R. 175=167 Ind. Cas. 870.

——**S. 115—Acquiescence—Person allowing wrong procedure without protest.**

A person who is a party to certain legal proceeding is not entitled to question the legality of the procedure adopted in such proceedings except in the manner authorised by law, that is, by appeal to a higher tribunal and if he allows a wrong procedure to be followed without effective protest, he must be deemed to have acquiesced in it and therefore, to be bound by it. A.I.R. 1937 Oudh 275=13 Luck. 96=1937 O.W.N. 58=166 Ind. Cas. 404.

——**S. 115—Acquiescence.**

Person interested in ancestral property assenting to its alienation by mortgage—Held no proof that he had renounced his proprietary interest in the ancestral property. A.I.R. 1937 Pesh. 69=170 Ind. Cas. 195.

——**S. 115—Acquiescence—Abandonment—Essentials—Plaintiff must know position at the time of acquiescence.**

There can be no acquiescence unless the plaintiff knows the position at the time of acquiescence, but if there has been acquiescence, it will be an answer to the suit for injunction.

Held, that where the plaintiff sold certain plot for residential purposes to the defendant and the defendant built a community Hall on it, there was no breach of covenant since the Hall came within the expression "residential area" and used for residential purposes. A.I.R. 1937 Rang. 387=1937 Rang. L.R. 151=172 Ind. Cas. 292.

——**S. 115—Acquiescence—Abandonment.**

Objection relating to the mode of proof only should be raised when the prosecution seeks to put the document into evidence and where it is raised at a later stage, it does not deserve serious consideration. A.I.R. 1936 Cal. 316=63 C.L.J. 232=37 Cr.L.J. 775=63 C. 1053=163 Ind. Cas. 41.

——S. 115—Acquiescence—Trespasser spending money—Conduct of true owner when acquiescence.

Mere silence, mere inaction, cannot be construed to be a representation. In order to support a case of acquiescence, there must be something more than mere silence or inaction. Inaction or silence in circumstances which require a duty to speak is the foundation of the doctrine. When inaction or silence would amount to fraud or deception, then and then only would the doctrine of standing by or acquiescence be applied.

Where in a suit for possession of land, if the possessor of the legal right does not know at the time when the trespasser is spending money upon his property that the land is his, and if he does not know in addition that the trespasser is acting under a mistaken belief that the property is his, there is nothing wrong if he remains silent. There is nothing fraudulent in his conduct and it cannot amount to acquiescence. A.I.R. 1936 Cal. 711=40 C.W.N. 1370=167 Ind. Cas. 271.

——S. 115—Acquiescence—Waiving necessity of formal proof and objection to inadmissible evidence—Distinction.

There is a clear distinction between waiving the necessity for formal proof of a document, an objection. which, if raised in the trial Court, might have been made good by the opposite party and objecting to the admission of evidence which the law forbids to be received. In the latter case, acquiescence in the Court below is no bar to raising the objection in a superior Court. A.I.R. 1936 Pat. 634=3 B.R. 139=166 Ind. Cas. 209.

——S. 115—Acquiescence—Opposite party not raising objection to documents in trial Court, cannot object in appeal.

The appellant did not raise any objection as to the irrelevancy of the document filed in the trial court or deny that they contained a true and accurate statement of the contents of the original documents:

Held, that they could not take the objection in appeal. A.I.R. 1936 Pat. 600=17 P.L.T. 709=3 B.R. 147=166 Ind. Cas. 262.

——S. 15—Acquiescence—No objection in trial Court—No objection in Appellate Court.

Where a copy of a document has been admitted in evidence in the trial Court without any objection, its admissibility cannot be challenged in the Appellate Court. A.I.R. 1935 Lah. 172.

——S. 115—Acquiescence—Party relying on certain evidence in trial Court—He cannot contend in appeal that the evidence inadmissible.

A party cannot contend in appeal that the evidence, on which he relied in the trial Court, is not admissible and cannot be used against him. A.I.R. 1935 Rang. 44=156 Ind. Cas. 325 (2).

——S. 115—Acquiescence—Setting aside of ex parte decree on payment of costs—Plaintiffs' pleader accepting costs.

Where an **ex parte** decree was set aside without considering the contentions of the plaintiffs, on payment of costs and the plaintiffs' pleader accepted costs but filed an application in revision on the day of re-opeing of the High Court:

Held, that while there was nothing to show that the costs were taken by the plaintiffs' pleader in token of acceptance of the validity of the order, from the plaintiffs' conduct in that he filed the application in revision as soon as the High Court reopened, it appeared that he never proposed to acquiesce in the order of setting aside the **ex-parte** decree and hence, he was not estopped from maintaining the application in revision. A.I.R. 1934 All. 10=153 Ind. Cas. 999 (1).

——S. 115—Acquiescence.

Amendment in order to enable plaintiff to sue on original debt—Amendment allowed on payment of costs:

Held, that the receipt of costs by the defendants did not operate as an estoppel preventing them from raising the question of the validity of the amendment. A.I.R. 1934 Cal. 554=61 Cal. 433=38 C.W.N. 488=150 Ind. Cas. 982.

——S. 115—Acquiescence—Construction of road—Bona fides of defendant—Plaintiff making no protest—Suit for possession—Maintainability.

For a defence of acquiescence to be successful, it is necessary that the defendant should have acted in good faith believing that he had a valid right to do the act in question and that the plaintiff, knowing that the defendant was under this mistaken belief, should have abstained from doing anything to prevent his spending money in doing that act.

Where the defendant constructed a road without taking a written permission from his co-sharers because he trusted them, and the road was meant for the benefit of all of them, and the plaintiff raised no protest when the road was under construction:

Held, that no question of ownership arose and it was enough that the defendant believed **bona fide**, albeit wrongly, that he had the necessary permission from the owners of the land to construct the road. A.I.R. 1934 Oudh 178=11 O.W.N. 379=9 Luck. 538=148 Ind. Cas. 186.

——S. 115—Acquiescence.

Party getting costs subject to which the other party is allowed relief of amendment of plaint—The former will not be allowed to challenge the order unless he accepts the costs expressly reserving his right to challenge the order. A.I.R. 1934 Nag. 163 (1) =30 N.L.R. 347=150 Ind. Cas. 845 (1).

——S. 115—Acquiescence—Abandonment.

Where certain members of a joint Hindu family were aware of the fact of the attachment and putting up for sale of certain mortgages in favour of the family and raised no objection in execution, but one member thereof applied for extension of time to pay the debt:

Held, that such conduct constituted a clear representation that they had no objection for the sale and that they were estopped from maintaining a suit for a declaration that the mortgage-deeds were joint family property and that the sale was, therefore, void. A.I.R. 1933 Oudh 166=10 O.W.N. 58=142 Ind. Cas. 860.

——S. 115—Acquiescence.

Customer of bank, a man of business and well conversant with dealings of bank and always examining entries in his pass book and disputing and calling for explanations as regards entries—Rates of interest charged not stated in entries—Entries yet showing compound interest at monthly rests being charged and debited:

Held, that from continued and persistent acquiescence of this character the existence of an agreement as to the rate of interest might be presumed. A. I. R. 1932 Cal. 521=59 Cal. 662=138 Ind. Cas. 653.

——S. 115—Acquiescence—Documents filed before Commissioner without objection—Effect.

Where the lower Courts relied upon the result of the inquiry and the documents collected by the Commissioner appointed in the case and no objection was taken to this course:

Held, that it was not open to a party to contend that there was no legal proof of the instances of alienations. A.I.R. 1932 Lah. 130=133 Ind. Cas. 625.

——S. 115—Acquiescence—Objection to want of proof not raised.

It is settled law that the mere absence of formal proof of a document not objected to at the earliest opportunity will not be allowed to disturb the decision of the Court in final appeal. 134 Ind. Cas. 770 (1)=32 P.L.R. 470.

——S. 115—Acquiescence Omission to raise objection in trial Court.

Where secondary evidence is wrongly admitted without producing the original, but no objection is raised in the trial Court, the evidence admitted cannot be objected to in appeal. A.I.R. 1931 Lah. 722=32 P.L.R. 696=133 Ind. Cas. 874 (2).

——S. 115—Acquiescence—Amalnamas.

The genuineness of **amalnamas** which have been admitted by the Settlement Officer, without any objection, cannot be questioned in a subsequent suit, for resumption of the grants. A.I.R. 1931 Pat. 224=12 P.L.T. 891=131 Ind. Cas. 788.

——S. 115—Acquiescence and laches—Acquiescence relates to inaction during performance of act; laches refers to delay after the act—Acquiescence is equivalent to conduct amounting to either release or estoppel—Laches to bar a claim must amount to waiver, abandonment or acquiescence.

The word 'acquiescence" is used in two senses sometimes itis used to denote conduct which is evidence of an intention, by the party conducting himself, to abandon an equitable right; sometimes to denote conduct from which another party would be justified in inferring such an intention, **i.e.,** it is sometimes employed as equivalent to conduct which amounts to a release and sometimes as equivalent to conduct which creates an estoppel or constitutes a promise, for which the acts of the defendant supply a consideration. Acquiescence, properly speaking, relates to inaction during the performance of an act, laches relates to the delay after the act is done . . . So to fix acquiescence upon a party it should unequivocally appear that he knew the facts upon which the supposed acquiescence is founded, and to which it refers. Laches to bar the plaintiff's right must amount to waiver, abandonment, or acquiescence and to raise a presumption of any of these; the evidence of conduct must be plain and unambiguous: 29 Bom. 234 and 33 Cal. 633, Ref.

Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause the balance of justice or injustice in taking the one course or the other, so far as relates to the remedy: 95 Ind. Cas. 636=A.I.R. 1926 Nag. 416.

——S. 115—Acquiescence—Laches—Effect of.

There is a distinction between a case where the acquiescence alleged occurs while the act acquiesced is in progress, and another where acquiescence takes place after the act has been completed. In the former case, the acquies cence, is proof of assent. In the latter case, when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed the matter must be determined on very different legal considerations. A right of action has then vested in him, and mere delay to take legal proceedings to redress the injury cannot, by itself, constitute a bar to such proceedings unless the delay on his part, after he has acquired full knowledge has affected or altered the position of his opponent. A person cannot be barred of his remedy on the ground of waiver unless at the time of the alleged waiver he is shown to have been fully cognizant of his right and of the facts of the case. 19 C.W.N. 882=21 C. L. J. 557 =30 Ind. Cas. 161.

——S. 115 — Acquiescence — Laches — Difference between.

Where there is a statute of limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing, it means more than laches. If a party who could object stands by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to and so a kind of permission may be said to be given to another to alter his position, he is said to acquiesce. 11 Bur. L.T. 150 =41 Ind. Cas. 722.

——S. 115—Acquiescence—Quiescence—Estoppel'

Mere standing by when one's rights are infringed without in any manner inducing the wrong-doer to believe that his act are assented to, is mere quiescence and not acquiescence which (latter) alone can bring the doctrine of estoppel. 33 Ind. Cas. 762=20 C.W.N. 657.

——S. 115—Acquiescence — Abandonment — Non-user.

While mere non-user is not sufficient to amount into to abandonment, it is a fact to be taken consideration, with the other facts and circumstances of the case; and it is from all these facts that the Court has to decide, whether or not the clear intention to abandon can be inferred or is indicated. 84 Ind. Cas. 1093=3 Bur. L.J. 297=2 Rang. 534=A.I.R. 1925 Rang. 137.

——S. 115—Acquiescence—Abandonment of point by advocate.

The suit was brought by the sons of the reversioner S of the last male owner G, on the death of G's widow M.P., for possession of immoveable property. The last made owner died 40 years before suit, the widow in 1896, and the plaintiff' father, through whom the plain tiffs claimed, in 1889. The whole question in the case was one of plaintiffs' father's relationship to the last male holder. The defendant was thet nephew of the last male holder who took possession of the properties on the widows death. The first court found that the plaintiffs had proved the pedigrees filed by them and gave a decree. On appeal the judicial Commissioner held as follows:—"The oral evidence to prove the pedigree in the plaint is, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied and at the hearing of the appeal practically no attempt was made to support the findig of the Subordinate Judge. The only contention was that, accepting the pedigree filed by the appellant Mathura Parshad, the plaintiffs are heirs of G, and according to it they are **Samanodakas** and therefore, in the absence of other nearer heirs they exclude the defendant" and gave a decree for possession of the property on the ground that there were other persons in the same degree of relationship to the last male owner. **Held**:(1) that in the circumstances the plaintiffs were not, estopped by what happened before the judicial Commissioner. C.W.N. 76 dist. (1908) 12 C.W.N. 721 =8 C. L. J, 29=35 Cal. 904.

——S. 115—Acquiescence—Absence of objection.

Where a tenant without zamindars' permission makes a grave on the **abadi,** the mere fact that the servants of the zamindar stood by and did not object cannot amount to agent's acquiescence so as to estop zamindar from interfering with the grave. 115 Ind. Cas. 628= A.I.R. 1929 All. 386.

——S. 115—Acquiescence.

Owner standing by and allowing improvement on his land is estopped, but where he objects to do so by a notice, he is not. 97 Ind. Cas. 441=A I.R. 1927 Cal. 54.

——S. 115—Acquiescence—Absence of party.

No estoppel arises when a person builds a house on another's land in his absence. 94 Ind. Cas. 307 (Oudh).

——S. 115—Acquiescence—Acceptance of benefit.

There is a distinction between performing an award and accepting a benefit under an award. When a benefit is accepted by a party he may be precluded. The acceptance of a benefit even under protest might amount to acquiescence. But a party is not precluded by estoppel or acquiescence from challenging the validity of an award merely because certain payments have been made as directed by the award. 121 Ind. Cas. 164= A.I.R. 1930 Sind 195.

——S. 115—Acquiescence—Acts on one basis.

Where the correspondence between the parties showed that they proceeded on the assumption that the plaintiff was entitled to exercise a certain right the defendants who have acquiesced in it, were estopped from disputing it. 42 Bom. 103=19 Bom. L.R. 813=42 Ind. Cas. 882.

——S. 115—Acquiescence—Principle of ejectment —Bar by acquiescence.

The principle of acquiesence is that a person who acts in a fraudulent way to set up his legal rights cannot set up those rights. Where a land-lord sued to eject the defts., and to demolish the house and the land-lord had kept quite while the house was built the land-lord's claim was barred by acquiescence. 36 Ind. Cas. 1001 (A).

——S. 115—Acquiescence—Boundary.

Mere acquiescence in the boundary between certain properties erroneously laid down does not amount to estoppel. But if there was a dispute about the boundary and a certain line has been fixed by mutual agreement neither party can be allowed to change it. 12 C.L.J. 378=6 Ind. Cas. 467.

——S. 115—Acquiescence—Mere fact that party sees building being built is not sufficient—Other party must be encouraged to build.

The mere fact that plaintiffs living in the neighbour hood of a factory must have seen it being built by the defendant is not sufficient to establish the plea of acquiescence where there is nothing in the evidence indicating that the plaintiffs encouraged the defendants to build. 121 Ind. Cas. 295=31 P.L.R. 33=A.I.R. 1930 Lah. 392.

——S. 115—Acquiescence—Building on land.

A holder of an agricultural holding sold his house. The purchaser proceeded to erect a substantial **pucca** house. During this period the karinda of the zemindar did not make any objection to the transfer or the erection of the house. The circumstances indicated that the karinda must have had knowledge of the purchase and construction of the house.

Held, that the action of the karinda did amount to acquiescence on the part of the zemindar. 112 Ind. Cas. 609 (All.).

——S. 115—Acquiescence—Building on land.

In 1913 the land-lord contracted to grant a permanent lease in respect of certain land. No formal lease was executed under the terms of S. 107, T. P. Act. Pursuant to the contract the tenant obtained possession of the land and erected permanent and costly structures thereon. The land-lord was aware of the erection of those structures and must have realized that the tenant would not have constructed such a building unless he was assured of the possession of a permanent right in the land. In December, 1918, the land-lord gave notice to the tenant of his refusal to specifically perform the contract. The land-lord in 1923 brought a suit for ejectment against the defendant.

Held, that the land-lord having allowed the tenant to erect structures on his land would not be allowed to eject the tenant as he acquiesced in tenants conduct. 112 Ind. Cas. 865=55 Cal. 1090=33 C.W.N. 333= A.I.R. 1929 Cal. 101.

——S. 115—Acquiescence—Plaintiff's connivance at defendant's building in plaintiff's land—Defendants having **bona fide** belief that they possess good title to the property—Plaintiff's bringing a declartory suit —Plaintiff's claim cannot be decreed on ground of acquiescence—Evidence Act, S. 115.

Where the defendants built on the plaintiff's land on the **bona fide** belief that they had a good title to the property, the large investment they made being evidence of their **bona fide** belief and where the plaintiffs never objected to the infringement upon his right though they knew of the mistaken belief of the defendants and thus encouraged the defendants in their building.

Held: that when the plaintiff brought a declaratory suit, it could not be decreed, the plaintiffs being estopped b the doctrine of aquiescence. A.I.R. 1929 Oudh 292.

——S. 115—Acquiescence—Building on land.

Trespasser building on site of another in spite of owner's protesting—Owner suing for possession after two years—He has not acquiesced and is entitled to possession. 104 Ind. Cas. 565=A.I.R. 1927 Nag. 348.

——S. 115 — Acquiescence — Ryots building on waste land without zamindar's permission cannot resist a suit in ejectment against him by zamindar.

If a raiyat without the permission of the zamindar begins to build upon waste land over which he has no right to build and completes his construction within a few months, the zamindar is not estopped from recovering possession of the site on the ground that he did not intervene at an earlier stage. Unless it could be established that the defendants were making constructions under some **bona fide** mistake of which the plaintiffs were aware and in spite of their knowledge the plaintiffs deliberately refrained from intervening and thereby led the defendants to believe that they were right in their estimation, there could be no estoppel. No one can by merely trespassing upon the land of another and constructing costly building on it claim a right to retain possession or to compel the owner to receive compensation for the land. 89 Ind. Cas. 509=A.I.R. 1926 All. 87.

——S. 115—Acquiescence—Stranger deliberately building on another's land — Owner is entitled to recover except under special circumstances amounting to his acquiescence—Mere delay in bringing suit is not sufficient to deprive him of his right.

If a stranger builds deliberately on the land of another, the owner is entitled to recover the land, unless there are special circumstances amounting to a standing by, so as to induce the belief that, the owner intended to forego his right or to an acquiescence in his building on the land. Mere delay in bringing a suit is not in itself sufficient to create an equity in favour of the person building so as to deprive the owner of his strict rights. 94 Ind. Cas. 168=A.I.R. 1926 Lah. 354.

——S. 115—Acquiescence—Plaintiff conniving at defendant's building in plaintiff's land cannot pray for demolition of the structure—Evidence Act, S. 115.

If a stranger builds upon the land of **A**, supposing it to be his own and **A** remains wilfully passive, equity will not allow him to profit by the mistake. If a person having a right aud seeing another person about to commit or in the course of committing an act, infringing upon that right, stands by in such a manner as really to induce the person who commits the act and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the Act. 28 O.C. 114=84 Ind. Cas. 511=11 O.L.J. 677=A.I.R. 1925 Oudh 258.

——S. 115—Acquiescence.

If a stranger builds upon the land of **A**, supposing it to be his own, and **A** remains wilfully passive, equity will not allow him to profit by the mistake. If a person having a right and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person who commits the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. 84 Ind. Cas. 511=11 O.L J. 677=28 O.C. 114=A.I.R. 1925 Oudh 258.

——S. 115—Acquiescence—Owner of land acquiescing in stranger's building on land cannot subsequently sue for land—Acquiescenee may be implied—English and Indian law.

It is well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land. This is also the law in India with the exception that the party building on the land of another is allowed to remove the building. 73 Ind. Cas. 187=A. I. R. 1921 Nag. 167.

——S. 115—Acquiescence—Building by tenant on land-lord's land—Non-interference by land-lord—Acquiescence.

Mere abstinence from interference by the owner when another is building on his land is not sufficient to constitute acquiescence and to raise an equitable estoppel but there must also be a mistaken belief in the builder that the land was his own. Therefore, a lessee's building on his lessor's land with the knowledge of the latter's agent. who takes no active steps to prevent such erection does not amount to an acquiescence on the part of the lessor. Where a lessee or tenant builds upon the land of his land-lord without the mistaken belief that he is building on his own land and the land-lord does not actively interfere with the building it will not amount to acquiescence on his part so as to raise an equitable estoppel against him. 6 A.L.J. 57=1 Ind. Cas. 821.

——S. 115 — Acquiescence — Sale by father—Building by alienee—Son's silence.

The vendor's son stands by, while the land sold by his father is being built upon by the vendee and sues for possession 11 years after the sale on his father's death saying that the sale, was without necessity and consideration. **Held,** the son was estopped, on the ground of acquiescence from contesting the alienation. 177 P.W.R. 1911=12 Ind. Cas. 729.

——S. 115—Acquiescence — Building on land—Compensation.

A person knowingly building on another's land cannot claim compensation in an ejectment suit but can be allowed to remove the materials unless at the time of erection the owner stood by and made no protest. The plaintiff is not estopped where no acquiescence on his part is proved and the defendant's act is a clear trespass and not an encroachment in the honest belief that the land was his. 78 P.W.R. 1910=6 Ind. Cas. 1006.

——S. 115—Acquiescence—Tenant building on land—Knowledge of land-lord—Ejectment.

An under-proprietary tenancy for life without power of alienation was granted to a person by a superior proprietor. The grantee died, but the superior proprietor did not enforce the reversion but allowed a trespasser to assert that title and continue to pay the under-proprietary rent. On the faith of the trespasser being treated and recognised as an under-proprietor he did acts which were to the advantage of the superior proprietor. **Held,** the superior proprietor was estopped from denying the right of the trespasser to hold the property in question as an under proprietor for life without power of alienation. 6. O.L.J. 696=54 Ind. Cas. 901.

——S. 115—Acquiescence—Building on trespassed land.

Where a person builds upon lands on which he has trespassed the true owner is under no obligation to interfere with such building and the trespasser cannot plead that the owner is estopped by his acquiscence. 6. O.L J. 455=53 Ind. Cas, 683.

——S. 115—Acquiescence — Building on land without title—Silence.

(Wallis, C. J.) If a man builds a house partly on his neighbour's land and the neighbour aquiesces, Courts of Equity will interfere to prevent him from disturbing the house when completely finished. (Seshagiri Aiyar, J.)—The principles of equitable estoppel can apply to only executory contracts and not to executed contracts. Where title can be acquired only in a particular way there is no room for the application of the doctrine of estoppel. S. 115 of the Evidence Act does not apply to cases where two parties exchange plots by means of an unregistered agreement and one party on the ground of non-registration seeks to get back possession of his land after it had been built upon by the other. 30 M.L.J. 1=19 M.L.T. 114=(1915) M.W.N. 1043=32 Ind. Cas. 5.

[Opinion of Seshagiri Aiyar, J. upheld in 40 Mad. 1134=33 M.L.J. 253=43 Ind. Cas. 138.]

——S. 115—Acquiescence—Trespasser building upon another's land—Building with knowledge of defective title.

An owner can insist on having back his land with all the additional value which a stranger had imprudently added to it knowing that he is not the owner. (1917) P.H.C.C. 273=2 Pat.L.W. 133=2 Pat.L.J. 600=41 Ind. Cas. 175.

——S. 115—Acquiescence—Land-lord and tenant—Building on Land-lord's land.

An abstinence from interference on the part of the owner of land, upon which another man is building, does not arise as equitable estoppel against him. In order to estop the owner it must be proved that besides his abstinence there was a mistaken belief in the builder that the land was his own property. 21 A. 496, P. C. foll. 6 A.L.J. 57=1908 A.W.N. 282=1 Ind. Cas. 821.

——S. 115—Acquiescence—Bona fide belief.

To determine whether the land-lord is estopped by reason of the principle of acquiescence the real issue to be kept in mind is whether the person who acted in contravention of his right had a bona fide belief or not that he did possess the right to erect the building.

Where the wajib-ul-arz contained the prohibition against building a new building without the permission of the zemindar,

Held, that such a clause may honestly be interpreted not to preclude the alteration of a kachcha mosque into a pukka one. 101 Ind. Cas. 630= A.I.R. 1927 All. 544.

——S. 115—Conduct—Acquiescence—Company-Shareholder taking part in meetings of company—Estopped from objecting to director's authority to act on behalf of company.

A shareholder who has taken active part in general meetings of the company and has joined in an annual appointment of the director who has acted as such to the knowledge of the shareholders without any objection on his part is estopped from disputing the validity of his authority to act on behalf of the company. 182 P.W.R. 1915= 31 Ind. Cas. 595.

——S. 115—Acquiescence—Erroneous proceedings.

If parties consent to a course not strictly in accordance with the procedure prescribed by the rules aud take no objection to it, they are not entitled to turn round afterwards and seek to get some benefit from the failure to abide by the procedure in the same way as if they had objected at the start or if they had no notice of it. 4 Pat. L.J. 347=51 Ind. Cas. 881.

——S. 115—Defence of acquiescence explained and enunciated.

Before any one can acquiesce in another's act he must know what that act is. No one can acquiesce in a fraud till he knows that there has been a fraud or in a violation of his right till he knows that his rights have been violated and in what way. Persons cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute them. But it is not necessary that the plaintiff should have known the exact relief to which he was entitled; it is enough that he knew the facts constituting his title to relief. The ground for admitting the defence of acquiescence or laches according to the doctrine of the English Courts of Equity is that a plaintiff in equity is bound to prosecute his claim without undue delay. Where however there is, as in India, a statutory time limit to all conceivable kinds of action, the plaintiff is entiled to the full statutory period before his claim becomes unenforceable. Besides, even if in such cases the defence of laches were admissible the defendants would have to show that they had suffered a change of position by reason of the plaintiff's laches in which it would not be reasonable to allow him to assert his right. 122 Ind. Cas. 37=30 M. L. W. 898=A.I.R. 1930 Mad. 364.

——S. 115—Acquiescence — Essentials —Effect of fraud.

Acquiescence is only a form of an estoppel and it is of the essence of the acquiescence that the party acquiescing should be aware of and by words and conduct represent that he assents to what is a violation of his rights, and that the person to whom such representation is made, should be ignorant of the other party's right, and should have been deluded by the representation into thinking, that his wrongful action was assented to by the other party. Where there is fraud there is no room for the doctrine of acquiescence. 129 Ind. Cas. 612= A.I.R. 1930 Cal. 678.

——S. 115—Acquiescence — Essentials—Where defendants do not make mistake as to their legal rights there is no acquiescence.

In case of acquiescence the onus is on the defendants to show (1) that they made a mistake as to their legal rights, (2) that they had expended money on the faith of that belief, (3) that the plaintiff knew of the existence of his own right which was inconsistent with the rights claimed by the defendants, (4) that the plaintiff knew of the defendants' mistaken belief in his rights and (5) that the plaintiff must have encouraged the defendants in their expenditure of money directly or by abstaining from asserting his legal right. Where therefore the necessary elements are lacking and there is no evidence that the defendants made a mistake as to their legal rights, there can be no acquiescence: All. 324, Ref. A.I.R. 1929 All. 877.

——S. 115—Acquiescence—Essential elements of—Assertion of right—Knowledge.

Where acquiescence is pleaded in bar of a claim it must be shown that the person acquiescing was aware of the matter in which he acquiesced and of the effect of such acquiescence. 3 Pat. L.T. 653=65 Ind. Cas. 882=A.I.R. 1922 Pat. 619.

——S. 115—Acquiescence—Essentials of.

Two things are required to raise the equity of acquiescence:—(1) the person spending the money supposed himself to be building on his own land, (2) the real owner at the time of expenditure knows the land belongs to him and not to the person expending the money in the belief that he is the owner. 35 Bom. 182=9 Ind. Cas. 765=13 Bom. L.R. 92.

——S. 115—Acquiescence — Fraud—Application of acquiescence as bar to exercise of man's legal rights — Principle guiding Court enunciated.

The acquiescence which will depreive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. The elements or requisites necessary to constitute fraud of that description are, in the first place that the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily on the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal

right must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but nothing short of this will do. 122 Ind. Cas. 774=7 O.W.N. 271=14 R. D. 119=A.I.R. 1930 Oudh 235.

——S. 115—Acquiescence — Fraud — Acquiescence which will deprive a man of his legal rights must amount to fraud—Elements necessary to constitute fraud explained.

Acquiescence which will deprive a man of his legal rights must amount to fraud and the elements necessary to constitute such a fraud are: (1) the party pleading acquiescence must have made a mistake as to his legal rights; (2) he must have expended some money or done some act on the faith of his mistaken belief: (3) the party possessing the legal right must know the existence of his own right which is inconsistent with the right claimed by the other; and (4) he must know of that other's mistaken belief of his rights and he must have encouraged that other in his expenditure of money or in the other acts done by him. When all these elements exist, there is fraud of of such a nature that it will entitle the Court to restrain the possessor of the legal rights from exercising it: 110 Ind. Cas. 569=A.I.R. 1928 Oudh. 470.

——S. 115—Acquiescence.

The acquiescence, which would deprive a man of legal rights, must amount to fraud. 99 Ind. Cas. 894=8 L.R.A. Rev. 155=.A.I.R. 1927 Oudh 135.

——S. 115—Acquiescence to be successfully pleaded, must amount to fraud.

The acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights: Willmott v. Barber, (1880) L. R. 15 Ch. D. 96 and A.I.R. 1926 All. 324, Foll.

The mere fact the plaintiff raised no objection when the building was constructed by the defendant and that there was long delay on her part in enforcing her rights, if any, in respect of the land in dispute, is not sufficient to establish acquiescence when the defendant has never alleged that he had acted in the bona fide belief that he was acting within his rights. 99 Ind. Cas. 255=3 O.W.N. Sup. 282=A.I.R. 1927 Oudh 66.

——S. 115—Acquiescence to act as estoppel must be fraudulent—Elements rendering an acquiescence fraudulent indicated.

The acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. The following are the elements or requisites necessary to constitute fraud of that description. In the first place, the plaintiff must have made a mistake as to his legal rights. Seeondly, the plaintif must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, as, the doctrine of acquiescence is founded upon conduct with a knowledge of one's legal rights. Fourthly, the defendant, the possessor of the legal rights, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but nothing short of this will do. 92 Ind. Cas. 1017=48 All. 353=24 A.L. J. 355=A.I.R. 1926 All. 324.

——S. 115—Acquiescence—Grant.

Where an heir of the grantee enters into possession of the grant after the death of the grantee and the grantor accepts rent from him, the mere acceptance of rent by the grantor should not constitute the heir anything more than a mere tenant-at-will.

The mere assertion of a jagirdari right acquiesced in by the superior landlord cannot be taken to import a claim or an acknowledgment of a larger interest than that of a life-estate. 70 Ind. Cas. 232 =1921 P.H.C.C. 369=A.I.R. 1921 Pat. 218.

——S. 115—Acquiescence.

One co-sharer granting lease for planting grove —Tenant planting grove—Other co-sharers suing for injunction and possession—Defence of acquiescence—Defendant should prove his bona fide belief in his valid right and plaintiff's deliberate abstinence from preventing defendant from spending money. 65 Ind. Cas. 705=8 O.L. J. 474=A.I.R. 1921 Oudh 231.

——S. 115—Acquiescence.

The defendants having been granted a user of certain land for certain purposes, used it for purposes other than the purpose for which it had been granted, by digging a baoli which was used by the public.

Held, there was no question of the owner standing by watching the construction of the baoli being made by a person who was under a mistaken belief that the land was his own property, in order to gain an advantage. The defendants could not have believed that the land was their own property and there was nothing to show that the plaintiffs had any sinister motive in abstaining at the time from protest. 70 Ind. Cas. 836=A.I.R. 1923 All. 11.

——S. 115—Acquiescence—Hindu reversioner—Widow's act.

A widow allowed an occupancy tenant to exchange one of his occupancy fields with a non-occupancy one. Plaintiff who was one of the collaterals of the last male holder and a lambardar did not object to the exchange but affixed his seal to the patwari's report at the time of mutation. Subsequently the occupancy tenants sank a well in the field obtained by him under the exchange but the plaintiff did not object. Six years after the exhange he sued for a declaration that the exchange would not affect his reversionary right. Held, that the plaintiff having acquiesced in the exchange and having

failed to object to the sinking of the well was estopped from objecting to the exchange. 2 U.P.L.R. (L) 105=56 Ind Cas. 874.

——S. 115—Acquiescence—Hindu Law — Son's liability to pay father's debts—Improper debts.

The mere fact that during the father's time the son did not raise any objection to the execution of a decree obtained against the father for a tort committed by the father against the ancestral estate in the hands of the father cannot estop the son from raising the question of his non-liability to satisfy the debt after the father is dead. (1908) 10 Bom. L.R. 297=32 Bom. 348.

——S. 115—Acquiescence — Illegal transfer—Acquiescence by occupancy tenant in illegal transfer does not affect his heir to get rights after his death.

H, an occupancy tenant transferred his bhlding to D. On H's death P brought a suit for possession against D. P contended that the deed of transfer executed by H was sale-deed and as such the sale was void, while D said that it was a perpetual lease and also put up plea of adverse possession, namely that P had not proved possession within 12 years.

Held, P had no right until the death of H and as soon as H died P took every course to assert his right. P was not bound by the acquiescence of H for period of twelve years in his own illegal transfer. 7 O.W.N. 438=123 Ind. Cas. 53=14 R.D. 190=A.I.R. 1930 Oudh 300.

——S. 115—Acquiescence—Knowledge of owner—Knowledge on the part of the person to be estopped not proved—Doctrine of acquiescence does not apply.

Where the defendants regarded through mistake certain land to be their own and partitioned it among themselves and there was no evidence to the effect that the plaintiff knew that the defendants were partitioning his land as theirs and the plaintiff kept silent knowing that the defendants were likely to be prejudiced by the partition and by a subsequent claim on the part of the plaintiff, the plaintiff has done nothing and is not estopped from setting up his title and possession to the land by the principle of acquiescence. 97 Ind. Cas. 268 =8 L.R.A. Rev. 6=A.I.R. 1926 All. 721.

——S. 115—Acquiescence—Knowledge of facts essential—Pre-emption.

In a pre-emption suit if estoppel by acquiescence as distinct from that by the prescribed notice is pleaded, it must be proved that the pre-emptor had full knowledge of what was going on and not merely the knowledge that there was a proposal to sell the property to some one or another for a certain price. 22 O.C. 323=54 Ind. Cas. 520.

——S. 115—Acquiescence—Knowledge of right essential.

To raise a plea of estoppel by acquiescence it must be proved that the party sought to be esptopped was aware of his right and with such knowledge acquiesced in their invasion by the opposite party. 40 Mad. 1134=33 M.L. J. 252=6 L.W. 300 =22 M.L.T. 173=43 Ind. Cas. 138=(1917) M.W.N. 757.

——S. 115—Acquiescence—Knowledge essential.

The mere fact that the accounts of the Administrator pendente lite were passed and the plaintiff raised no objection, would not operate as an estoppel. Acquiescence cannot be imputed where there is no evidence that the plaintiff knew the facts as represented to be incorrect or that he did not rely on the representation. 41 Cal. 771=18 C.W.N. 631=26 Ind. Cas. 284.

——S. 115—Acquiescence—Knowledge of transaction—Estoppel.

In a suit by a reversioner for recovery of properties alienated by his father it was found that he was aware of the sale, that he was present at the time of its execution and registration and that he took no steps to question the sale for more than 11 years. Held, that there was an estoppel by title barring the plaintiff's claim. 49 Ind. Cas. 391 (Lah.).

——S. 115—Acquiescence—Landlord and tenant—Dihdari lands—Suit by superior proprietor.

Where a dihdar has been to the knowledge of the previous superior proprietors of the village in which the suit plots were situated, enjoying and mortgaging his dihdari rights for more than 12 years prior to the suit, the present superior proprietor cannot question the dihdar's under proprietary rights. 19 O.C. 27=35 Ind. Cas. 441.

——S. 115—Acquiescence—Long silence—Agreement—Property divided in pursuance of—Sons of a party to agreement.

Where the sons of the cousin of S contested the validity of an arrangement by which the property of S was divided between the cousins and his daughters, and the parties remained in possession for over 14 years under the arrangement,

Held, having been in possession for 14 years after their father's death who was a party to the agreement. the sons were estopped. 40 All. 487, Foll. 71 Ind. Cas. 405=21 A.L.J. 140=45 All. 277=4 L.R.A. (Civ.) 105=A.I.R. 1923 All. 204.

——S. 115—Acquiescence—Long silence.

Where a co-parcener has alienated joint property and the alienee improves the same by making heavy expenditure, the other co-parceners cannot impeach the sale if they stand by for a long time and allow without objection the expenditure to be made by the alienee. 177 P. W. R. 1911 and 13 Bom. L.R. 162, Foll. 64 Ind. Cas. 520=2 Lah. 258=10 P.L.R. 1922=A.I.R. 1921 Lah. 110.

——S. 115—Acquiescence—Long time—Voidable transaction.

A person may by his conduct or acquiescence make a transaction impeachable by him unimpeachable after a lapse of time. 18 Ind. Cas. 805 (Cal.).

——S. 115—Acquiescence —Long silence—Applicability of doctrine—Position of the parties—Government.

The position of the Government differs from that of a private owner and a period of abstinence from suit which would be excessive in a private owner is not excessive in the case of Government and would not create an equity in the private owner. The Government has the option of making the defendant, remove the materials of his building on paying compensation for the value of the buildings. 63 P.R. 1913=113 P.L.R. 1913=18 Ind. Cas. 799=112 P.W.R. 1913.

——S. 115—Acquiescence—Master and servant—Liability.

When the British Indian Rupees were substituted for Baroda Babashai rupees the Government undertook to accept genuine Babashai rupees at the rate of 100 British Indian for 130 Babashai. The defendant shroffs were employed at the treasuries to scrutinize the coins and to pass only genuine Babashai. They passed, however, a number of Shikkai coins as genuine Babashais and the mint officers kept and used these Shikkais for Government. The Secretary of State sued the defendants for the damages for the loss caused to Government by passing of the Shikkai rupees as Babashais. The fact that the Government kept and had the benefit of Shikkai rupees by itself raises no presumption of either estoppel, or acquiescence, or ratification. That ratification and acquiescence mean a full knowledge of the facts. 35 Bom. 12=12 Bom. L.R. 769=7 Ind. Cas. 968.

——S. 115—Acquiescence—Mines—Working of, by co-sharer.

Where a co-sharer knowing that a lessee from another sharer was spending large sums of money to develop the mine, did not promptly come in with his claim for an account of the profits his claim after long time could be barred by acquiescence. 22 C.W.N. 441=44 Ind. Cas. 297.

——S. 115—Acquiescence—Mortgage by manager of joint estate—Appointment of the manager subsequently declared illegal, effect of—Validity of actions of such manager, when for the benefit of estate—Acquiescence of major co-sharer—Non-liability of the minor's estate.

Where a person agrees to the appointment of a manager of his estate and that of a minor co-sharer of his, of whom he himself was the duly appointed guardian, and when such manager borrows money on the security of the joint estate for the purpose of paying off the liabilities of such person; Held, that, although the appointment of the manager was not lawfully made and his actions cannot affect the estate of the minor co-sharer, the major co-sharer cannot be heard to repudiate the action of a manager, to whose appointment he fully agreed, in some of which he himself joined, and by which he only was benefited. The estate of the major co-sharer must be held liable for the debt incurred by such manager for its benefit. (1906) 3 C.L.J. 537.

——S. 115—Acquiescence—Mortgage—Redemption—Subsequent conduct and understanding.

Where a contract entered into by the mortgagor and mortgagee, subsequent to the mortgage, to sell the lands to the mortgagee was solely due to the erroneous view of both parties about the jahan lahan clause in the mortgage deed and not the consequence of any transaction independent of the mortgage. Held, that the conduct and understanding of the mortgagor that the mortgage is irredeemable cannot amount to any acquiescence or estoppel and that he is entitled to redeem. 14 I.A. 78 foll. (1903) 5 Bom. L.R. 140=27 B. 297.

——S. 115—Acquiescence under mistake.

From 1830 to 1890 a zamindari had been managed by the Court of Wards. During the whole or a part of his period the Court of Wards worked the forest of the Malias (certain hill tracts to the north of the zamindari) for the benefit of the zamindari in the mistaken belief that it belonged to the zamindar and other Government officials acquiesced therein. The Government official, under the same mistake also, encouraged the expenditure of the zamindari funds upon the making of roads in the Maliahs. But on the first occasion, when a claim of ownership was distinctly put forward by the zamindar, it was repudiated by Government. Held, that these facts did not estop the Government from claiming ownership of the Malias. (1905) 1 C. L. J. 460=9 C.W.N. 553=28 M. 130=32 I.A. 53 (P.C.).

——S. 115 — Acquiescence — Mortgage deed provision in for increased interest in case of dispossession—Acquiescence of mortgagee in part—performance—Redemption without payment of interest.

Where the mortgagors covenanted that "we shall pay the whole mortgage-debt in a lump on Baisakh 16th of any year and we shall pay the money out of our own pocket and if there is any defect in the mortgaged property or in the mortgagee's possession thereof ,then we, the executants, will pay the principal with interest at 2 per cent. per mensem and besides this, damages and penalties" and possession was not obtained by the mortgagee of a portion of the mortgaged property for a certain period and in the subsequent suit for redemption the mortgagee claimed interest for the period during which he had been out of possession: Held, that by reason of his acquiescence the mortgagee was not entitled to claim interest in respect of that period during which he had not obtained possession of a portion of the mortgaged property—Jhunku Singh v. Chatkan Singh.—(Stanley C. J., Banerji J.) (1909) 6 A.L.J. 247. 31 A. 325=2 Ind. Cas. 221.

——S. 115—Acquiescence—Period of.

Widow making gift of her deceased husband's property to her daughter and daughter's husband jointly—Daughter acquiescing for less than 12 years in the position that her husband was co-owner of that property does not constitute estoppel so as to deprive her reversionary right. 43 Mad. 849, Appr. 119 Ind. Cas. 152=A.I.R. 1929 Mad. 467.

——S. 115 — Pre-emption — Acquiescence of plaintiff in sale—Mahomedan law, how far applicable to cases between Hindus.

A, who held a mortgage of a share in village K, purchased the mortgaged property from his mortgagors. At the time when the sale was concluded part of the consideration was left with the vendee to be paid to C who was in possession of the property sold as a usufructuary mortgage. C afterwards sued to pre-empt the sale to A. Held, that the acceptance by C of the money due in respect of his usufructuary mortgage did not prevent him from maintaining a suit for pre-emption of the same property. 2 A.L.J. 145 and I.L.R. 9A. 234 ref. to. Held, also, that in a suit for pre-emption between Hindus, based upon a wajib-ul-arz, the principles of Mahomedan law can only be referred to by way of analogy, and when those principles may be taken as consistent with "justice, equity and good conscience." They cannot be referred to where there exists on the Statute Book substantive law applicable to the point in issue. 1907 A.W.N. 88=4 A.L.J. 210.

——S. 115—Acquiescence—Proof of.

In order to sustain a plea of acquiescence and to raise the bar of an equitable estoppel, it is incumbent upon the party relying on it to show that the conduct of the owner whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that he had by plain implication, contracted that the right of occupation under which the other party originally obtained possession of the land, should be changed into a perpetual right of occupation. 100 Ind. Cas. 855=A.I.R. 1927 Nag. 180.

——S. 115—Acquiescence — Time of—Distinction between acquiescence when the act is in progress and acquiescence after the act is done, indicated.

Acquiescence by the land-lord is a question of legal inference drawn from the facts found.

There is a distinction between a case where the acquiescence allowed occurs while the act acquiesced in, is in progress, and another, where the acquiescence takes place after the act has been completed. In the former case, the acquiescence is acquiescence under such circumstances that assent may be reasonably inferred from it. In the latter case, when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined on very different legal considerations. A right of action has been vested in him, and mere delay to take legal proceeding to redress the injury cannot, by itself, constitute a bar to such proceedings, unless the delay on his part, after he has acquired full knowledge has affected or altered the position of his opponent. 100 Ind. Cas. 855=A.I.R. 1927 Nag. 180.

——S. 115—Acquiescence—What constitutes.

To constitute acquiescence (1) the tenant must have made a mistake as to his legal rights; (2) he must have expended some money or must have done an act on the faith of such mistaken belief; (3) the landlord, the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the tenant; (4) the land-lord must know of the tenant's mistaken belief on his rights; and (5) the land-lord must have encouraged the tenant in his expenditure of money or in other acts which he has done, either directly or by abstaining from asserting his legal right. 114 Ind. Cas. 70=A.I.R. 1929 Lah. 625.

——S. 115—Acquiescence — Words or conduct may amount to—Limitation Act, Art. 85.

Words or conduct may amount to acquiescence as to the correctness of an account and may even operate as a settlement: 7 Bom. L.R. 151, Foll. 29 Bom. L.R. 375=102 Ind. Cas. 225=A.I.R. 1927 Bom. 225.

——S. 115—Acquiescence—What constitutes—It must be with knowledge of a person's rights—Other party's bona fides—In absence of either, doctrine does not apply—It must amount to fraud to deprive a person of his rights.

Acquiescence implies that the person who is said to have acquiesced did so with knowledge of his rights and the other person acted in the bona fide belief that he was acting within his rights. The absence of either of these elements makes the doctrine inapplicable. The acquiescence, which will deprive a man of his legal rights, must amount to fraud. 99 Ind. Cas. 199=A.I.R. 1927 Oudh 89.

——S. 115—Acquiescence — What constitutes—To create estoppel by conduct, other party must have been led away by the conduct.

If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land. 14 W. R. 926, Foll.

Per Venkatasubba Rao, J.— To create an estoppel the declaration. act or omission must be of an unequivocal and unambiguous character. The essence of estoppel is that the conduct of the other party is the cause of the action of the person invoking the estoppel; and if the act is the result of the reliance upon the representation mere forbidding the act will not prevent the estoppel. 96 Ind. Cas. 915=A.I.R. 1926 Mad. 1052.

——S. 115—Acquiescence.

A mere delay in filing a suit does not per se constitute acquiescence. 1 All. 82, Foll. 105 Ind. Cas. 286=A.I.R. 1927 Nag. 400.

——S. 115 — Acquiescence — What constitutes —Delay—Whether amounts to.

Mere delay in suing does not amount to a proof of acquiescence. 69 Ind. Cas. 519=3 U.P.L.R. (Lah.) 24.

——S. 115—Acquiescence—Elements necessary to constitute —Lessor and lessee—Trees.

For a defence of acquiescence to be successful it is necessary that the deft. should have acted in good faith believing that he had a valid lease and was entitled to plant the trees and that the plaintiffs knowing that he was under this mistaken belief should have abstained from doing anything to prevent his spending money in planting the trees. 8 O.L.J. 474=65 Ind. Cas. 705.

——S. 115—Acquiescence—What constitutes.

If a party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. Duke of Leeds v. Lord Amerst, 2 P. 124, Foll.

But acquiescence cannot rehabilitate or render valid a transaction which ultra vires and illegal. Further, estoppel by acquiescence connotes, among othes things, that the person estopped in effect has represented to the person who is infringing his right that he is not entitled to complain that his right is being invaded, and that the party relying upon this representation has altered his position to his detriment under a mistaken impression that he was legally justified in acting as he had done. 89 Ind. Cas. 804=52 Cal. 748=29 C.W.N. 931=A.I.R. 1925 Cal. 1107.

——S. 115—Acquiescence—What constitutes—Person interested in preventing act, acquiescing therein will be estopped.

Generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done and acquiesces in it so as to induce a reasonable belief that he consents to it, and

the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done with his previous licence. Though mere acquiescence is not equivalent to consent, yet consent need not be by word and may be by act, and if consent can be intimated by conduct as well as by act it is clear that acquiescence may, under certain circumstances be taken to be consent. 85 Ind. Cas. 540=A.I.R. 1925 Cal. 993.

——S. 115—Acquiescence—What constitutes—Person doing a thing in spite of objection cannot plead acquiescence by other party.

Defendant encroached upon the Chabutara of the plaintiff, and placed beams on her wall more than 6 years ago. Defendant pleaded ownerhip and old construction. It was found that he was not owner, and that plaintiff had objected to the Municipal Board sanctioning construction. The Municipal Board refused to decide the question of title and the defendant went on making his construction.

Held, that there was no acquiescence. 76 Ind. Cas. 585=A.I.R. 1923 All. 452.

——S. 115—Acquiescence—What constitutes.

Mere acquiescence or absence of interference on the part of daughter who claimed a share in the property would not amount to an estoppel. 7 O.L.J. 78=55 Ind. Cas. 873.

——S. 115—Acquiescence—What amounts to.

Acquiescence in an act while it is in progress may amount to consent but not mere inaction after the act has been completed. 33 Ind. Cas. 273=23 C.L.J. 82.

——S. 115—Acquiescence—Question of fact.

Estoppel, like acquiescence, is not a question of fact but of legal inference from the facts found. To create an estoppel it is not sufficient to find that it may well be doubted that the plaintiff would have acted in the way he did but for the way in which the defendant had acted. It must be found as a fact that the plaintiff would not have acted in the way he did, and that the defendant by his "declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief." (1904) 6 Bom.L.R. 440=28 B. 440.

——S. 115—Acquiescence—When creates an estoppel.

Acquiescence after execution of a deed by a third party does not create an estoppel. There is a great difference between acquiescence in an act still in progress, and mere submission to it after it has been done, as such submission cannot change the past. 7 Bur. L.T. 88=7 L.B.R. 301=24 Ind.Cas. 60.

——S. 115—Acquiescence—Mere non-contesting of an adverse title—Presumption.

It is not the practice of the Courts in India to press a presumption by acquiescence against a Hindu female in a rival claim from the mere non-contestation for a limited time of an adverse title. 14 M.I.A. 346 foll. (1902) 4 Bom. L.R. 180=26 B. 577.

2. Admission.

——S. 115—Admission under wrong impression of law does not bind party—Held on facts that document could not operate as estoppel,

Two brothers, A and B, constituting a joint family executed a muchilika by which they agreed to appoint a panchayat for effecting a partition of the family properties. It was stated that the muchilika was executed in pursuance of the will of their father which provided that the properties were to be divided equally between them after excluding the properties which were to be transferred in favonr of B. In a suit for partition A sought to challenge the transfer in favour of B:

Held, that the muchilika could not estop A from challenging the transfer in favour of B. The document could not fall within any of the known legal positions of election, or ratification or the doctrine of approbate and reprobate. Even an admission made under a wrong impression of the law will not bind a party. A.I.R. 1946 Mad. 398=59 M.L.W. 227=(1946) 1 M.L.J. 310=1946 M.W.N. 240=I.L.R. (1946) Mad. 858=228 Ind. Cas. 506.

——S. 115—Admission—Question of law—Admission by Counsel.

An admission made by a lawyer on behalf of his client that the parties were governed by custom is an admission on question of law and is not, therefore, binding on his client. A.I.R. 1945 Lah. 336=47 P.L.R. 384.

——S. 115—Admission of facts by Counsel.

Where certain facts have been admitted by a party's Counsel after full delibaration and the case has proceeded practically to its conclusion upon the basis of such admission, the party cannot be allowed to resile from that admission merely on the ground that neither he nor his Counsel were, at the time the admission was made, fully in possession of the facts. A.I.R. 1943 Pat. 327=22 Pat. 220=10 B.R. 259=210 Ind. Cas. 426.

——S. 115—Admission in written statement in former suit regarding title of co-defendant.

Where there is an entire absence of evidence in the case to show that co-defendants, owing to the defendants' written statement, in the former suit making admission regarding the title of the co-defendants acted in any way in which they would not have acted if this written statement had not been filed, the admissions do not operate as estoppel. A.I.R. 1940 Rang. 136=190 Ind. Cas. 609.

——S. 115—Admission.

Once the age is admitted by the Insurance Company there is no reason why they should not be held to be precluded from disputing the correctness of it unless the admission was procured by fraud. Fraud of course, vitiates even the most solemn transactions but if there is no fraud there is no reason why the company should not be held bound by the representation made by them to the assured that they will not dispute the correctness of age admitted by them. A.I.R. 1939 Bom. 161=41 Bom. L.R. 353=182 Ind. Cas. 127.

——S. 115—Admission.

An erroneous statement made by Counsel in the course of arguement cannot estop the client from taking the correct legal position afterwards. 42 P.L.R 249=A.I.R. 1939 Lah. 303.

——S. 115—Admission.

Rule of life insurance company that proposer above age of 45 to give proof of his age before

consideration of proposal by company—Proposer above such age furnishing such proof—His age admitted as correct by endorsement on policy—Company cannot, on maturity of policy, say that his age was different. A.I.R. 1938 Cal. 641=42 C.W.N. 855=I.L.R. (1938) 2 Cal. 457=178 Ind.Cas 554.

——S. 115—Admission.

A party who has made an admission is at liberty to prove that his admissions were mistaken or untrue and is not estopped or concluded by them unless another person has been induced by them to alter his condition. 67 C.L.J. 495.

——S. 115—Admission—Person with knowledge of facts admitting wakf nature of property.

A party cannot be allowed to approbate and reprobate. Where a person with full knowledge of the facts, in unmistakable terms admitted the wakf nature of the house in suit, he cannot subsequently be allowed to resile from that position. A.I.R. 1938 Lah. 686=40 P.L.R. 954=I.L.R. (1938) Lah. 704=181 Ind. Cas. 493.

——S. 115—Admission—Counsel's admission on point of law, if binding on client.

Waiving of the objection as to limitation by the Counsel does not estop his client from raising the same. Counsel's admissions on a point of law are not binding on him. A.I.R. 1938 Lah. 368=178 Ind. Cas. 288.

——S. 115—Admission—Partition.

Plaintiff suing for declaration of title—No application for partition to revenue authorities—No direction by revenue authorities to bring civil suit—Previous admission by plaintiff that suit property was already partitioned:

Held, that the principle of estoppel did not apply. A.I.R. 1938 Lah. 202=40 P.L.R. 524=181 Ind. Cas. 357.

——S. 115—Admission — Erroneous admission by Counsel—Party, if bound.

An erroneous admission on a question of law made by a Counsel does not bind the party whom he represents. A.I.R. 1938 Lah. 1=40 P.L.R. 188=I.L.R. (1937) Lah. 769=175 Ind. Cas. 824.

——S. 115—Admission.

Suit for rent—Defendant admitting in para. 1 of written statement the ownership of plaintiff but also denying his title in subsequent paras:

Held, only clerical mistake and no estoppel. A.I.R. 1937 All. 676=1937 A.L.J. 727=1937 A.W.R. 646=171 Ind. Cas. 736.

——S. 115—Admission.

When no explanation can be offered by a party for making admission, he is bound by it. ('37) 39 P.L.R. 876.

——S. 115 — Admission — Admitting mortgage in written statement.

Where defendants who were the mortgagors in the written statement admitted the mortgage, it is not necessary for the plaintiffs-mortgagees to tender formal evidence either to prove the loss of the original deed or to prove the contents of the certified copy. A.I.R. 1934 Lah. 898.

——S. 115—Admission.

An admission in previous suit cannot operate as estoppel in a subsequent suit unless the decision in the previous suit is based upon the admission. 33 C.W.N. 876=57 Cal. 258=A.I.R. 1930 Cal. 47.

——S. 115—Conduct—Admission.

Admission of liability under decree does not debar Court of Wards from challenging decree on ground that it was not validly obtained—(Obiter). 31 P.L.R. 749=126 Ind. Cas. 796=A.I.R. 1930 Lah. 798.

——S. 115—Admission.

Where a person admits execution before the Registrar after the document has been explained to him, it cannot subsequently be accepted that he was ignorant of the nature of the transaction. 114 Ind. Cas. 568=33 C.W.N. 407=29 M.L.W. 439=A.I.R. 1929 P.C. 81=56 M.L.J. 511 (P.C.).

——S. 115—Admission,

Admissions do not operate as estoppel but they must be explained by persons making them. A.I.R. 1929 Lah. 748.

——S. 115—Admission.

The admission by a mortgagor in a mortgage-deed that the property comprised in the deed belongs to him, in the absence of a strong proof on his side that such property was not really his when he mortgaged it, concludes the matter against him. 99 Ind. Cas. 642=A.I.R. 1927 Lah. 171.

——S. 115—Admission,

Property purchased at execution sale subject to mortgage—Purchaser cannot challenge validity of the mortgage in mortgagee's suit. 95 Ind. Cas. 563=A.I.R. 1926 Nag. 446.

——S. 115—Admission—Deed of further charge—Recital of earlier mortgages—Effect.

Where a co-parcener executes a deed of further charge in which he recites earlier mortgage-deeds he should be inferred to have admitted their validity in every respect and he cannot be allowed subsequently to set up that the earlier deeds were for an excessive rate of interest. The rate of interest in any deed cannot be impugned by a co-parcener who was himself a party to that deed or must be deemed by his statements or conduct to have admitted the propriety of the rate. 92 Ind. Cas. 681=13 O.L.J. 396=A.I.R. 1926 Oudh 306.

——S. 115—Admission.

A person is not entitled to give an undertaking to a Criminal Court to abstain from certain action and to go and file a civil suit for declaration that the undertaking given by him was of no effect. 85 Ind. Cas. 586=A.I.R. 1925 All. 605.

——S. 115—Admission,

Partition among co-sharer land-lords—Admission that certain lands were rent-free precludes contrary contention afterwards. 86 Ind. Cas. 835=29 C.W.N. 333=A.I.R. 1925 Cal. 635.

——S. 115—Admission.

Admission in a different proceeding that one had sold the land does not act as estoppel so as to do away with the necessity of registering the document. 86 Ind. Cas. 205=2 Rang. 459=A.I.R. 1925 Rang. 68.

——S. 115—Admission.

Admissions by a Hindu widow that she had acquired the property as heir to her husband does not necessarily involve the legal inference that she was asserting only a limited interest and not her absolute right. 42 All. 152 Foll. 74 Ind. Cas. 869= 45 All. 729=A.I.R. 1924 All. 88.

——S. 115—Admission.

Admissions in previous compromised suit does not estop party from proving the truth. 65 Ind. Cas. 368=A.I.R. 1922 Nag. 67.

——S. 115—Admissions — Compromise of previous litigation—Fraud.

Where in pursuance of a compromise of disputed claims the defendant acknowledged the title of the plaintiff, they could not set up their fraudulent lease from a third person against plaintiff's interest in the land which was admitted and recognised by the compromise. 55 Ind. Cas. 463 (Cal.).

——S. 115—Admissions — Waiver— Knowledge of right,

Where certain properties were not the subject of an arbitration award between the parties but the plaintiff subsequently sued for partition. **Held,** that waiver of plaintiff's right could not be inferred from plaintiff's omission to give evidence and explain when and how he came to know that the property was joint. In the absence of evidence that at the time of the arbitration plaintiff knew the property was joint his admission would not amount to waiver. Being gratuitous it did not create an estoppel. 68 P.R. 1919=52 Ind. Cas. 503.

——S. 115— Admissions — Former suit — Estoppel.

A person stating in a former suit that an alienation by him may be treated as sale, does not debar him from pleading that it was a mortgage in a subsequent suit for pre-emption. 50 Ind. Cas. 564 (Lah.)

——S. 115—Admissions—Value of evidence.

A mere admission of the right of one party by the other in a previous case between them does not amount to an estoppel though it is a strong piece of evidence against the person making the admission. 68 P.W.R. 1917=139 P.L.R. 1917=41 Ind. Cas. 283.

——S. 115—Admissions—Estoppel.

An admission by **X** in a deed of compromise of the right of **Y** to enjoy certain property in lieu of maintenance does not amount to an inducement to third persons that **Y** has a good title to the land so that when **X** impugns the validity of the compromise, a transferee from **Y** cannot set up the admission as estopping **X** from claiming the land. 1 Pat. L.J. 509=2 Pat. L.W. 396=38 Ind. Cas. 343.

——S. 115—Admissions—Pleader—Trial.

A party to a suit cannot dispute the correctness of his pleader's admission for the purpose of dispensing with further proof. 9 S.L.R. 220=34 Ind. Cas. 494.

——S. 115—Admissions—Estoppel.

A party or person claiming through another who has made a statement in a previous case is not estopped in the subsequent case from proving that the admission in that statement was mistaken or untrue unless some other person has been induced by them to change his position. 1 O.L.J. 532=26 Ind. Cas. 98.

——S. 115—Admission—Conduct — Plaintiff's admission of other person in suit for property—Effect.

If a plaintiff who was the nearest heir, allowed other heirs to join him in a redemption suit and such heirs spent money and actually assisted in prosecuting the litigation, the plaintiff could not, after recovering the property, assert his superior title as the nearest heir, on the principle of estoppel by conduct. 9 Ind. Cas. 415 (Oudh).

——S. 115 — Admissions — Deed acknowledging possession as servant.

Admission of the excution of a deed acknowledging possession as a servant does not estop the executant from denying his possession as servant and proving his possession as owner, if he did not obtain possession under that deed. 4 S.L.R. 80=8 Ind. Cas. 215.

——S 115—Admissions—Effect of.

The plaintiff brought a suit for partition against his father on the ground that the properties were ancestral; the defendant, pleaded that the properties were his self-acquisitions, the plaintiff, put in evidence certain admissions of the defendant that the properties were partly ancestral. **Held,** that the admissions would shift the **onus** of proof from the plaintiff and that the defendant must prove that the properties were his self-acquisitions. The admissions do not amount to estoppel. 8 M.L.T. 298=8 Ind. Cas. 152.

——S. 115—Admission—Contract Act, Ss. 65, 73.

Where, in an application to execute a decree which provides for no interest, the decree-holder put in a prayer as to the award of interest, and the judgment-debtor, accepting his liablity to pay the decretal debt as well as interest obtains from time to time adjournment from the court to enable him to pay the amount the case falls not under estoppel nor contract, but under Ss. 65 and 73 of the Contract Act, and the judgment-debtor cannot at a later stage of proceedings dispute the item of interest and is bound to pay it from the date on which he admitted his liability to pay it. 28 B. 393=6 Bom. L.R. 417.

——S. 115—Admission, effect of—Defendant not a party to deed containing admission—Presumption, rebuttable.

What a party himself admits to be true may reasonably be presumed to be so. When the defendant is no party to the deeds containing the admission, there is no estoppel, and the party making the admission may give evidence to rebut the presumption, but unless and until that is satisfactorily done, the fact admitted must be taken to be established. (1906) 11 C.W.N. 321=17 M.L.J. 103=4 A.L.J. 102=29 A. 184=2 M.L.T. 109= 9 Bom. L. R. 267=5C.L.J. 115=34 I.A. 27, (P.C.).

——S. 115—"Admission of a thing" — Mistake of law—Estoppel:—

Held, further, that an admission on a point of law is not an admission of a "thing" within the meaning of S. 115 of the Evidence Act. (1906) A.W.N. 182=3 A.L.J. 534.

——S. 115—Admission—Decree-holder — Auction-purchaser of equities of redemption, resisting application to cancel sale—Allegation of adequacy of price—Ground of existence of incumbrances—Subsequent declaration of invalidity of incumbrances—Suit by

judgment-debtor for recovery of mortgage amount. Per Stanley, C. J. (Burkitt J., dissenting):—

Where a decree-holder has represented to the executing court that the judgment-debtor's property is subject to mortgages and has got liberty to bid for it upon such representation he is estopped from denying the truth of that representation, and must make it good to the best of his ability, that is, must pay to the judgment-debtor the amount of the encumbrances represented by him to be subsisting. 1904 A.W.N. 174= 1 A.L.J. 435=27 A 97 (F. B.).

——S. 115—Admission—Withdrawal of.

A gratuitous admission may be withdrawn unless there is some obligation not to withdraw it. (1902) 2 A.L.J. 225.

3. Alteration of position.

——S. 115—Alteration of position—Approbate and Reprobate—Application of doctrine—Judgment-debtor not objecting to application for setting aside rent sale by sub-ordinate tenant—If estopped from questioning subordinate tenancy—B. T. Act, S. 174.

Where a Judgment debtor whose tenancy right has been lost by a rent sale does not object to the claim put forward as sub-ordinate tenant by an applicant for setting aside the sale under S. 174, Bengal Tenancy Act, and get the fullest advantage of the result of the proceeding initiated by him, he is estopped from disputing the subordinate tenancy in a subsequent suit. The judgment debtor has by his conduct induced the applicant under S. 174, Bengal Tenancy Act, to proceed on the basis of a particular position deliberately taken up in that proceding and he cannot be allowed to approbate and reprobate. This conduct on his part may be taken to lead to a species of estoppel which may be described to be an intermediate one between estoppel by record and estoppel in **pais**. This doctrine applies not only to successive stages of the same suit but also to suits other tham the one in which the position had been taken up. A party must not be heard to allege things contradictory to each other. The doctrine of approbate and reprobate is not applicable in the case where there are clear provisions of a statute but applies only to the conduct of parties. 85 C. L. J. 149=A.I.R. 1950 Cal. 351.

——S. 115—Alteration of position—Party setting up title in himself in ejectment suit against him and in subsequent title suit by him—Whether precluded from claiming relief under S. 17 of Calcutta Rent Ordinance on basis of being tenant.

A party who repudiates the status of a tenant and sets up full title in himself in an ejectment suit against him as well as in a title suit subsequently instituted by him, is not precluded from claiming relief under S. 17 of the Calcutta Rent Ordinance on the basis of being a tenant. There is nothing to prevent him from trying to establish his higher title in a title suit and from saying at the same time that in any event he is entitled to the advantages attaching to the lower status which the Court has found in the ejectment suit. 83 C. L. J. 191=A.I.R. 1949 Cal. 686.

——S. 115—Alteration of position—Duty of litigant.

The principle is well-established that a litigant cannot play fast and loose, blow hot and cold, approbate and reprobate either in the course of the proceedings in the same suit or in a different suit between the parties to the detriment of his opponent. 39 C.L.J. 40 and 53 I. A. 64, foll. 53 C.W.N. 284.

——S. 115—Alteration of position—Acknowledgment under S. 19 of the Limitation Act by defacto guardian of minor debtor—Latter executing subsequent acknowledgment on attaining majority—If estopped form questioning authority of **de facto** guardian.

Where a **de facto** guardian of a minor debtor executes an acknowledgment on behalf of the latter for purposes of extending limitation under S. 19 of the Limitation Act, and the debtor after attaining majority subsequently executes another acknowledgment, the susbequent acknowledgment does not estop him from questioning the authority of the **de facto** guardian, as it clearly could not have misled the creditor in receiving the prior acknowledgment. I. L. R. (1947) Nag. 710 =A.I.R. 1948 Nag. 293=1947 N. L. J. 405.

——S. 115—Alteration of position.

If the parties have taken up a particular position before the Court at one stage of the litigation, it is not open to them approbate and reprobate and to resile from that position. I.L.R. (1946) All. 549=224 Ind. Cas. 278=1946 A.L.J. 234=1946 A.W.R. (H.C.) 209=1946 A.L.W. 286=A.I.R. 1946 All. 436.

——S. 115—Alteration of position—Estoppel—Estoppel when comes into play, stated.

Estoppel can only come into play, if by a party's conduct the other party has changed his position in any way to his prejudice or detriment. A.I.R. 1946 Bom, 469=48 Bom.L.R. 313=226 Ind. Cas.503.

——S. 115—Alteration of position.

One of the essential conditions of the proper application of the principle of estoppel is that the person to whom the representation has been made and on which he has acted. has, as a result, altered his former position to his prejudice. A.I.R. 1943 Sind 177=I.L.R. (1943) Kar. 227=210 Ind. Cas. 35.

——S. 115—Alteration of position—Mahant estopped from claiming office for himself—Whether can sue in name of idol through hmself.

Where a mahant is estopped from claiming the office for himself, he cannot get over that estoppel and have it assumed that he was mahant by having a suit instituted by the idols through himself as mahant. ('35) 62 C. L. J. 153=63 Cal. 326=164 Ind. Cas. 33.

——S. 115—Alteration of position—Grantor changing his position on representation of plaintiff's ancestor.

When a grantor changed his position as a result of the representation intentionally made by the ancestors of the plaintiffs all the conditions requisite for an estoppel by conduct under S. 115, are satisfied:

Held, that plaintiffs were estopped from claiming under-proprietary rights. A.I.R. 1935 Oudh 289=1935 O.W.N. 387=1935 R.D. 171=11 Luck. 35=154 Ind. Cas. 965.

——S. 115—Alteration of position—Plaintiff claiming by adoption—Adoption invalid.

Although the adoption may be found to be invalid the plaintiff who is claiming on the basis of adoption is estopped from disputing the adoption and is precluded from recovering the properties, though such estoppel will not make the invalid adoption a valid one. ('33) 1933 M.W.N. 1148.

——S. 115—Alteration of position.

Before an estoppel can take place it is necessary for the party to establish that he had been led to do something detrimental to the interest owing to the action of the other party. 119 Ind. Cas. 337=6 O.W.N. 549=A.I.R. 1929 Oudh 494.

——S. 115—Alteration of position.

Estoppel—Reversioners not succeeding in claiming property on prior occasions, as persons in possession alleged it to be trust property—The latter cannot subsequently deny the character. 108 Ind. Cas. 199=A.I.R. 1928 Mad. 268.

——S. 115—Alteration of position—Change of position on faith of act or omission pleaded is necessary.

In order that a particular declaration, act or omission of a certain person may constitute estoppel against him, the person pleading estoppel in his favour must show that he, accepting the truth of his declaration and relying upon the truth thereof, has acted upon such belief and changed his position to his detriment. 97 Ind. Cas. 897=2 Luck. 335=3 O.W.N. Sup. 102=A.I.R. 1926 Oudh 561.

——S. 115—Alteration of position—Inconsistent statements in two suits—Change of position.

In a previous suit the claim of the plaintiff was based on the ground that certain widows did not inherit the properties, but that his grand father inherited them. In the second the plaintiff claimed the properties as reversioner of the very widows.

Held, that the plaintiff was not estopped by the statement made in the previous suit. So far as the plaintiff himself was concerned, there was no doubt that the statements in the second suit were inconsistent with what was stated in the previous suit but there had been no change of position by reason of the statements made by the plaintiff in the first suit. 89 Ind. Cas. 207=29 C.W.N. 861=A.I.R 1925 Cal. 1195.

——S. 115—Alteration of position — Causing another to believe that he is one's adopted son —Change in circumstances — Estoppel is created.

Where a person is treated by another in such a way as leads him to believe that he is the adopted son of that other and on that footing and on account of such acquiescence and by reason of such encouragement he severs his connection with his natural family or undergoes a change of circumstances in such a way that when restored to his natural family his position would be very different from what it would have been if he had never left it the person treating him as described above and those who claim through him will be estopped from questioning the adoption. 14 M.I.A. 67, Foll. 85 Ind. Cas. 540=A.I.R. 1925 Cal. 993.

——S. 115—Alteration of position — A mere undertaking may operate as an estoppel, though it may not amount to a contract.

An untertaking may operate as an estoppel, though in the absence of consideration it cannot amount to a contract. A man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon particular arguments or contentions which the rules of equity and good conscience prevent his using as against his opponent.

Where the question was whether the undertaking of mortgagee, viz., "I shall accept so much in satisfaction of our debt. I release the balance in your favour. You may purchase the equity of redemption" operated as an estoppel against him.

Held, the mortgagee could not turn round and say that he was entitled to claim the full amount of the bond if the other party relying upon the statement had purchased the property which they otherwise would not have done. 84 Ind. Cas. 124=40 C.L.J. 67=A.I.R. 1925 Cal. 94.

——S. 115—Alteration of position—'Act on such belief' meaning.

Where the facts are within the knowledge of both the parties, there is no scope for the doctrine of estoppel. However, the language of S. 115, extends to the encouragememt of an erroneous belief. But party must have acted on such belief in consequence of the encouragement. The phrase, "act upon such belief" means that the party must have altered its position with reference to the subject-matter of the representation.

Where all that the Judge was able to say was, 'It may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendants had acted',

Held, that was not sufficient. It must be found as a fact that the plaintiff would not have acted as he did. 82 Ind. Cas. 791=48 Bom. 38=25 Bom. L.R. 1170=A.I.R. 1924 Bom. 115.

——S. 115—Alteration of position.

Transfer of Reversionary interest—Transferee not acting thereon—No estoppel is created. 67 Ind. Cas. 963=24 Bom. L.R. 351 = A.I.R. 1922 Bom. 437.

——S. 115—Alteration of position,

What the law and the Indian statute mainly regard is the position of the person who was induced to act and the principle on which the law and the statute rest, is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, had induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge of under error, sibi impulet it may in the result be unfortunate for him, but it would be unjust, even though he acted under error to throw the consequence on the person who believed his statement and acted on it as it was intended he should do. 67 Ind. Cas. 744=1 Pat. 717 =3 P.L.T. 467=1922 P.H.C.C. 209=A.I.R. 1922 Pat. 258.

——S. 115—Alteration of position.

Where a statement is relied upon as constituting an estoppel, it must be proved that the statement caused a change of position of the parties setting up the estoppel. 62 Ind. Cas. 809=A.I.R. 1921 Lah. 117.

——S. 115—Alteration of position.

The doing of anything will not amount to estoppel when it has not led the other party to change his position. 61 Ind. Cas. 979=13 M.L.W. 37=1921 M.W.N. 181=A.I.R. 1921 Mad. 126.

——S. 115—Alteration of position.

The whole principle of estoppel is based on altered circumstances, that is position of the person pleading estoppel must be changed by the alleged representation. 61 Ind. Cas. 807=2 P.L.T. 556=6 P.L.J. 273=A.I.R. 1921 Pat. 166.

——S. 115—Alteration of position—Conduct—Change of position.

Actions and conduct of parties might give rise to estoppel where such actings and conduct have altered in such a way that the parties cannot be put back in their original position without great loss and inconvenience. 5 L.W. 835=41 Ind. Cas. 184.

——S. 115—Alteration of position—Approbation and reprobation of same document.

Per Brett, J.—A person cannot accept all the benefits and repudiate all the liability arising under the same deed. (1904) 8 C.W.N. 438. Also, 6 Bom. L.R. 1103.

——S. 115—Alteration of position—Award—Performance accepted—Specific performance of underformed portion—Validity of award.

Where in accordance with the terms of an award benefits have been accepted by one party, it is not open to him to impeach the validity of the award when the other party sues for specific performance of the terms in his favour. (1901) A.W.N. 208=24 A. 164.

4. Arbitration.

——S. 115—Arbitration.

Where a document drawn in English is an agreement to refer the point in dispute between the parties to an arbitration and is signed by a party not knowing English and to whom the document was not properly explained, he is not bound by the agreement, and such an agreement cannot bar his subsequent suit on the same cause of action. A.I.R. 1937 P.C. 274=170 Ind. Cas. 423 (P.C.).

——S. 115—Arbitration—Parties entering into arbitration and agreeing, there shall be no right of appeal—One party, it can subsequently challenge validity of bye-law and claim right of appeal.

Where the parties have gone to arbitration when a bye-law framed under the Co-operative Societies Act was in force, that bye-law must be taken to govern the contract and be treated as though it were one of the conditions of the contract. There is nothing illegal in the parties agreeing that there shall be no right of appeal in a particular case. The consideration for such an agreement on the part of either party is the agreement of the opposite party to forego its right of appeal. When the society has thus given up its right of appeal and the opposite party has acted upon that basis, the society cannot subsequently be allowed to challenge the validity of its bye-law and claim a right of appeal. Even if there is a right of appeal given by statute, there is nothing illegal in the parties giving it up for a consideration as above.

Consequently, where the rules framed by the local Government allowed a reference to one or three arbitrators but under the bye-laws of the society in force when the dispute was referred, provision was made for a reference to three arbitrators only, and the decision of the arbitrators was made final, whether the bye-law was intra vires or not, it may be taken that the parties agreed to refer to three arbitrators only in consideration of the right of appeal being abandoned, and such an agreement not being illegal, the society is estopped from repudiating it. A.I.R. 1937 Lah. 673=39 P.L.R. 460=168 Ind. Cas. 483.

——S. 115—Arbitration.

Where a contract is unenforceable by **A** and voidable at the option of **B**, who, failing to exercise the option of treating it void, treats it as valid and nominates a person as arbitrator, having accepted a chance of having an award in his favour, **B** is estopped from denying the validity of the submission and alleging that he himself and **A** obtained the award arbitrarily. A.I.R. 1933 Sind 207=148 Ind. Cas. 372.

——S. 115—Conduct—Arbitration.

The Court will not permit a party to lie by or act in an indecisive manner so as to obtain the benefit of an award if it is in his favour and endeavour to set it aside if it is not. 123 Ind. Cas. 234=A.I.R. 1930 Sind 79.

——S. 115—Arbitration.

Where the defendant adduces evidence and acts as if the arbitrator is legally appointed and objects to the award only when it has gone against him he is estopped from questioning the validity of the appointment. 117 Ind. Cas. 344=1929 A.L.J. 868=A.I.R. 1929 All. 559.

——S. 115—Arbitration.

Agreement to refer not signed by a party but arbitrator's authority accepted by him—There is sufficient satisfaction and the party cannot subsequently challenge the validity of the award. 110 Ind. Cas. 302=A.I.R. 1929 Lah. 367.

——S. 115—Arbitration—Arbitrators having no jurisdiction—Mere appearance of the parties before them under protest and examining witnesses will not amount to waiver of objections as to jurisdiction or estoppel. 104 Ind. Cas. 174=29 Bom. L.R. 1087=A.I.R. 1927 Bom. 553.

——S. 115—Arbitration.

Award accepted and acted upon cannot be challenged. 42 Cal. 801 (P.C.), Foll. 96 Ind. Cas. 39=24 A.L.J. 649=A.I.R. 1926 All. 527.

——S. 115—Arbitration.

Civil P.C., Sch. 2, Para 14—Parties representing whole property to be theirs—Third persons interested in the property but arbitrator unaware of the fact and deciding the dispute—Party to reference are estopped from challenging award. 93 Ind. Cas. 261=4 Pat. 670=7 P.L.T. 644=A.I.R. 1925 Pat. 810.

——S. 115—Conduct—Arbitration—Consent given orally—Objection to award.

Where a party to a suit does not join in a written application for reference to arbitration but makes an oral application accepting the arbitration and takes an active part in conducting the proceedings he is estopped from questioning the award on the ground of want of written consent. 77 P.R. 1919=52 Ind. Cas. 859.

——S. 115 — Conduct — Arbitration —Arbitrator seeking to upset award.

A dispute was settled by arbitration. Subsequently two of the arbitrators purchased the interest of one of the parties to the dispute and sought to upset the arrangement. **Held,** that they were estopped from doing so. 7 O.L. J. 26=55 Ind. Cas. 506.

——S. 115—Arbitration—Estoppel by agreement.

Where the defendant has agreed to appoint as arbitrator a European residing at Karachi it is not open to him to plead that he does not know any European merchant at Karachi. 70 P.W.R. 1911= 85 P.L.R. 1911=35 P.R. 1911=9 Ind. Cas. 655.

5. Attestation.

——S. 115—Attestation—Recitals—Whether binding on attesting witnesses.

Recitals in a deed do not bind the attesting witnesses, for, an attestation, pure and simple, is not enough to fix the attestator with knowledge of the contents of the deed. A.I.R. 1944 Lah. 1=45 P.L.R. 325=211 Ind. Cas. 145.

——S. 115—Attestation—If shows consent.

Attestation of a deed does not by itself prove that the person attesting it had knowledge of its contents or consented to the transaction, though there may be cases in which the fact of attestation has to be taken in conjunction with certain other circumstances and other connected events, and inference as to consent drawn from those circumstances supported by the fact of attestation. 8 B.R. 18=196 Ind. Cas. 380.

——S. 115—Attestation—Person signing as witness—Whether can be said to have signed in another capacity.

If a person has signed a document merely as a witness and this is expressed on the face of the document, he cannot be deemed to have appended his signature in another capacity. A.I.R. 1938 Mad. 90 =1937 M.W.N. 1104=46 M.L.W. 892=176 Ind. Cas. 584.

——S. 115—Attestation—Effect as estoppel.

Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys neither directly nor by implication any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. Of course, there may be cases in which attestation is made in circumstances when, coupled with other evidence of consent and acquiescence in the execution of a document, it is relevant to the question whether the attesting witness had knowledge of the contents and agreed to them. A.I.R. 1937 Pat. 353=4 B.R. 5=170 Ind. Cas. 1005.

——S. 115—Attestation.

The mere attestation of a document is no proof that the attesting witness is aware of the contents of the document. A.I.R. 1937 Pesh. 69=170 Ind. Cas. 195.

——S. 115—Attestation — Wife of mortgagor refusing to attest mortgage deed as executant but signing it as witness.

Held, that in the face of evidence that the wife of the mortgagor refused to sign the mortgage-deed as excutant but signed it as attesting witness, the mortgagee could not contend in a suit on the mortgage that she signed the deed as an executant. A.I.R. 1937 Rang. 293=172 Ind. Cas. 613.

——S. 115—Attestation.

The mere fact that a person signs certain documents as an attesting witness does not establish that he was aware of their contents and was a consenting party to the transaction embodied in them. The burden of proving that he had such knowledge and was a consenting party to the transactions lies upon the parties who rely upon these documents. A.I.R. 1936 Lah. 978=38 P.L.R. 416=165 Ind. Cas. 997.

——S. 115—Attestation — Whether necessarily imports consent.

Mere attestation of a deed does not necessarily import consent. But it is possible that an attestation may take place in circumstances which would show that the witnesses did, in fact, know of the contents of the document.

[**Held,** on the facts and evidence that the three brothers who attested the document were fully aware of its contents and that their attestation was obtained for the purpose of evidencing their consent to the transaction.] A.I.R. 1935 Oudh 257=10 Luck. 652=1935 O.W.N. 222=154 Ind. cas. 563.

——S. 115—Attestation.

A Burmese wife not making any claim to husband's **payin** property but attesting a mortgage deed and paying interest—Suit and decree by the mortgagee —Wife is estopped from saying that decree is inoperative against her interest. A.I.R. 1935 Rang. 17=154 Ind. Cas. 1061.

——S. 115—Attestation after hearing contents—Attestor, if estopped from challenging rights of transferee.

Where a person attests a deed after hearing its contents, he is estopped from challenging the right of the transferee of the property covered by thd deed. A.I.R. 1934 Pat. 93=150 Ind. Cas. 765.

——S. 115—Attestation.

Mere attestation cannot necessarily import knowledge of the contents of the document; much less can it amount to a sanction of the alienation effected by the document. A.I.R. 1933 Bom. 217=35 Bom. L.R. 252=57 Bom. 709=148 Ind. Cas. 385.

——S. 115—Attestation.

The signing of a deed as a witness does not, by itself, amount to a knowledge of its contents and does not estop anybody from taking a position to the contrary, unless it is positively shown that he knew the contents of the document. A.I.R. 1933 Lah. 703= 145 Ind. Cas. 746.

——S. 115—Attestation.

Attestation of a document does not involve the witness in any knowledge of the contents of the deed nor fix him with the notice of its provisions. A.I.R. 1933 Lah. 551=34 P.L.R. 196=14 Lah. 369=141 Ind. Cas. 454.

——S. 115—Attestation.

The attestation by presumptive reversioner of the widow's alienation only raises a presumption of legal necessity but it would not, by itself, either create estoppel or imply consent. A.I.R. 1931 Pat. 442=10 Pat. 352=12 P.L.T. 521=134 Ind, Cas. 129.

——S. 115—Attestation.

Person attesting asserting facts mentioned in document—Attestation is sufficient to prove his knowledge of its contents. 116 Ind. Cas. 716=A.I.R. 1930 Lah. 217.

——S. 115—Attestation—If creates estoppel.

Attestation of a deed proves no more than that the signature of an executing party has been attached to a

document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed, nor affect him with notice of its provisions. Mere attestation by itself would neither create an estoppel nor imply consent. A.I.R. 1916 P.C. 110, **Foll.** 118 Ind. Cas. 93=6 O.W.N. 369.

——S. 115—Attestation by itself does not operate as estoppel but it can so operate when coupled with other circumstances.

Attestation of a deed by itself estops a man from denying nothing whatever except that he witnessed the execution of the deed, and by itself it does not show that he consented to the transaction which the document effects.

But where in addition to the fact of attestation there was evidence to show that the attestor who was managing member of the family consented to and acquiesced in the execution of the mortgage by a widow of the family property which was in her possession, and took an active part in the consultations which resulted in the mortgage and after the mortgage was executed entered into an agreement with mortgagee whereby in effect he obtained an option to have the mortgage transferred to him,

Held, that the attestor not only witnessed the execution of the mortgage but also he, in his capacity of managing member of the joint family, consented to and acquiesced in the mortgage being given and could not, therefore, be allowed to challenge its validity. 107 Ind. Cas. 20=47 C.L.J. 189=30 Bom. L.R. 267=32 C.W.N. 538=29 P.L.R. 182=27 M.L.W. 672=26 A.L.J. 533=1928 M.W.N. 933=A.I.R. 1928 P.C. 20=54 M.L.J. 254 (P.C.)

——S. 115—Attestation.

Mere attestation of deed cannot amount to an estoppel, since attestation does not fix an attesting witness with knowledge of the contents of a document. 112 Ind. Cas. 89=9 Lah. 224=30 P.L.R. 154=A.I.R. 1928 Lah. 432.

——S. 115—Attestation.

A reversioner who brings about a mortgage by limited owner and also attests it cannot be allowed to challenge that the debt secured by the mortgage was not binding on the reversioner. 1927 M.W.N. 231=A.I.R. 1927 Mad. 438.

——S. 115—Attestation.

Award **ultra vires** — Signature thereon does not estop. 104 Ind. Cas. 394=1 L. C. 311=A.I.R. 1927 Oudh 448.

——S. 115—Attestation.

Where thumb marks of witnesses are impressed on a document in token of consent and as attestation and the document is read and explained to them at the time of registration and again their thumb marks are impressed,

Held, that it is not a mere attestation but is a distinct and clear acquiescence which binds the attestors and estops them from questioning the validity of the document. 90 Ind. Cas. 1032=26 P.L.R. 756=A.I.R. 1926 Lah. 62.

——S. 115 — Attestation — Real owner attesting a deed of mortgage by ostensible owner in token of his consent is estopped from claiming ownership.

The fact that a party attested the deed of mortgage does not by itself estop him from denying that he knew of its contents or that he consented to the mortgage, but there might be circumstances which would show that the attestation was intended to convey something more than a mere witnessing of the execution and was meant as involving consent to the transaction.

Where the owner assured the mortgagees that the title to the estate lay with the transferor, that he had no interest in it, and that with a view to signify that assurance he attested the deed of mortgage.

Held, that the assurance given by the owner as to the title of the property under mortgage was enough to create a belief in the mind of the mortgagees and to act upon it, and if they believed and acted upon that belief, the owner cannot turn round and say that the mortgagees should not have believed him but made further enquiries: A.I.R. 1922 P.C. 20 **Foll.** 90 Ind. Cas. 547=A.I.R. 1926 Oudh 131.

——S. 115—Attestation coupled with other circumstances can be "consent."

Though mere attestation is not sufficient to fix a party with knowledge of the deed attested yet attestation combined with other circumstances may amount to evidence of consent. Where not only did the reversioners attend before the Registrar, identify the executant, and attest the deed, but the debt in respect of which the deed was executed was a debt from the reversioners themselves as principal debtors.

Held, that it was impossible to believe under these circumstances that they were not aware of the nature of the transaction or that their attestation was not meant to indicate their assent to it. 85 Ind. Cas. 580=5 L.R.A.Civ. 644=A.I.R. 1925 All. 209.

——S. 115—Attestation.

The attestation of a deed does not by itself estop the person attesting from denying that he knew of its contents or that he consented to the transaction which it effects. A.I.R. 1922 P.C. 20, **Foll.** 87 Ind. Cas. 652=7 L.L.J. 179=26 P.L.R. 215=A.I.R. 1925 Lah. 413.

——S. 115—Attestation.

Attestation does not by itself create estoppel. 49 C. 334, **Foll.** 71 Ind. Cas. 43=A.I.R. 1924 Nag. 65.

——S. 115—Attestation.

The mere attestation of a deed by a relative does not import concurrence nor does it involve any knowledge of the contents of the deed. 84 Ind. Cas. 208=5 P.L.T. 375=A.I.R. 1924 Pat. 736.

——S. 115—Attestation — Gift deed — Application for mutation—Attestor of—If can challenge gift.

A gift of immovable property was made by a report to the Revenue Surveyor. The heirs of the donor signed the report as witnesses to the transaction and possession was given to the donees.

Held, that the heirs could not after many years dispute the right of the donees to the possession of the land, though the donees did not get a legal title to the lands for want of a registered deed. 79 Ind. Cas. 579=1 Rang. 651=A.I.R. 1924 Rang. 102.

——S. 115—Attestation.

The mere fact of attestation does not raise any presumption that the attesting witnesses were aware of the contents of the document. A plea of estoppel cannot be founded on that fact alone. 70 Ind. Cas. 815=A.I.R. 1923 All. 28.

——S. 115—Attestation does not work estoppel.

The attestation of a deed by itself estops a man from denying nothing whatsover excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the documents and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. 65 Ind. Cas. 954=24 Bom. L. R. 557=35 C.L.J. 409=15 M.L.W. 486=20 A.L.J. 305=

18 N.L.R. 1=26 C. W. N. 201=30 M.L.T. 249=49 Cal. 334=49 I.A. 16=5 N.L.J. 6=A.I.R. 1922 P. C. 20=42 M.L.J. 436 (P.C.).

——S. 115—Attestation.

Merely because a person signed a mortgage bond as an attesting witness, he cannot be held to be bound by the recitals in it. 63 Ind. Cas. 266=2 P.L.T. 614.

——S. 115—Attestation.

Attestation by a reversioner of a conveyance by a Hindu widow does not import knowledge of the contents of the deed. Consent to the transaction should not be imputed to the attestor nor does it operate as an estoppel. 44 Cal. 186=20 M. L. T. 335=31 M.L.J. 563=(1916) 2 M.W.N. 336=4 L.W. 458=18 Bom. L. R. 868=14 A. L. J. 1103=24 C.L.J. 487=1 Pat. L. W. 1=21 C.W.N. 225=10 Bur. L.T. 177=36 Ind. Cas. 420=43 I. A. 249 (P.C.).

——S. 115 — Attestation — Entries in Khewat as mortgagees.

Where the defendants had been shown in a Khewat as mortgagees in possession of certain lands which they had attested, the Court had power of drawing an inference of fact from such evidence, which, if unrebutted would estop the defendant. 34 Ind. Cas. 165 (All.).

——S. 115—Attestation—Estoppel.

A reversioner by attesting a deed of exchange of the disputed property is estopped from contesting the validity of its alienation. 66 P.W.R. 1914=159 P.L.R. 1914=25 Ind. Cas. 724.

——S. 115—Attestation—Representation.

To give rise to estoppel no actual representation is necessary. 20 C. 296 (P.C.) Ref. Attestation may in certain cases create an estoppel. If the auction purchaser allows another to remain in possession for long time and attests a sale-deed by him, his conduct estops him from claiming the benefit under S. 317 of C. P. Code, of 1882. (Per **Sadasiva Aiyar, J.**)—Estoppel does not give rise to a cause of action but is only a bar to defendant's plea in answer to the action. 36 Mad. 564=23 M. L. J. 301=12 M. L. T. 211=(1912) M.W.N. 882=16 Ind. Cas. 30.

——S. 115—Attestation—Effect of.

The mere attestation of a deed does not estop the attestor from claiming his title unless it is established that he had full apprehension and knowledge of the contents of the document and that in some way or other it was signed with a view to affect his interest in the properties in suit covered by it. (1920) P.H.C.C. 305 =5 Pat. L.J. 521=1 Pat. L.T. 546=57 Ind. Cas. 353.

——S. 115—Attestation.

Attestation of a deed do not necessarily import consent to an alienation effected thereby nor even knowledge of its contents. 20 C.W.N. 210=32 Ind. Cas. 468=22 C.L.J. 452.

——S. 115—Attestation.

It is doubtful whether attestation is sufficient evidence of consent by a son to his father's alienation. 29 Ind. Cas. 749 (A).

——S. 115—Attestation—Effect of.

There is no estoppel against a person challenging a sale merely because he took an active part in bringing about the sale and attested it. 14 S.L.R. 12=56 Ind. Cas. 492.

——S. 115—Attestation—Effect of.

In Talvandi Kalan Tahsil Jagram Dist. Ludhina, if a member of proprietary body attests a sale-deed by a non-proprietor at its registration, he cannot contest the alienation. 96 P. W. R. 1910=69 P.L.R. 1910=125 P.L.R. 1910=7 Ind. Cas. 711.

——S. 115—Attestation—Signature on document as a witness—Knowledge of contents—Denial of lessor's right—Transfer of the witnesses' right.

The plaintiff's suit was for possession of certain property, on the ground that the plaintiff was its absolute owner. The defendant alleged that the plaintiff's husband had relinquished the land in his favour and that he was absolute owner of that land. The defendant produced a lease purporting to have been executed by himself in respect to the property in dispute, in which it was recited that the plaintiff had no title to the property but that the defendant was its owner. To this lease the plaintiff was marginal witness. The courts below found that she was aware of the contents of the lease. **Held,** that the plaintiff's title was not transferred by a mere recital in the lease to the person in whose favour the recital was made. **Held,** further, that the plaintiff was estopped from denying the defendant's right as against the leases but she was competent to deny the defendants right as against herself. (1910) 7 A.L.J. 664=7 Ind. Cas. 264.

——S. 115—Attestation.

Mere attestation of a deed does not necessarily import an assent to all the recitals contained therein. 3 C. L. J. 576=10 C.W.N. 551=33 C. 613.

——S. 115 — Attestation — Hindu widow—Reversioner.

Where the heir of any deceased Hindu deliberately allows the widow to hold herself out as a true owner and attests the mortgage-deed in proof of his consent, he cannot be allowed to resile from that position and deprive the mortgagee of the money advanced on the faith of that representation as he is estopped from setting up the invalidity of the mortgage. 2 O.L.J. 368=30 Ind. Cas. 388.

6. Compromise.

——S. 115—Compromise.

Suit for injunction—Agreement between parties that one of them may remain in possession on condition of his paying mesne profits to the other if the latter was successful — Execution of security bond empowering Court to recover mesne profits in execution:

Held, that the defendant and his surety were estopped form contending that the Court had no power to enforce the undertaking. A.I.R. 1936 Mad. 990=1936 M.W.N. 1160=44 M.L.W. 717=166 Ind. Cas. 670.

——S. 115—Compromise—Principle of.

When parties have agreed to act upon an assumed state of facts, the rights between themselves depend on the conventional state of facts and not on the truth. A.I.R. 1936 Pat. 393=17 P.L.T. 268=2 B. R. 633=15 Pat. 394=163 Ind. Cas. 685.

——S. 115—Compromise.

Widows parties to compromise of suit—They cannot subsequently turn round and plead that the title had not passed by the compromise. A.I.R. 1932 Lah. 281= 13 Lah. 70=33 P.L.R. 1003=137 Ind. Cas. 820.

——S. 115—Compromise.

Respondents had obtained a money-decree against A. A died subsequently and respondents took out execution against appellant as representative of A. When notice was issued to him, he entered into agreement with decree-holders and paid a sum of money and decree-holders, in their turn, allowed sale to be adjourned for six months after which sale was again to be held without fresh proclamation. When execution

was again prosecuted, appellant raised an objection that property attached had devolved on him by right of survivorship and not by inheritance:

Held, appellant had by his conduct disentitled himself to raise the objection that he was raising. ('31) 8 O.W.N. 339=132 Ind. Cas. 80.

——S. 115—Compromise—Advantage not taken.

Even if the compromise is beneficial to a party's interest, but he has not taken any benefit out of or under it, that compromise does not constitute an estoppel debarring him from challenging it. 108 Ind. Cas. 44=A.I.R. 1928 Cal. 334.

——S. 115—Conduct—Compromise.

Plaintiff compromising suit on defendant's allowing property to be sold on certain conditions—Defendant cannot afterwards say that holding is non-transferable. 87 Ind. Cas. 250=1 Pat. 153=A.I.R. 1922 Pat. 483.

——S. 115—Compromise—Boundary dispute.

Owners of adjoining tracts of land are not bound by consent to a boundary which has been defined under the mistaken apprehension that it is the true line and neither party is precluded or estopped from claiming his own rights under the true line when discovered, provided that the position of his opponent has not been meanwhile altered on the faithfulness of his representation. If the boundary line between the lands of two adjacent owners has led to any dispute and if in settlement of such dispute the parties have adopted a certain boundary as the true line of division between their properties, neither can be permitted to resile from the settlement. (1910) 12 C.L.J. 378=6 Ind. Cas. 467.

——S. 115—Compromise of claim to inherit—Creditor of parties not bound by.

A compromise of a claim by a Mahomedan to inherit her husband's properties with the defendant who set up a wakfnamah as mutiwali thereunder, whereby the widow relinquished her claim in consideration of an annuity is not binding upon a creditor of hers who had advanced money previous to the suit compromised and the creditor is entitled to show that the wakf was invalid and inoperative. (1906) 10 C.W.N. 560.

[Their Lordships did not allow it in this case.—Ed.]

7. Conduct.

- **a. Absence of**
- **b. Acceptance of benefit**
- **c. Adoption**
- **d. Compliance with order**
- **e. Consent**
- **f. Inducement**
- **g. Negligence**
- **h. No estoppel**
- **i. Omissions**
- **j. Recognition of agency**
- **k. Representation**
- **l. Scope and essentials.**

7. (a) Absence of.

——S. 115—Conduct—Absence of.

No litigant has any right to delay or obstruct the proceedings of the Court by absenting himself deliberately and then asking for re-consideration of the matter passed in his absence. 116 Ind. Cas. 714 (Lah.).

7. (b) Acceptance of benefit.

——S. 115 — Conduct — Acceptance of benefit — Estoppel by conduct.

Defendant making payment of revenue and cess in excess of his liability in property and to the advantage of plaintiff—Latter taking advantage of same —Payment by plaintiff of amount in excess of his liability in other property—Right to contribution from defendant—Estoppel. A.I.R. 1950 Pat. 255.

——S. 115—Conduct—Acceptance of benefit—Party accepting costs—Whether can question order.

Where a party accepts costs under an order which, but for the order, would not at that time be payable, he cannot afterwards say that the order was made without jurisdiction, unless, of course, at the time of realising the costs he expressly reserved his right to challenge the order. 1947 M.L.R. 41 (Civ).

——S. 115—Conduct—Acceptance of benefit.

Where a person relinquishes his claim to a share in an estate and accepts a **guzara** or maintenance allowance, the acceptance of the **guzara** disentitles him from putting forward any claim to the estate subsequently. A.I.R. 1944 Oudh 162=1944 O.W.N. 83=1944 A.W.R. 27.

——S. 115—Conduct—Acceptance of benefit.

Permanent lease by former trustee—Lease supported by partial necessity—Suit by succeeding trustee to avoid lease and for possession—Acceptance of rent:

Held, that the fact that plaintiff had received certain monies could not estop the plaintiff from contending that the lease was not binding on him in the absence of evidence to show that the monies were paid and accepted as rent. A.I.R. 1936 Mad. 262=1936 M.W.N. 476=162 Ind. Cas. 325.

——S. 115 — Conduct — Acceptance of benefit—Daughter receivng under father's will.

Where it is proved that the daughter took part of her father's property under the will, she cannot afterwards set up a title as an heir to her father and she is bound by the terms of the will of her father so far as those terms are valid. 18 Nag. L.J. 1=158 Ind. Cas. 1042.

——S. 115—Conduct—Acceptance of benefit—Agreement between decree-holder and Judgment-debtor — Decree-holder accepting benefit under agreement—Rufusal to abide by other terms—Decree-holder estopped from repudiating.

During the execution of a money decree, the parties arrived at an agreement to the effect that Rs. 1,000 would be paid to the decree-holder immediately and Rs. 500 would be paid on a subsequent fixed date and the remaining amount due under the decree would be registered with certain trustees who had been appointed by the judgment-debtor to pay off their creditors and on this amount, the decree-holder would receive rateable distribution from trustees. Accordingly, Rs. 1,000 was paid there and then. The judgment-debtor applied for adjustment of decree, but the decree-holder resisted urging that the agreement was invalid:

Held, that the decree-holder having accepted the benefit of the compromise by accepting Rs. 1,000, was estopped from repudiating other terms of the compromise. A.I.R. 1934 Lah. 423=35 P.L.R. 315.

——S. 115—Conduct—Acceptance of benefit—Judgment-debtor induced by conduct of decree-holder not to appeal.

A party, having by his conduct, induced the other party to make an immediate payment of the decretal amount and having entered into an engagement with him which makes it impossible for him to question the decree of the trial Court, is estopped from acting contrary to his undertaking. A.I.R. 1934 Pat. 644=B. R. 271=153 Ind. Cas. 1098.

——S. 115—Conduct—Acceptance of benefit.

The plaintiff agreed to sell to the defendant certain goods to be manufactured by the plaintiffs from November 1929 to Jaunary 1930. At the end of Jan-

uary, the plaintiffs appropriated certain goods to the contract which consisted partly of goods manufactured before November, 1929. The defendant, however, assented to the appropriation even after they came to know that the goods were not in accordance with the contract. Between January and May, the defendants continued to take delivery of portion of the goods and the plaintiffs continued to hold the goods in their godown to the order of the defendants. In a suit for the price of the goods sold:

Held, that the conduct of the defendants amounted to a representation to the plaintiffs that they would not repudiate the appropriation on the ground that some of the goods were packed before the date of the contract and as the plaintiffs had acted upon this representation by continuing to hold the goods, the defendants were estopped from asserting that property had not passed to them. A.I.R. 1933 Bom. 46=34 Bom. L.R. 1252=140 Ind. Cas. 610.

——S. 115—Conduct—Acceptance of benefit.

It is not open to a party to a compromise, who has taken benefit under it to contend subsequently that it is not binding on it for non-joinder of all interested parties. A.I.R. 1931 Cal. 155=34 C.W.N. 996=58 Cal. 366=130 Ind. Cas. 873.

——S. 115—Conduct—Acceptance of benefit.

Where a person obtains a release from a liability upon the understanding of foregoing a definite claim against a third party, that person is estopped from asserting or enforcing the claim to the detriment of the third party. A. I. R. 1930 All. 434.

——S. 115—Conduct—Acceptance of benefit.

Where during the life-time of the mother, the daughters who were in possession effected a partition of certain properties and the parties enjoyed the properties in pursuance of that arrangement but its validity was sought to be questioned after the death of the mother by the executants themselves,

Held, that they were estopped from doing so. 125 Ind. Cas. 1=1930 A.L.J. 688=A.I.R. 1930 All. 687.

——S. 115—Conduct—Acceptance of benefit.

Award—Election by party to award by taking benefits under it—Party cannot turn round and say that award is invalid. A.I.R. 1929 Cal. 796, **Ref:** 50 C.L. J. 323=125 Ind. Cas. 290=A.I.R. 1930 Cal. 255.

——S. 115 — Conduct—Acceptance of benefit—Order for restoration on payment of costs—Acceptance of costs—Effect.

When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. For instance, if the Court directs that the suit shall be restored on the plaintiff paying the costs of the opposing party, there is no intention to benefit the latter, except on the terms mentioned in the order itself. If the party receives the costs his act is tantamount to adopting the order. But if a party receives the benefit reserving his right to object to the order, he will not in that case be precluded from attacking it. A.I.R. 1927 Mad. 1009, **Not foll. (Case-law discussed).** 123 Ind. Cas. 337=31 M.L.W. 30=1930 M.W.N. 50=A.I.R. 1930 Mad. 268=58 M.L.J. 137.

——S. 115—Conduct—Acceptance of benefit.

Where Court orders restoration of a suit dismissed for default, on condition that plaintiff pays certain amount to defendant and defendant received that amount, having been under no compulsion to do so, no revision against the order lies at the instance of the defendant. (1849) 4 Ex. 187, **Foll.**; 12 C. L. J. 556 **Dist.** 110 Ind, Cas. 528 (Mad.)

——S. 115—Conduct—Acceptance of benefit.

A co-sharer under a partition decree cannot reprobate the decree after having obtained an advantage to the detriment of the other co-sharer. But if the decree was a nullity it cannot be affirmed by anything that a co-sharer does short of obtaining an advantage under it to the detriment of others. A.I.R. 1929 Cal. 586.

——S. 115—Conduct — Acceptance of benefit — Advantage taken under partition—Party estopped from setting impartibility.

The father of the plaintiff entered into a partition and the deed was acted upon for over 40 years, the plaintiff asserted his claim to entire property as being entitled by law of primogeniture and estate being impartible, but kept quiet for about 12 years and dealt with his share of the property as having been derived under the deed of partition.

Held, that he cannot reasonably be heard to say that he is entitled to succeed by primogeniture which is the subsisting custom of the family. 118 Ind. Cas. 342=50 C.L.J. 267=A.I.R. 1929 Cal. 577.

——115—Conduct—Acceptance of benefit.

Persons acting on general award and accepting benefit under it cannot challenge it. 117 Ind. Cas. 153=23 S.L.R. 417=A.I.R. 1929 Sind 168.

——S. 115—Conduct — Acceptance of benefit—Plaintiff allowed to amend plaint on payment of costs—Defendant accepting payment cannot challenge the order in appeal.

A party who has adopted an order of the Court and acted under it cannot after he has enjoyed a benefit under the order contend that it is valid for one purpose and invalid for another.

Defendants resisted the suit for rendition of accounts filed by the plaintiffs, pleading inter alia that no suit for accounts was maintainable on the facts alleged. The Trial Court upheld that plea and dismissed the suit. On appeal the Court agreed with the trial Court that a suit for accounts was not maintainable on the facts alleged, but allowed the plaintiffs to amend the plaint on payment of Rs. 150 as costs to the defendants and remanded the case for re-trial. The defendants took the costs but filed a second appeal from the order of remand,

Held, that the appeal was not competent as the defendants acquiesced in the order passed by the Trial Court by accepting the costs awarded to them; 12 C.L.J. 556; 21 C.W.N. 232 and A.I.R. 1927 Mad. 1009, **Rel. on**; 31 P.R. 1907 (F.B.) and A.I.R. 1927 Lah. 771, **Dist.** 109 Ind. Cas. 819=10 L.L.J. 398=A.I.R. 1928 Lah. 813.

——S. 115—Conduct—Acceptance of benefit.

Person, not included in the cause title but claiming to be party, and taking steps for securing some relief to himself—He is estopped from contending that he was not made a party. 110 Ind. Cas. 837=1928 M.W.N. 634=A.I.R. 1928 Mad. 690.

——S, 115—Conduct—Acceptance of benefit—Legatee cannot dispute testator's title nor can he set up title different from that contained in the will.

One who obtains or accepts or retains possession of property under the will and who neither has, nor professes to have, any title thereto except under the will is estopped, as against any remainder-man or other person claiming under the same will, from asserting that the testator was not entitled to such an estate in the property as he

purported to devise or bequeath and generally from setting up any title to the property in himself which is independent of and adverse to the will, or any interest of a different kind from that which he would have taken if the property had passed by the will as it was impliedly represented by him to have passed. 109 Ind. Cas. 835=1 L.C. 592=A.I.R. 1928 Oudh 67.

——S. 115—Conduct—Acceptance of benefit—Party to decree taking advantage of the decree cannot subsequently go behind it.

Where a party to a decree passed an award files an execution application to enforce the decree by possession being awarded to him of the lands as provided in the award and obtains possession in execution proceedings of at least a part of that property, the maxim allegans contrarria non est audiendus applies and he having taken advantage of the decree by its enforcement cannot be allowed to play fast and loose with justice and go behind the decree: 24 All. 164; 21 C.W.N. 232 and Tinker v. Hilder, (1849) 18 L.J. Ex. 429, Rel. on. 112 Ind. Cas. 286=23=S.L.R. 196=A.I.R. 1928 Sind 175.

——S. 115—Conduct—Acceptance of benefit.

Will—Legatee, having no title to property except under will, accepting the will—He cannot set up that the testator has a defective title nor can he claim title adverse to testator or other legatees. Board v. Board, L.R. 9 Q.B. 48, Appl. 106 Ind. Cas. 20=26 A.L.J. 62=A.I.R. 1927 All. 642.

——S. 115—Conduct—Acceptance of benefit—Order setting aside ex parte decree—Plaintiff accepting costs—Effect.

Where an order setting aside an ex parte decree has been passed and the plaintiff accepts costs and his pleader appears in Courts thereafter the plaintiff should be deemed to have accepted the order setting aside decree and the order will not be interfered with. 96 Ind. Cas. 782=A.I.R. 1926 Lah. 637.

——S. 115—Conduct—Acceptance of benefit.

Judgment-debtor requesting decree to be by instalments and acting upon it cannot subsequently object to it. 95 Ind. Cas. 243=A.I.R. 1926 Lah. 465.

——S. 115—Conduct—Acceptance of benefit.

Gift by ostensible owners—Donee cannot afterwards deny right of donors to make gift: 42 Cal. 56, Dist. 85 Ind. Cas. 546=22 M.L.W. 113=A.I.R. 1925 Mad. 990.

——S. 115—Conduct—Acceptance of benefit—Right to appeal—Estoppel by conduct—Judicial proceedings — Dismissal for default of suit—Appellate Court ordering restoration on payment of compensation to the other party—Compensation accepted—Waiver of right to appeal.

When an Appellate Court ordered restoration of a suit dismissed for default on payment of compensation and compensation was accepted by the opposite party the latter is equitably estopped from appealing from the order of remand. 18 Ind. Cas. 525 (All.).

——S. 115—Conduct—Acceptence of benifit—Decree—Alteration of.

A decree should be executed as made and the parties connot make a substantial alteration therein. But the parties having acted upon the decree as altered for long time the judgment-debtors cannot be permitted to object to its validity, when they have been benefited. 16 C.L.J. 404=17 C.W.N. 565=17 Ind. Cas. 936.

——S. 115—Conduct — Acceptance of benefit—If party can impeach an award, if act of arbitrator favourable.

A party who is benefited by the wrong act of an arbitrator cannot afterwards impeach its validity. 15 C.L.J. 110=16 C.W.N. 256=13 Ind. Cas. 118.

——S. 115—Conduct—Acceptance of benefit—Withdrawal of money from Court.

Withdrawal of money deposited under O. 21 R. 89, C.P.C. by a private transferee of a holding, by the land-lord and acquiescence in the setting aside of the sale estops the land-lord from questioning the transfer. 6 C.L.J. 601 Foll. 9 Ind. Cas. 619 (Cal.).

——S. 115—Conduct — Acceptance of benefit—Order, propriety of, if can be questioned after accepting—Costs.

A party who has adopted an order of the Court and acted under it cannot, after he has enjoyed a benefit under the order contend that it is valid for one purpose and invalid for another. But the rule is inapplicable where the order was so framed as to make it practically obligatory upon him to adopt. (1845) 4 Ch. 187 distin. (1910) 12 C.L.J. 556=8 Ind. Cas. 79.

7. (c) Adoption.

——S. 115—Conduct—Adoption.

The belief induced in the person who sets up an estoppel under S. 115, must be one in a fact, not in a proposition of law; hence a Hindu widow's conduct in adopting a boy and subsequently supporting the adoption, even if regarded as equivalent to a representation that the boy can be validly adopted does not give rise to an estoppel. A.I.R. 1944 Nag. 62=1943 M.L.J. 514=I.L.R. (1943) Nag. 678=211 Ind. Cas. 306.

——S. 115—Conduct—Adoption.

Widow adopting with consent of her husband's collaterals — Collaterals not objecting to the adopted son taking his share by partition—Adopted son taking care of the widow till her death and redeeming mortgage by her husband—Collaterals are estopped from challenging adoption. 96 Ind. Cas. 777 (Lah.)

——S. 115—Conduct — Adoption—Widow recognising adoption by conduct cannot dispute its validity.

When plaintiff's husband, a boy, was adopted his name and his house name was changed, he took the house name of the first defendant's husband and the name of his adopted father's father, and immediately after the adoption the first defendant performed his Upanayanam ceremony. Some years later the first defendant performed his marriage and also Grahapravesam ceremony and the adopted boy performed the shraddha for the first defendant's husband, and did not receive any of his natural family property, and the first defendant also asserted that she had her husband's authority to adopt at the time of the adoption.

Held, that these circumstances are quite sufficient to consitute an estoppel and therefore first defendant is estopped from denying the adoption. 34 A. 389 (P.C.) Foll. 77 Ind. Cas. 214=19 M.L.W. 83=33 M.L.T. 191=1924 M.W.N. 1=A.I.R. 1924 Mad. 308=46 M.L.J. 52.

——S. 115—Conduct—Adoption — Party can be estopped from denying adoption.

No doubt it is perfectly true that under the Hindu Law an adoption can only be effected by the due performance of certain religious ceremonies; but the plaintiff in an action can be estopped by his own previous conduct from asserting that such valid and binding adoption had not in fact taken place. 69 Ind. Cas. 971=20 A.L.J. 945=45 All. 169=A.I.R. 1923 All. 58.

——S. 115—Conduct—Adoption—Recognition of.

Where defendant who challenged, an adoption, was the grandson of a party to a compromise under which the adoption was made and under which he received a material benefit and who was present and consenting defendant, he is estopped from disputing the adoption and is bound by his grandfather's action. 1 Lah. 31=72 P.L.R. 1920 =55 Ind. Cas. 869.

——S. 115 — Conduct — Adoption — Status of person—Dispute as to—Burden of proof.

Those who challenge the status of a party must show that they have not by their own conduct led the person concerned to imagine that his status was accepted by them. In this respect there is a considerable difference between cases of say, mortgage and the like and cases of alleged adoptions, the legitimacy of children and the validity of marriages. If on the acquiescence of the collateral heirs of the adopted father and adopted son has been brought up as a member of the village community to which his adoptive father belonged and has always been recognised as such, the collaterals are estopped from challenging the validity of the adoption on the ground that it was invalid by custom. 69 P. R. 1917= 103 P.W.R. 1917=41 Ind. Cas. 927.

——S. 115—Conduct—Adoption—Reversioner—Estoppel by conduct.

The doctrine of estoppel by conduct is applicable to invalid adoptions. Where a reversioner deals with a person alleged to have been adopted by the last male owner as such and in that capacity accepts a patni from him, he is estopped from denying the status of the latter as adopted son. 30 Ind. Cas. 29 (Cal.)

——S. 115—Conduct—Adoption—Hindu widow—Assertion of authority from husband and adoption of a boy—Subsequent treatment as adopted son—Widow estopped from denying adoption —Estoppel personal.

Where a Hindu widow asserted in the most solemn manner under her hand and seal her husband's authority to adopt a son, and in persuance of such authority adopted a boy from another family executed a deed of adoption in his favour brought him up as her son, married him suitably and after some time sued for a declaration that the adoption was invalid owing to want of authority from her husband; Held, that though the authority was oral and its precise terms could not be ascertained, the widow was estopped by her conduct and declarations from alleging want of authority, and further, that the same evidence showed that the authority was not exhausted by to prior adoptions. The estoppel of the widow would only be personal to her and not bind the reversioners. 34 All. 398=39 I.A. 142=16 C.W.N. 675=9 A.L.J. 730=14 Bom. L.R. 485=(1912) M.W.N. 64=12 M.L.T. 95=16 C.L.J. 60=23 M.L.J. 200=15 Ind. Cas. 673 (P.C.),

——S. 115—Conduct—Adoption—Invalidity of.

There is no estoppel against the plea of invalid adoption even though the adoption was acquiesced in, by the family so as to debar the adoptee being restored to his natural family unless the position of those contesting such right, has, in consequence of the adoption been changed to their disadvantage. 37 Mad. 529=23 M.L.J. 189=(1912) M.W.N. 1127=15 Ind. Cas. 299.

——S. 115—Conduct—Adoption—Status—Right to property.

Plaintiff sued for a declaration that an alienation by R's widow was not binding on him as a reversioner. It being admitted that R was given in adoption, the plaintiff contended that the adoption was invalid. Plaintiff had regarded R was an adopted person all along. Held, that plaintiff was not estopped from questioning R's real status, though he could not question R's rights to the property of the adopter. 21 M.L.J. 500=10 M.L.T. 19=(1911) 2 M.W.N. 62=10 Ind. Cas. 194.

7. (d) Compliance with order.

——S. 115—Conduct—Compliance with order—Party accepting order of Court and acting on it.

Where the Deputy Commissioner was of opinion that the original order of the Assistant Collector disallowing the objection was an order passed under S. 111 (1), cl. (c) of the U. P. Land Revenue Act, and, therefore, the order reviewing it was appealable, not to his Court, but to the civil Court, and consequently returned the appeal to the appellant for presentation to the proper Court and the appellant, without going in appeal against the order of the Deputy Commissioner, accepted it by presenting an appeal to the Civil Court:

Held, that in the circumstances, the appellant must be taken to have accepted the position that the order of the Assistant Collector was one passed under S. 111 (1), cl. (c) of the U. P. Land Revenue Act, and therefore, the appeal must be decided on the footing that the order passed by the Assistant Collector was one under S. 111 (1), cl. (c) of the U. P. Land Revenue Act, and that the contention that the Assistant Collector had no power to grant the review inasmuch as the original order passed by him was not one under S. 111 (1) cl. (c), could not be allowed to prevail. A.I.R. 1936 Oudh 409=1936 O. W. N. 836=1936 R. D. 454=12 Luck. 362=165 Ind. Cas. 19.

——S. 115—Conduct—Compliance with order—When creates estoppel—Partition decree—Taking possession of properties allotted does not preclude appeal for further claim.

A final decree was passed in a partition suit awarding to the plaintiff a certain share in the family properties. The plaintiff took possession of the plots allotted to him under the decree and subsequently preferred an appeal against the decree alleging that there was no proper division of the properties and that necessary provision had not been made in regard to water rights. The respondent contended that as the plaintiff had accepted the decree and taken possession of the properties allotted, he was not entitled to prefer an appeal on the principle that a party who has adopted an order of the Court and acted upon it cannot, after he has enjoyed a benefit under it, contend that it is invalid;

Held, that this principle was not applicable to the case as the plaintiff had not derived any benefit to which he was not otherwise entitled; no question of estoppel or acquiescence arose and the appeal was quite competent. A.I.R. 1935 Mad. 465=41 M.L.W. 218=68 M.L.J. 255=1935 M.W.N. 227=156 Ind. Cas. 987.

——S. 115—Conduct—Compliance with order.

When amendment has been allowed subject to payment of costs to the defendant who accepts the amount, he cannot turn round and attack the amendment. A.I.R. 1934 Lah. 974=36 P.L.R. 264=156 Ind. Cas. 342.

——S. 115—Conduct—Compliance with order.

The fact that the plaintiffs paid without demur the small ad valorem Court-fee in pursuance of the order of an earlier date does not debar them from questioning the validity or illegality of the Court demanding ad valorem Court-fee when subsequently the Court demanded a much larger fee since a fresh cause of action accrued to the plaintiffs on the latter date when additional Court-fee was demanded. 80 Ind. Cas. 667=5 P.L.T. 425=1924 P.H.C.C. 254=3 Pat. 930=A.I.R. 1924 Pat. 673.

7. (e) Consent.

——S. 115—Conduct—Consent.

Hindu family firm—Disruption of joint family—Effect on manager's power to contract debts—Liability of other members—Participation in active management amounts to estoppel since a member cannot deny the character he has assumed and on the faith of which third parties may be presumed to have acted. A.I.R. 1936 Mad. 94=43 M.L.W. 437=1936 M.W.N. 134=70 M.L.J. 214=162 Ind. Cas. 371.

——S. 115—Conduct—Consent.

A party cannot approbate and reprobate with knowledge of the facts, and if the husband or the wife once deliberately affirms the marriage, he or she cannot subsequently object to the marriage. Therefore, where a previous petition for declaring the marriage a nullity has been been dismissed by consent of parties a second petition is not competent: (1885) A.C. 171, Rel. on. 110 Ind. Cas. 266=30 Bom. L.R. 523=A.I.R. 1928 Bom. 279.

——S. 115—Conduct—Consent.

Where the plaintiff by his conduct permitted the defendants to believe that they would have the right to use the water of the well of the plaintiff and the defendants relying upon the permission had acted upon the belief that they would be entitled to that right the plaintiff was estopped from denying the rights of the defendants under S. 115, Evidence Act. 22 Bom. L.R. 415=57 Ind. Cas. 143.

——S. 115—Conduct—Consent — Hindu joint family—Father—Benami transfers—Sons recognising transaction.

Where in a joint Hindu family consisting of the plaintiffs and their father, the latter as manager of joint family properties entered into several benami transactions for the purpose of saving a portion of the estate from the hands of a mortgagee execution-purchaser, and being accepted by plaintiff on that footing, rights had sprung up, based on those transactions. Held, that plaintiffs having accepted the transactions entered into by the head of the family, they were bound. 55 Ind. Cas. 222 (Cal.).

——S. 115—Conduct—Consent—Award given after time—Acquiescence.

Where the parties have by conduct agreed to accept the award, made after the allotted time they cannot afterwards contend that it was invalid because delivered out of time. 4 Pat. L.J. 265=50 Ind. Cas. 52.

——S. 115—Conduct—Consent—Party to partition deed.

If a man allows a certain land to be recorded as Sir in a certain proceeding for partition to which he is a party, he is estopped from denying it. 32 Ind.Cas. 387 (U.P.B.R.).

——S. 115—Conduct—Consent to mutation proceedings.

When a person appeared at the time of the mutation in respect of the sale in dispute and expressed his consent to it, he cannot subsequently come forward and impugn it. 2 Lah. L.J. 306.

——S. 115 — Conduct — Land-lord's consent — Occupancy holding.

Where the plaintiff mortgagee of an occupancy holding obtained a decree on his mortgage and after taking a **Hukumnamah** from a co-sharer land-lord purchased the holding in execution of his decree and became the owner of the land with the land-lord's consent, he could not be ousted by any subsequent action of land-lord. S. 27 of the Sp. Rel. Act did not embody the only rule of equity applicable to this case and S. 115 of the Evidence Act was particularly applicable to this case. 14 Ind. Cas. 28 (Cal.)

——S. 115—Conduct—Mortgage of tenant right—Consent of land-lord—Receipt of rent.

A transferee land-lord cannot refuse to receive rent from the mortgagee tenant, nor can he obtain a decree or arrears of rent due to his refusal and obtain possession of the holding in execution, when the original land-lord has been treating the mortgagee as a tenant for about a period of six years and receiving rents. 5 N.L.R. 111=3 Ind. Cas. 57.

7. (f) Inducement.

——S. 115—Conduct—Inducement—Mortgagee inducing stranger to purchase property as free from incumbrances.

Where a mortgagee took an active part in the sale of the mortgaged property to third party without disclosing the mortgage and by his conduct, induced the latter to enter into the transaction, and subsequently assigned his mortgage to another person:

Held, that the mortgagee was estopped by his conduct from setting up his mortgage and this estoppel was binding on his assignee also. A.I.R. 1934 Mad. 302=39 M.L.W. 431=1934 M.W.N. 316=66 M.L.J. 563=148 Ind. Cas. 612.

——S. 115—Conduct—Promise under inducement.

Oral promise of gift of land to Municipality after latter had already constructed road on the land—Donor is not estopped from denying gift. 45 Bom. 164=A.I.R. 1921 Bom. 198=22 Bom.L.R 654.

——S. 115—Conduct—Inducement—Husband and wife.

Where a **pardanashin** lady deliberately makes herself jointly and severally liable for a debt incurred by her husband on the strength of a power given to him by her, she cannot afterwards repudiate the same. 12 C.L.J. 115=3 Ind. Cas. 330.

——S. 115—Conduct—Inducement—Agreement to release mortgage.

An agreement to release a mortgage if made for consideration binds the parties to it and a third party

can enforce it if he is induced by it to purchase it or to advance money upon it or to do some act prejudicial to his interest. 10 C.L.J. 150=1 Ind. Cas. 264.

7. (g) Negligence.

——S. 115—Conduct—Negligence—Stranger made to change position.

The judgment-debtor was aware of the decree and that it was obtained in the name of the joint family firm. He made payments under the decree towards its satisfaction, and negotiations took place to settle the amount remaining due under the decree. No step was ever taken by the judgment-debtor to have the decree set aside. A stranger took an assignment of it and paid consideration for his purchase:

Held, that the judgment-debtor, by reason of the conduct, caused the stranger to change his position to his detriment. The judgment-debtor was, therefore, estopped from asserting that the decree was a nullity and unenforceable against him. A.I.R. 1943 Cal. 172= I.L.R. (1942) 1 Cal. 562=207 Ind. Cas. 581.

——S. 115—Negligence—Estoppel by negligence and representation—Bank giving advances on railway receipt—Receipt handed over to pledgor to collect goods for storing them in Bank's godown—Pledgor re-pledging it to another Bank—Such Bank bona fide giving advances —Suit for conversion—If can be based on estoppel by negligence.

A pledge of the railway receipt operates as a pledge of the goods. The pledgee does not lose his right of property as pledgee by parting with the custody of the railway receipts or by entrusting them to the merchants or their agents or mandatories for the special purpose of convenient dealing with the goods by collecting them and putting them into the pledgee's godown. Such a procedure is in the usual course of business and is obviously either necessary or at least convenient for the conduct of the business. Where the merchants, after the pledge of the receipt with a Bank, repledge the same with another who takes the pledge bona fide, no action for conversion can be founded on the ground of estoppel by negligence or representation. The type of estoppel, which enables a party as against another party to claim a right of property which, in fact, he does not possess is described as estoppel by negligence or by conduct or by representation or by a holding out of ostensible authority. But the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake and also, it must be the neglect of some duty that is owing to the person let into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy. In this case, the Bank does not owe any duty to the subsequent pledgee. There is no relationship of contract or agency. Not only is there an absence both of any duty or of anything amounting to a neglect of usual precautions, but there is no ground for finding any representation. There is no reason for the Bank to think that they were representing to anybody that the merchants had any title to dispose of the goods. The railway receipts are not dangerous things; there is no question of arming the merchants with them. It is only in special conditions of fact that an estoppel by representation can be established. The railway receipt, though a document of title, is, in form, merely an authority to take delivery of the goods and the possession of such a document contains no representation that the holder has any implied authority or right to dispose of the goods. It is at the best, an ambiguous document. Its possession no more conveys a representation that the merchants were entitled to dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. A.I.R. 1938 P.C. 52=22 S.L.R. 315= 40 Bom. L.R. 713=4 B.R. 260=1938 O.W.N. 206= 42 C.W.N. 321=19 P.L.T. 147=1938 A.L. J. 273= 47 M.L.W. 329=(1938) 1 M.L.J. 268=66 C.L.J. 510 =I.L.R. (1938) Mad. 360=1938 M.W.N. 552=65 I.A. 75=1938 A.W.R. 90=172 Ind. Cas. 745 (P.C.).

——S. 115—Conduct—Negligence.

Plaintiff owner of Government promissory loan notes—His agent handing them over to A—A forging signature to endorsements and presenting them to Bank of India—Bank cancelling them and issuing new ones—Plaintiff suing Secretary of State for possession of notes—Defence of estoppel on ground of negligence.

Held, that in order to succeed on the plea of estoppel, the defendant must establish that there was a duty on the part of the plaintiff and his agent to use due care towards the party or towards the general public of which he is one. Further, the negligence must be in the transaction itself and the negligence must not only be calculated to have the misleading effect attributed to it but must be the proximate or real cause of that result. The fraud must have flowed as a natural and uninterrupted sequence from the negligent act. Consequently, the Secretary of State was liable. A.I.R. 1938 Bom. 93=39 Bom. L.R. 1152=I.L.R. (1938) Bom. 139=173 Ind. Cas. 522.

——S. 115—Conduct—Negligence—No estoppel.

Where a mortgagee gives title deeds to mortgagor knowing that the latter required them to effect a sale knowing that the latter required them to effect a sale of properties, the mortgagee is guilty of negligence under S. 78, T. P. Act, in having allowed the mortgagor to defraud the purchaser but in sueh a case no estoppel under S. 115, Evidence Act, arises against him. A.I.R. 1937 Mad. 195=1936 M.W.N. 871=170 Ind. Cas. 845.

——S. 115—Conduct—Negligence — Extinction of right.

If a man has been neglectful of his rights in certain cases that does not mean that he should be compelled to forego his remaining property. 79 Ind. Cas. 134=5 L. R. A. Rev. 115=A.I.R. 1924 All. 477.

——S. 115—Conduct—Negligence.

Where the plaintiff, by signing the transfer forms, and delivering the same and the share certificates to the brokers, who absconded without paying for the shares to plaintiff, placed them in a position to give a title to defendant, who was a bona fide purchaser for value without notice.

Held, whatever right he may have against the absconding brokers, plaintiff is estopped by his act from asserting any right to the shares: 15 A. C. 267, Foll. 66 Ind. Cas. 726=46 Bom. 489=23 Bom. L.R. 1144=A.I.R. 1922 Bom. 303.

——S. 115—Conduct — Negligence — Suit for mesne profits—Omission—Possession of lands on partition—Subsequent suit for mesne profits against person who was in possession.

Omission to take possession of lands even when possesion was offered cannot deprive the party neglecting to take possession of the right to recover the subsequent mesne profits from the party who was in actual possession of the lands. (1904) 18 M.L.J. 217.

7. (h) No estoppel.

——S. 115—Conduct—No estoppel—Failure of legal representative to volunteer to be brought on record.

The duty of bringing the legal representatives on the record of a case rests upon the plaintiff in that case. There is no duty upon the legal representative to volunteer. His inaction cannot be used against him because there is no duty on him to speak. His conduct cannot be used as an admission or even as an estoppel. I.L.R. (1950) Nag. 491=1950 N. L. J. 281=A.I.R. 1951 Nag. 270.

——S. 115—Conduct—No estoppel—Government basing assessment of Zamindari on charge levied in past—If estopped from disputing the legality of their levy in future.

The fact that the Government based the assessment of a Zamindari on charges actually, though illegally, levied in the past does not give rise to the inference that they consented to the levy of similar charges in the future, and the Government are not, therefore, estopped from disputing the legality of levies in the future. Basing assessment upon actual charges made in the past does not amount to affirmance that charges of a similar nature will be allowed in the future. I.L.R. (1949) Nag. 263=A.I.R. 1949 P.C. 140.

——S. 115 — Conduct — No estoppel — Decree providing for its satisfaction if smaller amount is paid before certain date—Deposit of that amount by judgment-debtor after due date—Decree-holder withdrawing that amount—If estopped from executing decree for balance.

Where a decree provides that if a smaller amount is paid by a certain date it would be deemed to be satisfied and the judgment-debtor doposits that amount in Court after the due date, the decree-holder withdrawing that amount is not estopped from executing the decree for the balance of the decretal amount, as the judgment-debtor's position has not been worsened in any way and no improper advantage has been gained by the decree-holder by such withdrawal. The fact that the judgment-debtor has stated in his application for permission to deposit the amount that he is making the deposit in full satisfaction of the decretal amount, makes no difference. The bare act of the decree-holder in withdrawing the amount cannot be interpreted to mean that he impliedly agreed to the condition. The condition is meaningless after the due date has elapsed and therefore, the decree-holder is within his rights in ignoring it and in withdrawing the amount, treating it as part satisfaction of his claim. 36 C. 840 (P.C.) and 27 B. 1 (F.B.), Dist. I.L.R. (1949) Nag. 295=A.I.R. (1949) Nag. 385=1949 N.L.J. 513.

——S. 115—Conduct—No estoppel—Rule that there can be no estoppel against statute does not imply that there can be no estoppel against plea of fact necessary to be established before statute can be invoked.

It is quite true that there can be no estoppel against a statute but this rule does not imply that there can be no estoppel even against a plea of a fact which has to be established before the application of the statute can be invoked. A man may not estop himself by any conduct of his from pleading that an alienation made by him is in contravention of a provision of the Punjab Alienation of Land Act. He may, however, estop himself by such conduct from pleading that he is a member of a tribe to which protection is afforded by the Act. A.I.R. 1946 Lah. 73=47 P.L.R. 385=223 Ind. Cas. 458.

——S. 115—Conduct—No estoppel—Legal dues —Person recovering then partially — He is not estopped from claiming balance due.

It is always open to a person to recover his legal dues unless he has, by some action, legally bound himself not to do so. If not, it does not matter whether he has not exercised his rights or whether he has recovered his dues only partially, provided he sues within limitation. Estoppel is a ground on which he might be precluded from claiming; express waiver is another and so forth. But the mere fact that he accepts a part of the money tendered does not estop him from claiming the rest unless his hands are tied by something more. 224 Ind.Cas. 12=I.L.R. (1946) Nag. 392=1946 N.L.J. 358=A.I.R. 1947 Nag. 153.

——S. 115—Conduct—No estoppel.

Agreement to lease—Proposed lessee in possession—Suit for ejectment — Fact that proposed lessor did not interfere with but on the contrary, stood by and permitted him to erect structures does not bar the suit for ejectment by reason of any doctrine of estoppel, acquiescence and waiver. A.I.R. 1940 Pat. 438=21 P.L.T. 277=190 Ind. Cas. 581.

——S. 115—Conduct—No estoppel.

Lessee of land and premises, near realtion of lessor—Lease in year 1893 and not registered—Improvements by lessee without protest from lessor—Suit for possession by lessor—Decree, held could be passed conditional on payment by lessor of amount spent by lessee for improvements and that no question of estoppel arose because there was no inducement by the lessor. A.I.R. 1938 All. 342=1938 A.W.R. 280=1938 A.L.J. 465=176 Ind. Cas. 135.

——S. 115—Conduct—No estoppel.

Fire—Warranty in policy that no hazardous goods shall be stored in premises—Fire occurring from such breach of warranty—Claim against company—Company taking possession of salvage and keeping it for month:

Held, that if in such a policy there is no clause relating to salvage the mere fact that the company takes the salvage and keeps it for about a month does not operate as an estoppel against its pleading that the assured cannot make a claim under the policy. A.I.R. 1938 Lah. 168=40 P.L.R. 549=178 Ind. Cas. 35.

——S. 115—Conduct—No estoppel.

Joint Hindu family—Throwing of separate property into common stock—Income used only for support of son—Purchase of property with father's own money in son's name;

Held, that father's conduct in purchasing and recording the property in son's name does not lead to estoppel from pleading that it was father's property. A.I.R. 1936 Nag. 185=I.L.R. (1936) Nag. 65=165 Ind. Cas. 350.

——S. 115—Conduct—No estoppel.

The mere fact that a person attached the surplus sale proceeds of the execution sale under another decree in order to satisfy any decree obtained by him but did not proceed further cannot preclude him from claiming title to the property. 85 Ind. Cas. 747=A.I.R. 1926 Cal. 420.

——S. 115—Conduct—No estoppel.

Granting of lease of nazul for building purposes does not estop Municipal Committee from refusing permission to build. 92 Ind. Cas. 796=A.I.R. 1926 Nag. 281.

——S. 115—Conduct—No estoppel.

Rent suit—Inclusion of a plot in the suit on objection by defendant—Subsequent suit to eject defendant from the plot—No estoppel is created. 81 Ind. Cas. 324=4 P.L.T. 730=A.I.R. 1924 Pat. 203.

——S. 115—Conduct — No estoppel — Will—Hindu widow—Estoppel, whether arises by accepting an invalid will by a Hindu widow.

Where a testatrix disposed of her woman's estate by a will to her daughter with some allowance to her son, the fact that the son accepted the will does not amount to an estoppel and preclude him or his son from disputing the title of the daughter under a will. 44 Cal. 145=39 Ind. Cas. 223.

——S. 115—Conduct—No estoppel — Mutation proceedings—Assent—Withdrawal of assent on reconsideration.

Where plaintiff's consent was given to a certain mutation of names without consideration but was on reconsideration quickly withdrawn. **Held**, there was no estoppel by consent. 58 P.W.R. 1917=39 Ind. Cas. 204.

——S. 115—Conduct—No estoppel— Mortgage—Priority—Waiver.

A prior mortgagee waiving his priority as against one item of the mortgaged property is not estopped from enforcing is against the remaining items. 37 All. 474=42. I. A. 163=13 A.L.J. 809=19 C.W.N. 991=17 Bom. L. R. 617=18 M. L. T. 85=2 L.W. 639=29 M.L.J. 159=22 C.L.J. 165=(1915) M.W.N. 709=30. Ind. Cas. 366(P.C).

——S. 115—Conduct—No estoppel—Withdrawal of application—Reference—Award.

Where one of the applicants withdrew his application for revision of the order of dismissal of his suit based on a certain award, he in not precluded from challenging the award especially where the Court held that the reference to the arbitration was bad. 93 P.R. 1915=18 M. L. T. 54=19 C.W.N. 929=15 A.L.J. 801=17 Bom. L. R. 609 =2 L.W. 645=(1915) M.W.N. 500=22 C.L.J. 172=110 P.W.R. 1915=29 M.L.J. 307=11 P.L.R. 1916=29 Ind. Cas. 807 (P.C.)

——S. 115—Conduct—No estoppel— Mortgage—Heir redeeming a portion — Subsequent suit for rest of the property.

An heir is not estopped from claiming the rest of the property of a deceased person in the hands of a stranger by reason of his redeeming from that stranger, a small portion of that property. 5 P.W.R. 1915=37 P.L.R. 1915=27 Ind. Cas. 565.

——S. 115—Conduct — No estoppel — Will—Daughters taking under will—Subsequent repudiation.

Daughters taking the estate of the deceased father under a will executed by the mother are not estopped from claiming subsequently on the the ground of the invalidity of the will executed by their mother. 16 M.L.T. 592=(1915) M.W.N. 26=28 M. L. J. 685=26 Ind. Cas. 455.

——S. 115—Conduct — No estoppel — Mutation proceedings—Withdrawal of claim.

A withdrawal of claim in a revenue mutation proceeding does not estop a person from suing for the portion in a Civil Court if the opposite party is not thereby prejudiced. 25 Ind. Cas. 34 (Oudh).

——S. 115—Conduct—No estoppel—Acceptance of rent by land-lord.

Acceptance of rent under protest, does not estop the acceptor from impeaching the tenancy as such acceptance does not create land-lord and tenant relation. 19 C.L.J. 244=23 Ind. Cas. 592.

——S. 115 — Conduct — No estoppel — Hindu reversioner accepting mortgage of land sold by widow—Whether estopped from contesting sale.

A reversioner who accepts a mortgage from a person to whom the widow had sold her share under the impression that the land mortgaged was the vendor's share and not that which the widow sold, is not estopped from contesting the sale. 32 P.W.R. 1914=108 P.L.R. 1914=23 Ind. Cas. 525.

——S. 115 — Conduct — No estoppel — Invalid grant—Acceptance of rent.

In the case of an invalid grant, acceptance of rent from the grantee does not amount to recognition of the grant and does not validate it. 18 C.L.J. 23=21 Ind. Cas. 204.

——S. 115 — Conduct — No estoppel — Will—Bequest—Validity of—Right of heir to question —Gift to charity.

Where a bequest to Dharmarth was used for a langar for more than six years it will not amount to estoppel against the testator's heir as regards the future and so he can deny the validity of the gift on the ground of its being void for vagueness. 63 P.W.R. 1912=106 P.L.R. 1912=78 P.R. 1912=14 Ind. Cas. 247.

——S. 115—Conduct—No estoppel—Disclaimer —Expression of intention not to claim.

A mere disclaimer by a person of his preferential right to acquire land made over to rival applicant will not estop him after the land had been actually granted to him by the Government in the absence of a deliberate fraud practised on the Government or the rival claimant. 32 M. 300 Expl. 23 M.L.J. 593=12 M.L.T. 539=17 Ind. Cas. 489.

——S. 115—Conduct—No estoppel—Entry of husband's name as joint occupier—Effect.

The entry in revenue Maps of a person's name as joint occupier with another would not estop the latter from claiming as sole owner. 4 Bur. L.T. 255=12 Ind. Cas. 206.

——S. 115—Conduct—No estoppel.

Plaintiff brought a suit for partition of certain property. In appeal the District Court found that in fact it was a suit for a declaration of title and possession. Thereupon, the plaintiff

agreed to amend the plaint accordingly. Plaintiff appealed against the order of the District Judge. Held, that he was not estopped by his conduct from challenging the order of the District Judge. 38 Cal. 681=15 C.L.J. 443=10 Ind. Cas. 463.

——S. 115—Conduct—No estoppel—Hindu joint family — Son taking benefit during father's time—Right to impeach alienation.

A son by getting certain lands from his father in his life-time is not estopped from challenging the father's alienations when the latter dies and the son comes into possession of the whole estate. 76 P.L.R. 1911=73 P.W.R. 1911=9 Ind. Cas. 586.

——S. 115—Conduct—No estoppel — Suit for rent—Deposit by third party alleging himself to be transferee of tenant — Withdrawal of amount under protest—Suit for possession against depositor—Estoppel.

A land-lord brought a suit for rent against his tenants. In execution of the decree got therein, the holding was advertised for sale. First defendant asked for permission to deposit the decretal amount stating that he was the representative of the tenants. The land-lord protested against the deposit being made by him but he was allowed to deposit the amount which the land-lord withdrew. The land-lord subsequently filed a suit for possession against the depositor. Held, that the withdrawal of the amount by him could not be regarded as barring his suit for possession. 7 Ind. Cas. 86 (Cal.).

——S. 115—Conduct—No estoppel.

Plaintiff took settlement of a piece of land from the chairman of a Municipality who had no power to do so, and built a house thereon, and after two years the plaintiff was allowed by the Municipality to construct a drain round the house. Held, that since the plaintiff built his house before constructing the drain and he was not led to erect the house by the Municipality's permission to construct the drain, this did not operate as an estoppel against the Municipality. 9 C.L.J. 286=4 Ind. Cas. 55.

——S. 115—Conduct—No estoppel—Non-transferable holding.

Though a land-lord purchases a part of non-transferable holding under mortgage, he is not precluded from objecting to the transfer on the ground of non-transferability without his consent in a suit by the mortgagee. 1 Ind. Cas. 661 (Cal.).

——S. 115—Conduct— No estoppel —Surrender qualified by widow to two reversioners—Death of reversioners— Attestation of deed by plaintiff—Son of one reversioner—Suit by plaintiff to recover the other half as real reversioner on death of widow.

A widow conveyed in halves her property to two reversioners subject to their giving her maintenance. The son of one of them, plaintiff, attested the deed of conveyance to the other, where it was described that his father was the owner of one-half. The reversioners died before the widow. The plaintiff sued as the real reversioner for the recovery of the other half:— Held, that he was not estopped. (1906) 3 A.L.J. 755=1906 A.W.N. 272=29 A. 71.

——S. 115—Conduct—No estoppel—Hindu law—Gift.

The mere fact that a minor member of a joint family (here a grandson) did not object during life-time of his ancestor for payments being made out of the current income of the property cannot estop him from afterwards contending against the validity of gifts out of the corpus of the family property. (1904) 17 M.L.J. 405=30 M. 452=3 M.L.T. 23.

7. (i) Omissions.

——S. 115—Conduct — Omission to assent — Land-lord and tenant.

The land-lord succeeded in his suit for ejectment in the lower Courts and obtained possession. But the High Court reversed the decision on the technical ground that no proper notice to quit was given by the land-lord. The tenants however did not claim restitution,

Held, that by accepting the land-lord's possession as good the tenants impliedly surrendered the tenancy and by their failure to claim immediate possession they led the land-lord into the belief that no proper notice to quit was necessary. They were therefore estopped from pleading that his possession was not lawful. 13 M.L.W. 32=A.I.R. 1921 Mad. 144.

——S. 115—Conduct—Omission to dissociate.

Where during the pendency of a suit the minor becomes major, but the guardian continues to represent him and the parties continue the old state of affairs the guardian is liable for costs. 1929 M.W.N. 545=A.I.R. 1929 Mad. 782.

——S. 115—Conduct—Omission to plead.

Where plaintiffs allowed one S to join with them in a suit against another person and to obtain a decree as the son of a particular man without denying that he was the son of the man and had no right to sue, they will be estopped from disputing his paternity in a suit by them for possession of the property decreed. 80 Ind. Cas. 235=A.I.R. 1923 Lah. 630.

——S. 115—Conduct—Omission to plead—Question of law or abandoning a point—Power of court to go into question.

Omission of a counsel either to argue a question of law or his abandoning a question of law is not sufficient to disentitle the Court to go into the question. 27 C. 156, Foll. (1906) 11 C.W.N. 340.

——S. 115—Conduct—Omission to object.

Fire breaking out at wax refinery—Wax flowing into river and collected by general public and brought and sold in market—Company not asserting its right to wax:

Held, that the company having stood by at a time when its officials knew perfectly well that the public were trading in wax and having permitted them to believe that the company had no further interest, the estoppel arose by reason of their inaction as there was no prosecution instituted as a warning, no notice in the press and no evidence of cautions given to the general public. A.I.R. 1941 Rang. 166=1941 Rang. L.R. 153=194 Ind. Cas. 887.

——S. 115—Conduct — Omission to object—Lessee, held estopped from questioning legality of third person's possession or his right to build.

Held, on facts that the lessee having induced the third person to believe that he (third person) was in lawful possession of the land and had a right to construct building thereon, by his conduct, was

estopped from questioning the legality of the third person's possession or his right to construct building and to remain in possession of it. A.I.R. 1940 Rang. 172=189 Ind. Cas. 735.

——S. 115—Conduct — Omission to object—Attachment of decree—Rightful owner omitting to object—Other parties acting on such conduct—Effect.

Where a person did by his omission to object to the attachment of the decree lead another party to believe that the decree was still the property of his judgment-debtor at the time of the attachment and to act on that belief in giving credit for the amount recovered by execution of the decree which he attached and in releasing the other debtors who were jointly liable under the decree in his favour from liability under that decree.

Held, that the person who omitted to raise the objection was estopped from denying that the judgment-debtor was still the owner of the decree attached at the time of attachment. 125 Ind. Cas. 365=8 Rang. 223=A.I.R. 1930 Rang. 265.

——S. 115 — Conduct — Omission to object—Burden of proof.

A part accepting the onus without demur cannot object at a late stage saying that burden was wrongly put on them. 120 Ind. Cas. 168=31 P.L.R. 481=A.I.R. 1930 Lah. 213.

——S. 115—Conduct—Omission to object.

Person, in whose favour three mortgages on same property were executed, assigning second of them to another—Assignee suing making assignor pro forma defendant — Assignor not disclosing third mortgage by written statement—He cannot sue auction-purchaser on his third mortgage. 115 Ind. Cas. 638=A.I.R. 1929 All. 511.

——S. 115 — Conduct — Omission to object — Admission of additional evidence in appeal.

In appeal, appellants were allowed to adduce further evidence on an issue of fact. The respondents did not take up their stand on the inadmissibility of such evidence but adduced furth evidence to rebut the contention of the appellants,

Held, that the respondents could not complain of the allowing of evidence. 115 Ind. Cas. 184=32 C.W.N. 1020=A.I.R. 1929 Cal. 26.

——S. 115 — Conduct — Omission to object—Trial of Small Cause suit on original side.

Where in a suit, instituted in a Small Cause Court, a question of title was raised and the suit was transferred to the original side for trial, and afterwards the issue of title was deleted but the suit was tried on the original side without any objection from the plaintiff, and further the objection was not also raised in the grounds of plaintiff's appeal to the High Court, the plaintiff would not be allowed to raise it at a later stage: A.I.R. 1922 Mad. 352, Rel. on. 119 Ind. Cas. 386=A.I.R. 1929 Mad. 525.

——S. 115—Conduct—Omission to object—Suit by minor without next friend—Failure to object after notice—Effect.

If a defendant in a suit instituted by a minor without a next friend is aware or has received notice of the minority of the plaintiff and yet elects to proceed to trial and take his chance of obtaining a decree in his favour on the merits without raising any objection to, or issue upon, the maintainability of the suit and prefers the objection for the first time on appeal when the trial has gone against him he is estopped. 22 Cal. 270 and 19 Mad. 127, Rel. on. 111 Ind. Cas. 349=55 Cal. 712=A.I.R. 1928 Cal. 537.

——S. 115—Conduct—Omission to object.

Pre-emption—Sale after notice that co-sharers have a right of pre-emption—Before commencement of sale co-sharer claiming his right without protest by purchaser—Purchaser cannot subsequently resist the claim of the co-sharer. 103 Ind. Cas. 823=A.I.R. 1927 Cal. 925.

——S. 115—Conduct—Omission to object.

Person entitled to challenge alienation present at mutation but failing to object is estopped. 96 Ind. Cas. 915=A.I.R. 1926 Lah. 650.

——S. 115—Conduct—Omtssion to object.

Where P allowed S to act as lambardar, knowing that he was not one, and that under the law he could not become one.

Held, P cannot be allowed to disown S's acts by contending that he was not a lambardar at all. 95 Ind. Cas. 987=8 N.L. J. 195=A.I.R. 1926 Nag. 188.

——S. 115—Conduct—Omission to object.

Where two members of a Hindu joint family mortgaged property and there was a mortgage-decree after which one of the mortgagors died without issue and in the proceeding for final decree one of his brothers not a party to the mortgage had been made a party,

Held, that as it was legally open to him to plead that he claimed under independent title and should not be made a party to the final decree and as he had not done so he was bound by the decree and could not be plaintiff in a subsequent suit to set aside the decree. 78 Ind. Cas. 637=5 L.R.A. Civ. 279=A.I.R. 1924 All. 873.

——S. 115—Conduct—Omission to object.

Where a party failed to object to a wrong order of a court and thus deprived the opponent of certain remedies open to him if the party had objected, he cannot afterwards raise that objection. 83 Ind. Cas. 438=39 C.L.J. 434=28 C.W.N. 559=51 Cal. 690=A.I.R. 1924 Cal. 633.

——S. 115—Conduct — Omission to object—Right of person made a party defendent to urge in appeal that he was not a proper party.

When a person who is not a proper party to a suit allows himself to be made a party defendant without any objection and an issue relating to him is raised and decided in the suit, he cannot change front and insist in the appellate court that an error has occurred in making him a party and the issue was not triable in the action. (1906) 11 C.W.N. 284=5 C.L.J. 95=3 A.L.J. 456.

——S. 115 — Conduct — Omission to object—Major represented as minor—Party to suit—Defendant improperly impleaded as a minor—No objection raised by defendant during suit—Subsequent suit for declaration that decree was not binding on defendant.

A certain defendant was impleaded in a suit as a minor under the guardianship of his mother, who was his certified guardian. He and his mother jointly defended the suit, and at no period did the defendant raise the objection that he was not a minor when the suit was instituted. A decree was passed in favour of the plaintiff and no appeal was preferred either by the defendant or his guardian ad litem, **Held,** that it was no

competent to the defendant to sue and subsequently to have the decree declared not binding upon him upon the ground that he was in fact of full age when it was instituted and that his mother had betrayed his interests. 20 A. 90 and 1905 C. W. N., p. 229, distinguished. (1904) 1906 A.W.N. 73=3 A. L. J. 187=28 A. 416.

7. (j) Recognition of agency.

——S. 115—Conduct—Recognition of agency—Plaintiff deliberately accepting through his general agent liability to pay under proprietary rent—Whether can seek for declaration that it is to be paid by others.

Where a person has, through his general agent, deliberately accepted before the Assistant Settlement Officer the liability to pay the under-proprietary rent of a holding, he cannot subsequently resile from that position and seek for a declaration to the effect that other persons are liable to pay the under-proprietary rent. A.I.R. 1935 Oudh 409=1935 O.W.N. 537=165 Ind. Cas. 295.

——S. 115—Conduct—Recognition of agency—Sale of part of mortgaged property—Mortgagee's agent agreeing to sale and accepting sale proceeds in reduction of mortgagor's indebtedness.

Where it appeared that the mortgagee's agent raised no objection to the sale of property for its full value to the respondents and accepted the whole of the proceeds in reduction of the indebtedness of the mortgagor and then furnished a list of debts due by the mortgagor in which the mortgage debt in suit was not mentioned:

Held, that by these acts, the agent of the mortgagee gave the respondents the impression that he was prepared to allow them to purchase this land free of any claim under his mortgage, and that they purchased the land on the understanding that they were buying it free from encumbrances and that the mortgagee was estopped from setting up that the land sold was subject to the mortgage. A.I.R. 1935 Rang. 191=13 Rang. 346=156 Ind. Cas. 707.

——S. 115—Conduct—Recognition of agency.

After a principal has refused to indemnify an agent in the future in a speculative business committed to that agent, that principal cannot be heard to say that the agency subsisted. Keech v. Sanford and Ch. L. C. 635 and 19 Beavon 356; 19 Ves. 144, 13 L. J. Ch. 238; De Gm. and Cr. 787, Dist.; Mc Naughten's Select Cases in Ch. 29; 1900 A. C. 293 and 2 H. and T.W. 224, Foll. 93 Ind. Cas. 454=5 P.L.T. Sup. 1=A.I.R. 1925 Pat. 68 (F.B.).

——S. 115—Conduct—Recognition of agency.

Contract by agent—Principal fully recognising his authority cannot subsequently question it. 60 Ind. Cas. 739=3 L. L. J. 265=A. I. R. 1921 Lah. 48.

7. (k) Representation.

——S. 115—Conduct — Representation — Mahomedan acquiring land for construction thereon of school, causing others to believe that he was doing this on behalf of that school and to take certain action in that belief—He cannot change his mind and dedicate property for another object.

A Muhammadan who has acquired land for the construction thereon of school buildings, who has constructed those buildings, and who has over a period of several years caused everyone concerned to believe that he was doing this on behalf of a certain school, and to take certain action in that belief, is not entitled to change his mind and dedicate the property for another object, namely an orphanage. His conduct creates an estoppel against him and anyone claiming in his right. A.I.R. 1946 All. 468=227 Ind. Cas. 50=1947 A.L.J. 65.

——S. 115—Conduct—Representation—Estoppel by conduct illustrated.

A Hindu widow gifted her husband's property to her son-in-law. After the death of the son-in-law, his son became the heir. Some of the property was sold to a stranger and the sale deed by the minor grandson was signed by the daughter (mother of the vendor) in token of her consent. She also executed another document with respect to some other property along with her son and represented that the son was the owner of the property. She applied and got the name of the son recorded as the occupant in the record of Rights. On the death of the widow (mother) the daughter challenged the title of the transferees:

Held, that the daughter was estopped by her conduct from repudiating the gift by the widow and the title of the transferees. A.I.R. 1946 Nag. 108=1945 N.L.J. 413=I.L.R. (1945) Nag. 871.

——S. 115—Conduct—Representation.

Mortgage of property standing in mortgagor's name—Mortgagor's mother present at the time of mortgage and inducing mortgagee to advance money —Suit by mother to avoid mortgage:

Held, that the mother was estopped. A.I.R. 1937 Lah. 272=174 Ind. Cas. 299.

——S. 115—Conduct—Representation.

Where the judgment-debtors have, by their action, represented that their house could be sold by mortgaging the same to the decree-holder, they are estopped from raising the question that the house is not liable to attachment under S. 60, Civil. P.C. A.I.R, 1935 Lah. 164 (1).

——S. 115—Conduct—Representation.

Plaintiff causing defendant to repair a well on the understanding that defendant should be entitled to use the water of the well as easement—No registered deed executed granting easement—Plaintiff is estopped from questioning defendant's right. 45 Bom. 80=A.I.R. 1921 Bom. 417.

——S. 115—Conduct — Representation — Mortgage by two, as co-owners — Mortgagor, if can question title of co-mortgagor.

If A and B jointly mortgage to X a property which stands in their names on the allegation that they are proprietors in respect of the share for which they are registered, it is futile for A or his successor to contend subsequently as against X or his representative, that B had no title to the property and that A was the sole owner. 21 C.L.J. 635=30 Ind. Cas. 47.

7. (l) Scope and essentials of.

——S. 115—Conduct—Conditions giving rise to estoppel—Change of position.

An estoppel by conduct can only come into play if by the conduct of one party the other party has changed his position in a way to his prejudice. 226 Ind. Cas. 503=48 Bom. L.R. 313=A.I.R. 1946 Bom. 469.

——S. 115—Scope and essentials of conduct—A party cannot take advantage of an event brought about by his own act or omission.

A person who has deliberately brought about a state of affairs, should not be allowed to take exception to that state of affairs and use that changed state for his own advantage.

In the articles of Association of an Insurance Company, it was provided that the meeting of the policy-holders was to be held in the registered office of the company. The directors of the company refused permission to hold the meeting in company's premises. The meeting was then held at another place:

Held, that the meeting was perfectly regular the change of venue in this case having been caused by the company itself: New Zealand Shipping Co. v. Society des Atellierz, (1919) A. C. 1 and Queshel Forks Gold Mining Co., Ltd. v. Ward, (1920) A. C. 222, Foll. 114 Ind. Cas. 636=A.I.R. 1928 Mad. 1215=55 M.L.J. 385.

——S. 115—Conduct—Scope and essentials.

A person who deliberately, by his own act, got the name of another entered as owner of half the property cannot subsequently plead that the was the owner of the whole property. 74 Ind. Cas. 911=21 A.L.J. 498=4 L.R.A. Civ. 555=A.I.R. 1924 All. 63.

——S. 115—Conduct—Scope and essentials of —Estoppel.

Conduct, to create an estoppel, must have misled the plaintiff. 33 Mad. 459=(1910) M.W.N. 26=20 M.L.J. 752=5 Ind. Cas. 732.

——S. 115—Conduct—Essentials of.

An omission by the defendant in order to create an estoppel in favour of the plaintiff should have misled the plaintiff. (1910) 20 M.L.J. 752.

8. Consent,

——S. 115—Consent—Persons consenting and giving effect to family arrangement cannot afterwards repudiate it.

When a family arrangement has been entered into or acquiesced in, by all the persons interested in the family property, none of the persons who consented thereto may thereafter be heard to repudiate that arrangement or to set up that it is not binding in law. A.I.R. 1935 Rang. 355=159 Ind. Cas. 798.

——S. 115—Consent.

If it is proved that the transfer was made with the consent of the rightful owner, the case would fall within the purview of S. 115, and the other conditions of S. 41. T. P. Act, need not be satisfied. Such consent will estop the owner, even though the transferee made no enquiries as to ascertain that the transferor had power to make the transfer a condition which is essential for the application of S. 41, T. P. Act. A.I.R. 1934 All. 193=1934 A.L. J. 544=18 R. D. 374=56 All. 582=4 A.W.R. 1427=150 Ind. Cas. 81.

——S. 115—Consent.

Certain lands were granted to a temple of Jivanram Swamy, the family of plaintiff being Vahivatdars. The original grant which was a very ancient one was continued by British Government under sanad issued by the Inam Commission. The sanad was given to one G who had two sons R and H of whom R was father of plaintiffs. H sold the suit property to D on June 7, 1914, and died childless in 1919. On June 7, 1926, the heirs of R (Plaintiffs) sued for a declaration that they were the managers and owners of the suit property and for an injunction directing D not to collect income from occupancy tenants:

Held, that plaintiffs were not estopped by the alienation by H in D's favour from claiming the property from D, there being no evidence to show that there was any declaration, act or omission on the part of plaintiffs or their predecessors by which the defendant was induced to believe anything and to act on such belief. A.I.R. 1933 Bom. 26=34 Bom. L.R. 1469=141 Ind.Cas. 103.

——S. 115—Consent—Adoption.

Where, in a dispute regarding family property, settlement was effected between B and W (a female member) and property was partitioned between them and B agreed that W would be at liberty to adopt any person as her son and in pursuance of the compromise between them W adopted a son:

Held, that whatever the legal position as regards the validity of the adoption may be, B is estopped from questioning the adoption by W. 34 All. 398 (P.C.) and 15 Mad. 486, Rel. on. 114 Ind. Cas. 711 =A.I.R. 1929 Lah. 16.

——S. 115—Consent—Civil case.

Irregular mode of recording evidence can be validated by consent—Party consenting is estopped. 99 Ind. Cas. 681=A.I.R. 1927 Lah. 132.

——S. 115—Consent.

Contract—One party agreeing to abide by the decision of the other—He must accept the decision unless it is arbitrary or unjust. 5 Mad. 173, Rel. on. 104 Ind. Cas. 185=A.I.R. 1927 Sind 253.

——S. 115—Consent.

When a person appeared at the time of the mutation in respect of the sale in dispute and expressed his consent to it he cannot subsequently come forward and impugn it. 99 Ind.Cas. 752=2 L.L.J. 306.

——S. 115—Consent.

By consenting to the order of reference to arbitration and extension of time, the party is not estopped from objecting to the continuance of the proceedings ad infinitum or after they have proved themselves incorrigible. 80 Ind. Cas. 459=27 C.W.N. 420=A.I.R. 1923 Cal. 410.

——S. 115—Consent.

Lease—Lessor's consent to allow permanent construction—Will estop him from subsequently disputing the permanent nature of the lease. 67 Ind.Cas. 744=1 Pat. 717=3 P.L.T. 467=1922 P.H.C.C. 209=A.I.R. 1922 Pat. 258.

——S. 115—Consent—Evidence.

Independent evidence of consent other than mere attestation is essential for an estoppel. 26 C.W.N. 201=65 Ind. Cas. 954=30 M.L.T. 249=49 C. 334=49 I.A. 16=18 N.L.R. 1=42 M.L.J. 436=24 Bom. L.R. 557=35 C.L.J. 409=15 L.W. 486=20 A.L.J. 305=5 M.L.J. 6=1922 P.C. 20.

9. Consent decree or order.

See also Civil P. Code, O. 23, R. 3.

——S. 115—Consent decree or order—Instalment bond—Suit by plaintiff on default—Suit compromised and decree for two instalments passed—In a subsequent suit by plaintiff, defendant claiming that full consideration for bond had not been paid—Plea held not barred by compromise decree.

The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise, must depend upon the answer to the question: Did the parties decide for themselves the particular matter in dispute by the compromise and was the matter expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of what was embodied in the decree?

The original bond was payable in ten annual instalments. The plaintiff instituted a suit for recovery of certain sum when two instalments remained unpaid. This suit was compromised and the plaintiff was granted a decree for the full amount and costs. The parties had come to an agreement that a decree for the two instalments should be passed, but that no further claim should be made by the plaintiff without going into the accounts relating to the balance. In a subsequent suit by plaintiff, it was pleaded by the defendant inter alia that the full consideration for the bond had not been paid:

Held, that the compromise decree was merely confined to the two instalments which were in dispute in the previous suit. The decree could not, therefore, be considered to be tantamount to an admission that full consideration had been paid for the bond. Therefore, the consent decree in the previous suit was not a bar to the pleas raised by the defendant in the subsequent suit. A.I.R. 1941 Lah. 116=42 P.L.R. 749=193 Ind. Cas. 781.

——S. 115—Consent decree or order.

In the case of a consent decree, the parties themselves decide the issues in dispute between them in the litigation in which that decree is made and they are estopped from subsequently challenging the decision at which they arrived. A.I.R. 1941 Pat. 536=7 B.R. 767=194 Ind. Cas. 428.

——S. 115—Consent decree or order—Consent decree subsisting—Property declared inalienable.

Where there is a subsisting compromise decree between the parties declaring the property in dispute to be inalienable, the defendant is estopped from contending in a subsequent proceeding that the property is alienable, whether the subsisting decree offends against the law of perpetuities or not. A.I.R. 1937 Sind 177=31 S. L. R. 197=171 Ind. Cas. 127.

——S. 115—Consent decree or order—Consent decree.

A decree by consent of a competent Court, until it is set aside, raises an estoppel just in the same way as a decree by default or after consent. A.I.R. 1936 Sind 99 =29 S.L.R. 455=164 Ind. Cas. 43.

——S. 115—Consent decree or order.

A party to a consent decree which the Court had jurisdiction to pass, is estopped from going behind the terms to which he has voluntarily submitted on the ground that the decree was wrongly passed. A.I.R. 1933 Sind 29=26 S.L.R. 395=141 Ind. Cas. 290.

——S. 115—Consent decree or order—Compromise decree against life tenant, whether binding on remainder-man — Knowledge of litigation, whether creates estoppel.

A and B, two cousins, held lands as tenants in common. A died leaving his share by will to his daughter M for life and after her death to the plaintiff, his grandson but the joint possession under B's management still continued. After B's death, M sued for her share. The suit was compromised by giving M a half share in the joint lands except the suit land which was given wholly to B's son. The draft of the compromise deed was written by the plaintiff. After the death of M, the plaintiff sued for a half share in suit land contending that the compromise decree was not binding on him:

Held, (1) that the plaintiff was not estopped from claiming the suit land though he had managed the previous litigation and knew of the compromise and had even drafted the deed of compromise;

(2) that the defendant's possession was not adverse to the plaintiff;

(3) that M who was a mere life-tenant had no power to represent the plaintiff in the previous suit, even if she wished to do so and as the compromise decree was not binding on the plaintiff, he was entitled to recover a half share. A.I.R. 1931 Mad. 354=1931 M.W.N. 302=131 Ind. Cas 669.

——S. 115—Consent decree or order.

A consent order raises an estoppel as much as a decree passed in invitum. 36 Bom. 283, Foll. 120 Ind. Cas. 776=10 P.L.T. 469=A.I.R. 1929 Pat. 440.

——S. 115—Consent decree or order—Petition of compromise in probate Court—Admissions in —Regular suit for possession—No estoppel.

Held, that a probate Court has no jurisdiction to deal with title to property covered by a testamentary instrument, that at the the worst the plaintiff abandoned her claim to the estate of her husband but that abandonment, whether orally stated or recited in the petition, could not destroy her title, nor can estop her from filing a suit for possession of her husband's share in the joint property. 78 Ind. Cas. 14= A.I.R. 1924 Cal. 905.

——S. 115—Consent decree or order.

A compromise as to possession in proceedings under S. 145, Cr. P. C., could not be deemed to have the effect of estoppel. 76 Ind. Cas. 527= 20 A.L.J. 932=45 All. 162=A.I.R. 1923 All. 77.

——S. 115—Consent decree — Estoppel.

Where a party agreed to dispose of the suit by the ascertainment of a simple fact under O. 23, R. 3 C. P. Code, he cannot resile from the agreement. 23 C. L. J. 482=34 Ind. Cas. 220.

——S. 115—Consent decree —Party to a compromise — Not estopped from contending that sale should be set aside in its entirety.

A party to a compromise is not estopped from contending that a sale if set aside at all, must be set aside in its entirety. 31 Ind. Cas. 858 (Cal.)

——S. 115—Consent decree — Agreement by plaintiff in a previous suit to give up land—Effect.

An agreement by way of compromise in a previous suit, by the plaintiff to give up possession of a certain land to the defendant will operate as an estoppel against the plaintiff from alleging that he still had a subsisting title to it. 121 P.W.R. 1918=46 Ind. Cas. 7.

——S. 115—Consent decree—Jurisdiction.

Consent to refer to arbitration does not estop a party from challenging the jurisdiction of the Court which made the reference on the agreement. 16 P.W.R. 1913=52 P.R. 1913=14 P.L.R. 1912=17 Ind. Cas. 684.

——S. 115—Consent order—Alteration by consent—Estoppel.

Where the parties to a decree come into Court with an agreement to alter its terms and the Court alters the same, both are estopped from questioning the validity of the order modifying the terms of the decree. 4 P.W.R. 1909=5 P.L.R. 1909=1 Ind. Cas. 48.

——S. 115—Consent order—Estoppel—Scope of the doctrine.

An estoppel arises when the person is not allowed to deny the truth of some matter which he has made another to believe to be true. When it was agreed between the parties that the claim petition of the defendant should be allowed but without costs and that plaintiff should apparently in consideration of the defendant giving up the costs refrain from instituting a suit; Held, no question of estoppel arises. Quaere:—Whether such an agreement would be void on the principle contained in Section 28, Contract Act. (1915) M.W.N. 237=28 Ind. Cas. 536.

——S. 115—Consent decree—Will—Legatees—Suit by legatee under will—Consent decree—Subsequent suit between parties—Question of genuineness of will, if res judicata.

In a suit for possession where the defendant claims the property as an adopted son and sets up a will the fact that in a former suit in which the plaintiff was a party, the question of the genuineness of the will was at issue but was not contested by the plaintiff does not amount to an estoppel; nor does a question of res judicata arise as the decree in the previous suit is one by consent between different parties altogether. 11 Ind. Cas. 834 (Mad.)

——S. 115—Consent decree.

For determining on what matters estoppel will operate by reason of a consent decree it will be necessary to see whether the parties decided the particular matter by compromise, whether it was embodied in the decree or whether it was necessarily involved in the decree or whether it was the basis of what was embodied in the decree. 35 Mad. 75=(1911) 1 M.W.N. 290=9 M.L.T. 487=21 M.L.J. 709=9 Ind. Cas. 875.

——S. 115—Consent decree — Acceptance of benefit.

An acceptance of benefits under a compromise will operate to estop the person accepting from disputing it afterwards. 1 O.L.J. 442=25 Ind. Cas. 816.

——S. 115—Consent order—Compromise of suit —Withdrawal of claim—Estoppel.

Where a person by consent to a compromise includes another to withdraw his claim, the former is estopped from subsequently ignoring the terms of the compromise. 2 Pat. L. J. 634=45 Ind. Cas. 332.

——S. 115—Consent order—Order not passed by consent—Order on application for withdrawal of execution proceedings—Restrictions.

Held, that an order passed by the court on an application to withdraw execution petition, on failure by the decree-holder-purchaser to deposit the premium within a due date, allowing the application on condition of the decree-holder again bringing the same property to sale and bidding for the same amount is invalid and not binding upon the decree-holder who is at liberty to proceed with the sale of the other properties. A court has no power after adjudication upon the application before it to lay down a rule binding the judgment-creditor in respect of any future application he might make. An order which is not passed by consent can only be binding in respect of the immediate subject-matter of adjudication. (1906) 11 C.W.N. 236.

——S. 115—Compromise decree—Objection that decree is not executable.

Held, that where a decree was passed on compromise, the judgment-debtor will be estopped from subsequently objecting to the execution on the ground that it is contrary to S. 99, T. P. A. (1904) 31 C. 922 (D.B.)=8 C.W.N. 264.

——S. 115—Consent decree or order—Consent order that suit be tried on merits—Objections that plaintiff should not have been allowed to sue "in forma pauperis"—Question not raised at the time of consent order—Validity of objection.

When a consent order is passed that a case be tried on the merits and the plaintiff's right to sue in forma pauperis is not then questioned, no objection to his right to sue as a pauper can afterwards be raised. (1902) A. W. N. 206=25 A. 137.

——S. 115—Consent decree or order—Agreement between parties to abide by decision of Commissioner—Right to re-open his decision—Civil P. Code, Ss. 150, 151—Decision according to Commissioner's finding—Right to appeal.

Where the parties to a suit agreed to a question between them being referred for decision to a Commissioner and to the suit being decided according to his decision, and the suit is decided on his finding, the parties are estopped from resiling from the agreement and from appealing against the decision in the suit. (1901) 6 C.W.N. 121=29 C. 306.

10. Construction of document.

——S. 115—Construction of document—Party suggesting one construction and succeeding—Whether can put forth diametrically opposite construction of same deed in subsequent suit.

There would be monstrous injustice if a party, having suggested one construction of a deed in a previous suit and succeeded on that footing, were allowed to turn round and win the new suit upon a diametrically opposite construction of the same deed. A.I.R. 1942 All. 122=1941 A.W.R. 379 =1941 A.L.J. 721=I.L.R. (1942) All. 103=199 Ind. Cas. 190.

——S. 115—Conduct — Construction of document—Document executed with one intention cannot be utilised for another purpose.

The executant of a document executed with one intention cannot by change of mind utilize that document for a transaction of a wholly different character.

Per Devadoss, J.—When a document is executed without the intention of conveying title by one person in favour of another, it cannot afterwards be used for the purpose of conveying the title merely because one of them changes his mind and wants the document to be operative. 106 Ind. Cas. 652=39 M. L. T. 470=A.I.R. 1928 Mad. 25=53 M.L.J. 808.

——S. 115—Construction of document—Question of law.

The question of the proper construction to be placed on a deed is one of law and and there can be no estoppel by a pleading of law. 7 O.W.N. 1052=A.I.R. 1931 Oudh 133=129 Ind. Cas. 163=6 Luck. 382.

11. Contract.

——S. 115—Contract.

The forbearance of a plaintiff to sue coupled with his forbearance to declare the defendant a defaulter, constitutes a good consideration for the fresh agreement though the original contract had been in the nature of a wagering transaction and the plaintiff is entitled to recover. The defendants would be estopped from setting up the defence that the transactions were wagering. A.I.R. 1938 Lah. 781=180 Ind. Cas. 453.

——S. 115—Contract—Agreement that one party did not wish to participate in litigation in securing the property and not claiming any interest therein—Property secured by the other party.

Where it was found that the predecessor of the plaintiff had assured the defendants that he would not take his share in the lands left by **B**, as he did not wish to participate in the costs of the litigation in procuring those lands, and acting on this representation the defendants carried on the litigation and secured the property for themselves, and it was also found that the predecessor of the plaintiff had not, in pursuance of this agreement, claimed any title in them:

Held, that the plaintiff was estopped from claiming any interest in the lands. A.I.R. 1935 Pat. 21=1 B.R. 118=152 Ind. Cas. 823.

——S. 115—Contract—Person holding office under agreement—Terms accepted—Whether bound by terms.

A person who has held office under a registered agreement, for a period of three years, on certain terms and conditions, and who had unreservedly accepted a fresh tenure of office on the same terms and conditions, cannot be heard to say that he was not bound by the terms of his service; that the terms were not binding on him, at a time when his employers had acted strictly under the terms of service in discharging him from service. A.I.R. 1934 Cal. 328=58 C. L. J. 333=38 C.W.N. 214=61 Cal. 80=149 Ind Cas. 1215.

——S. 115—Contract Act, S. 264.

It is not open to the new customers of a firm who begin dealings with the firm after its dissolution, to take advantage of the provisions of S. 264, of the Contract Act. Section 264, Contract Act is a particular form of estoppel by conduct and a person is not entitled to take advantage of it unless the facts raise a presumption that the absence of public notice excited in him a belief which caused him to do something that he would not otherwise have done. Even if this section applied to such cases, the new customers will have to prove that they knew that the partners who had retired were partners of the firm when they started their dealings. A. I. R. 1933 Lah. 591=34 P. L. R. 1022=146 Ind. Cas. 847.

——S. 115—Contract.

Where a party to a contract agrees that in case of any dispute arising out of the contract or in any matter concerning the contract, he will abide by the decision of the other party, he cannot afterwards be allowed to say that such decision is not binding upon him being a decision by a person in his own cause unless it can be shown to be arbitrary or otherwise unjust. A.I.R. 1933 Sind 93=26 S.L.R. 469=141 Ind. Cas. 768.

——S. 115—Contract.

In a contract between **A** and **B**, if **B** agrees to pay a certain amount to **C**, and subsequently agrees with **C** to pay him direct, he (**B**) is estopped from denying his liability to pay personally to **C**. 131 Ind. Cas. 210.

——S. 115—Conduct—Contract.

After the right to get either rescission or reformation of the contract is barred, it is not competent to a party to a contract enjoying the benefit under it to say that he is not bound by one of its terms. 82 Ind. Cas. 970=A.I.R. 1925 Cal. 389.

——S. 115—Contract—Sale of goods— Repudiation.

A purchaser buying goods through an agent from an undisclosed principal can repudiate the contract even after receiving part of the goods on finding that they are not of the quality agreed to be sold. 71 P.R. 1909 =110 P.W.R. 1909=107 P.L.R. 1909=2 Ind. Cas. 804.

——S. 115—Contract—Subsequent claim for performance after unsuccessful attempt to set aside.

There is not necessarily any inconsistency in a party who has unsuccessfully tried to rescind an agreement afterwards claiming performance of it. (1904) 31 C. 584=14 M.L. J. 185=8 C.W.N. 594=6 Bom. L.R. 501 =2 A.L. J. 31=31 I.A. 103 (P. C.)

——S. 115—Contract — Part-performance—Contract to settle property in consideration of donee coming and living with donor—Part-performance —Actings of the parties—No locus penitentiae.

An old widowed aunt in highly affluent circumstances wanted her niece and her husband to come and live with her and the niece agreed to do so on condition that the aunt settled a village on her. Subsequently the aunt wrote to the niece and to her husband assuring them that a village had been purchased only with a view to be given to the niece and that it would be duly given to her after the death of the writer. The niece and her husband thereupon came and lived with the aunt for seven years till her death. The niece claimed the village as hers, though there was no written and registered conveyance in writing in her favour, as required by law. **Held,** that having regard to the actions of the parties, neither the aunt nor her legal representatives could resile from the contract which was specifically enforceable by the niece. The niece was accordingly held entitled to the possession of the village. The conduct of the parties and their actings had supplied whatever defects there might have been from a conveyancing point of view and the parties were estopped from going behind the contract. 39 Mad. 509=43 I.A. 138=20 C.W.N. 1054=14 A.L.J. 797=31 M.L.J. 58=(1916) 2 M.W.N. 23=20 M.L.T. 137=4 L.W. 58=18 Bom. L.R. 651=24 C.L.J. 279=34 Ind. Cas. 921 (P.C.)

Also 42 Cal. 801=28 Ind. Cas. 930 (P.C.). But see 40 Mad. 1134=43 Ind. Cas. 138.

——S. 115—Contract — Part-performance — Contract not embodied in statutory form—Actings of the parties—Parties not allowed to reside from contract—No locus penitentiae.

Locus penitentiae, i.e., the power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract, to which all have not assented, from an obligation to which writing is requisite, and has not yet been adhileitted, in an authentic shape exists, when the parties stand upon an engagement which is not complete or final. But where the actings and conduct of the parties are founded upon, **rei inter ventus** raises a personal exception which excludes the plea of **locus penitentiae.** It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocably referable to the contract and productive of alteration of circumstances, loss or inconvenience, though not irretrievable. 42 Cal. 801=42 I.A. 1=17 Bom. L.R. 420=21 C.L.J. 231=28 M.L.J. 548=19 C.W.N. 250=13 A.L.J. 229=17 M.L.T. 143=2 L.W. 258=(1915) M.W.N. 621=28 Ind. Cas. 930 (P.C.)

——S. 115—Contract — Part-performance — Conduct of parties subsequent to a deed.

The conduct of the parties subsequent to the execution of a deed, may oparate as an estoppel, if it amounts to a part-performance of the contract. 27 P.R. 1911=118 P.W.R. 1911=191 P.L.R. 1911=10 Ind. Cas. 1004.

12. Different subject.

——S. 115—Different subject—Hindu Law—Adoption — Agarwalla adoption — Brahminical adoption falsely set up—Acts and representations regarding former cannot create estoppel as to latter.

The parties were agarwallas and the adoption was made in the manner customary among the Agarwallas. The story of a regular Brahminical adoption of the same boy previous to the Agarwalla adoption was invented with the object of giving to latter adoption the rights of collateral succession. The acts and representations of the plaintiffs which were set up as estopping them from questioning the adoption related to the agarwalla adoption:

Held, that the plaintiffs were not estopped from questioning the adoption and denying that the adopted son acquired any rights of collateral succession by the adoption. 19 W.R. 12 (P.C.), **Foll.** and 34 All. 398 (P.C.), **Dist.** 87 Ind. Cas. 357=1925 M.W.N. 692=30 C.W.N. 601=23 A.L.J. 273=2 O.W.N. 335=21 N.L.R. 50=52 Cal. 482=6 L.R.P.C. 97=27 Bom. L.R. 837=52 I.A. 231=A.I.R. 1925 P.C. 118=49 M.L.J. 173 (P.C.)

——S. 115—Different subject.

Occupancy holding—Portion sold under mortgage decree—Raiyat is not estopped from objecting to sale under money-decree. 62 Ind. Cas. 55=2 P.L.T. 341=6 P.L.J. 202=1921 P.H.C.C. 197=A.I.R. 1921 Pat. 4.

——S. 115 — Different subject-matter — Suit—Binding nature of.

An estoppel may be binding notwithstanding that the suit which raises it relates to a different property. 6 M.L.T. 364=9 C.L.J. 597=12 C.W.N. 739=4 Ind Cas. 81.

13. Effect of.

——S. 115—Effect of—Rule of estoppel is personal—Adopted son does not get a status merely by this doctrine.

A rule of estoppel is purely personal against the person estopped and cannot create any substantive right **in rem** except against the person estopped or his personal representative. By the operation of this rule, no status arises in favour of the defendant as an adopted son for all purposes under the Hindu law. 110 Ind. Cas. 665=50 All. 885=26 A.L.J. 1106=A.I.R. 1928 All. 459.

——S. 115—Effect of.

Estoppel being simply a principle of the law of evidence, it creates no substantive rights of an absolute character, but can only operate to close the mouths of certain people who have acted in a certain way from setting up what may be true facts of the case. 1927 M.W.N. 311=A.I.R. 1927 Mad. 777=103 Ind. Cas. 855.

14. Election.

——S. 115—Election—Party repudiating contract cannot enforce arbitration clause in it.

On a total repudiation of any liability under the contract, it is not open to the person repudiating, to say that although he is not bound by the contract, the other party is bound by the arbitration clause in it. A. I. R. 1942 Bom. 297=44 Bom. L.R. 692=I.L.R. (1942) Bom. 744=203 Ind. Cas. 322.

——S. 115—Election—Of remedies.

Where a decree-holder has definitely elected to proceed in one of two ways permitted to him by a decree, he cannot be allowed later, to go back upon his election and chose the second way. But the doctrine is not a mere legal prohibition against everchanging one's mind. It is an equitable doctrine which is applied in law in order to prevent prejudice being done to the opposite party. A.I.R. 1942 Mad. 679=1942 M.W.N. 476=55 M.L.W. 522=1942-2 M.L.J. 225=203 Ind. Cas. 478.

——S. 115—Doctrine of election—Person cannot approbate and reprobate transaction.

The doctrine of election is not confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage, that is, to approbate and reprobate the transaction. A.I.R. 1938 Mad. 1004=48 M.L.W. 476=1938 M.W.N. 1013=(1938) 2 M.L.J. 835=179 Ind. Cas. 466.

——S. 115 Election—Suit for ejectment treating defendant as tenant—Subsequent suit against him as trespasser.

Where it was open to the plaintiffs to accept the defendant in a suit for possession as a tenant, having elected once to accept the defendant as a tenant and brought a suit for ejectment against him, they cannot subsequently be allowed to shift their ground and sue him as a trespasser. A.I.R. 1935 Oudh 515=11 Luck. 435=1935 O.W.N. 985=1935 R.D. 451=157 Ind. Cas. 960.

——S. 115—Election.

Relief claimed alternatively against A or B—Decree given against A—Plaintiff is precluded from asking decree against B subsequently. A.I.R. 1935 Rang. 397=13 Rang. 186=159 Ind. Cas. 167.

——S. 115—Election — Adverse possession — Principle of approbation and reprobation.

A party cannot both approbate and reprobate. He cannot, therefore, be allowed to say at one time that the question between him and the auction-purchaser as to adverse possession is not necessary to be decided in the suit and thereby induce the Court to refrain from deciding it and at another time say that because that question was not decided between him and the auction-purchaser, the auction-purchaser's claim is barred by adverse possession, which is the very issue which he objected to being decided. Even if he is not estopped, the principle of approbation and reprobation will apply, and he cannot be allowed to take this stand-point. A.I.R. 1934 Bom. 329=36 Bom. L.R. 694=153 Ind. Cas. 637.

——S. 115—Election.

A party cannot both approbate and reprobate. A.I.R. 1933 P.C. 167=37 C.W.N. 797=60 I.A. 266=35 Bom. L.R. 807=57 C.L. J. 454=1933 M.W.N. 739=65 M.L.J. 103=38 M.L.W. 29=56 Mad. 737=143 Ind. Cas. 433 (P.C.)

——S. 115—Election—Double remedy open to creditor—One chosen—Creditor is not estopped from re-electing his remedy.

Where the creditors have a double remedy open to them and they intentionally eject their remedy against the joint estate of the firm, there is nothing to estop them from re-electing their remedy against the separate estate of the individual partners. **Ex parte Adamson, In re. Collie,** (1878) 8 Ch. 807, **Rel. on.** 105 Ind. Cas. 366=A.I.R. 1928 Sind 40.

——S. 115—Election—Remedies — After election second remedy is lost.

When a plaintiff has the choice of suing two persons on the same cause of action it may happen that if he elects to sue one and obtain a decree he is estopped from suing the other but if he obtained a decree on a mortgage under the belief that his mortgagor acted in a personal capacity but afterwards finds he was acting in a fiduciary capacity he is not debarred from suing the right person. 83 Ind. Cas. 324=20 M.L.W. 207=1924 M.W.N. 623=47 Mad. 850=A.I.R. 1924 Mad. 716=47 M.L.J. 85.

——S. 115—Election of remedies.

Person taking recourse to special procedure cannot fall back upon general one but must conform to the special only. 79 Ind. Cas. 161=20 N.L.R. 145=A.I.R. 1924 Nag. 275.

——S. 115—Election—Exception.

A person who elected to take a legacy under the will is estopped from setting up a title contrary to its provisions. But when the party sought to be estopped is in possession the person asserting such estoppel cannot succeed without proving his own title. (1904) 9 C.W.N. 309.

15. Equitable estoppel.

——S. 115—Equitable estoppel.

Fire insurance—Warranty in policy that no hazardous goods shall be stored in premises—That he can store one per cent. of such goods cannot be contended by assured—Fire occurring from such breach of warranty—Claim against company cannot be had—Company taking possession of salvage and keeping it for month is not estopped from contesting claim. A.I.R. 1938 Lah. 168=40 P.L.R. 549=178 Ind. Cas. 35.

—S. 115—Equitable estoppel—Doctrine of—Basis and scope—Trespass—Leave and licence—No mistaken belief.

The doctrine of equitable estoppel applies to a case where a person builds on land thinking it to be his but which really belongs to another who, knowing the builder's mistake, encourages him to build either directly or by abstaining from asserting his legal right. Equity will, in such a case, interfere for the protection of the person who builds on the other's land. The foundation on which the right of equity to intervene is based, is either contract or the existence of some fact which the legal owner is estopped from denying.

But if there was no mistaken belief as to the ownership of the land which the party knew belonged to the Crown, nor was any such mistaken belief known to the Crown, the occupation by the person amounts to a trespass which, not being interrupted for some time, became an occupation by leave and licence, and the doctrine of equitable estoppel does not apply. In such a case, the Crown is entitled to revoke the licence and direct the removal of the superstructures erected. A.I.R. 1932 P.C. 108=61 M.L.J. 958=36 M.L.W. 91=138 Ind. Cas. 292 (P.C.)

——S. 115—Equitable estoppel.

Donor's heirs challenging gift on the ground of insanity of donor—Donor and donee both made defendants and they successfully contesting suit—Subsequent suit by donor to cancel gift on the same ground is not barred nor does equitable estoppel arise. Civil P. C., S. 11. 100 Ind. Cas. 527=A.I.R. 1927 All. 365.

——S. 115—Equitable estoppel.

Person without right building in spite of remonstrance by owner—Equitable estoppel laid down in. 21 A. 490 (P. C.) does not apply. A.I.R. 1923 All. 567.

——S. 115—Equitable estoppel—Essentials.

It is not enough for the defendants to show that the plaintiff land-lord stood aside and allowed the structures to be erected. One of the essential elements of equitable estoppel is that the person who sets up that estoppel must have acted in good faith and must have been under the belief that he had a right to put up the buildings. 66 Ind. Cas. 603=A.I.R. 1922 All. 210.

——S. 115—Equitable estoppel—Occupancy raiyat—Transfer of holding—Subsequent surrender to land-lord—Effect of.

S. 86 of the B. T. Act is not exhaustive in respect of the law of land-lord and tenant much less does it incorporate the general principles of equity so far as they have to be applied in the dertermination of the disputes between land-lord and tenant. An occupancy raiyat who has transferred part of his non-transferable holding is equitably estopped from surrendering to his land-lord the portion so transferred either by surrender of that portion alone or by surrender of the whole holding. 32 C.L. J. 286=25 C.W.N. 29=48 Cal. 605=61 Ind. Cas. 443=A.I.R. 1921 Cal. 444 (F.B.)

——S. 115—Equitable estoppel—Recourse to—Clean hands.

A Court of equity will not have recourse to the doctrine of estoppel or acquiescence for the benefit of a party who does not come into Court with clean hands. 20 C.W.N. 657=33 Ind. Cas. 762.

——S. 115—Equitable estoppel—Indemnity.

Where under a contract of indemnity **A** was bound to pay interest on **B**'s debts and on breach thereof a suit was brought against **A** and **B** in which **A** contended that he had paid the interest but his contention was rejected and the suit decreed. **Held,** in a

suit by **B** against **A** for damages that **A** was equitably estopped from again contending that he had paid interest. 37 Mad. 270=25 Ind. Cas. 888.

——S. 115— Estoppel against estoppel.

Estoppel against estoppel sets the matter at large. The Court has to see what the original rights of the parties are. 152 P.W.R. 1918=45 Ind. Cas. 68.

——S. 115—Estoppel against estoppel.

Estoppel against estoppel setteth the matter at large explained. 19 O.C. 240=37 Ind. Cas. 198.

16. Estoppel by record.

See Evidence Act, S. 115—Judgment.

17. Execution of decree.

——S. 115—Conduct—Execution of decree.

Decree-holder accepting deposit made in Court under protest—Decree-holder is not estopped from prosecuting appeal. 11 Lah. 342=31 P.L.R. 668=124 Ind. Cas. 339=A.I.R. 1930 Lah. 26.

——S. 115—Execution of decree—Satisfaction of decree by surrendering a cross-decree—Effect.

An involuntary act done by a person in pursuance of an order of the Court cannot operate as an estoppel against him and prevent him from enforcing a remedy given to him by law.

Where after filing an appeal the judgment debtors satisfied the execution of the decree appealed against, partly by payment in cash and partly by surrendering their decree:

Held, that this act of the judgment-debtors does not amount to a recognition of the validity of the decree thus precluding them from impeaching it in appeal. 115 Ind. Cas. 67=A.I.R. 1929 Lah. 42.

——S. 115—Execution of decree.

Vendee taking out money deposited by pre-emptor does not estop him from challenging pre-emptor's right to pre-empt: 83 P. R. 1912 and 16 P. R. 1907, **Foll.** 96 Ind. Cas. 543=48 All. 616=24 A.L. J. 779 =A.I.R. 1926 All. 661.

——S. 115—Conduct—Execution of decree—Execution of the claim allowed does not preclude plaintiff from appealing against the claim disallowed.

When a party has derived any advantage and taken benefit under the order of the Court, he is to be deemed to have acquiesced in it and should not be allowed to challenge it at any subsequent proceeding or by way of appeal: 12 C.L.J. 556 and 21 C.W.N. 232, **Rel. on.** But where plaintiff sues defendant for a certain amount and the defendant admits the liability as regards a part of the amount and denies the rest of the claim and a decree is passed for the amount admitted to be due by the defendant, execution of the decree as regards the amount decreed does not preclude the plaintiff from appealing against the claim dismissed. 95 Ind. Cas. 10=A.I.R. 1926 Cal. 960.

——S. 115—Execution of decree.

Appellant offering money deposited by respondent in lower Court, as security for costs—No estoppel is created. 71 Ind. Cas. 632=17 M.L.W. 481=27 C.W.N. 629=25 Bom L.R. 548=37 C.L. J. 501= 1923 M.W.N. 392=32 M.L.T. 137=A.I.R. 1923 P.C. 13 (P.C.)

——S. 115—Execution of decree.

Execution of a decree has never been held to estop the decree holder from appealing from it so far as it is against him. 72 Ind. Cas. 292=1923 M.W.N. 533 =47 Mad. 7=18 M.L.W. 61=A.I.R. 1923 Mad. 533=44 M.L. J. 534.

18. Execution proceedings.

——S. 115—Execution proceedings.

Decree against **A** personally and as family manager—Another decree against **A** and his brother **B** as members of joint family.

Held, that it was not open to the second decree-holder to impeach first decree in absence of any fraud or collusion between the first decree-holder and **A**, when **B** had not chosen to contest the same on the ground that **A** and **B** were divided.

Held, further, that as the second decree-holder had himself sold the properties as joint family properties, he was precluded from asserting as against the first decree-holder that when he instituted his suit, **A** and **B** were not members of a joint family. A.I.R. 1936 Mad. 123=43 M.L.W. 624=1936 M.W.N. 343=160 Ind. Cas. 559.

——S. 115—Conduct—Execution proceedings.

The parties to execution proceedings are governed by general law of estoppel. They cannot continue to raise the same plea over and over again. But if the plea has never been raised before, the principle of constructive estoppel does not apply to execution proceedings. Hence, the fact that without raising a certain plea of objection a party submitted to prior execution proceedings does not debar him from raising that plea as an objection to later execution proceedings. 82 Ind. Cas. 504=20 M.L.W. 649=35 M.L.T. 118=1924 M.W.N. 771=A.I.R. 1925 Mad. 127= 47 M.L. J. 798.

19. Execution sale.

See also C. P. C. (1) S. 60—Waiver and estoppel.
(2) O. 21, R. 93—Estoppel.

——S. 115—Execution sale—Charge holder putting property to sale without mentioning charge.

If it can be shown that the person holding a charge has deliberately waived his right in respect of the charge and put the property up to the sale free of the charge, he is estopped by his own conduct from pleading a charge at any subsequent time. But where the omission to mention the charge in the sale proclamation was more likely due to an omission on the part of some officer of the Court than to any deliberate omission on the part of the charge-holder, he should not be held to be estopped by his own conduct from setting up the charge. A.I.R. 1940 Cal. 60=44 C.W.N. 240=186 Ind. Cas. 833.

——S. 115—Execution sale.

Plaintiff mortgaging property to two persons at different times—Property sold to defendant and some amount out of consideration left with defendant for payment in full to subsequent mortgagee—On defendant's failure, mortgagee obtaining mortgage decree and property sold in execution—Sale proclamation mentioning existence of prior incumbrance—Sale price not sufficient to satisfy decree—Mortgagee obtaining personal decree against plaintiff—Suit by plaintiff against defendant for damages for breach of contract—Court finding that prior mortgage was paid off before sale to defendant:

Held, that no question of estoppel arose in the case as the plaintiff had no interest in the property at the time of auction-sale and it was the defendant's duty to see whether the incumbrance was still existing or was paid off. A.I.R. 1939 All. 289=1939 A.W.R. 161=181 Ind. Cas. 790.

——S. 115—Execution sale.

Mortgage—Consideration—Execution proved—Acknowledgment of consideration recited—Purchase of equity of redemption in auction sale:

Held, that the purchaser had derived title from the mortgagor at a Court sale in execution of a decree for interest due on the mortgage-deed and therefore, it was not open to him to say that this very mortgage deed was without consideration. A.I.R. 1938 Lah. 463=40 P.L.R. 313 & 709=181 Ind. Cas. 505.

——S. 115—Execution sale.

When a decree-holder has himself sold properties of the judgment-debtors as joint family properties, he cannot afterwards assert in a claim for rateable distribution, as against another decree holder that when he instituted his suit, the judgment-debtors were not members of a joint family. A.I.R. 1936 Mad. 123=43 M.L.W. 624=1936 M.W.N. 343=160 Ind. Cas. 559.

——S. 115—Execution sale.

Where, in execution of a decree, the decree holder gets possession and there is no objection, a second application for execution of same decree on the ground that in the former application, the decree-holder had obtained only symbolical possession is not competent. A.I.R. 1935 Cal. 245=60 C. L. J. 286=155 Ind. Cas. 725.

——S. 115—Execution sale—Omission of mortgage-charge—Fact of presence of mortgagee at auction, whether debars him from maintaining action on mortgage.

At an auction-sale, the auction-purchaser purchases only the right, title and interest of the judgment-debtor. If a person, who is not a party to the decree and at the time of the auction-sale has an outstanding title in himself in the shape of a prior mortgage, it is not his duty to proclaim from the house-tops, while the auction-sale is going on, so as to warn the intending bidders that he holds a mortgage over the property. It is the duty of the decree-holder and perhaps to a certain extent, of the judgment-debtor, to see that the sale-proclamation contains the necessary particulars given in O. 21, R. 66, Civil P. C. If there is an omission and a mortgage charge is omitted, then the mere fact that the holder of that mortgage was present at the time of the auction-sale would not debar him afterwards from maintaining an action on his mortgage. A.I.R. 1935 Lah. 527=37 P.L.R. 301=157 Ind. Cas. 811.

——S. 115—Execution sale.

Defects in proclamation of sale—Judgment-debtor aware of defects but not taking action:

Held, that the judgment-debtor cannot, afterwards, be allowed to have the sale set aside on the ground of this defect, as he was already aware of it and no steps were taken by him at the proper time. A.I.R. 1934 Bom. 348=36 Bom. L.R. 681=58 Bom. 564=153 Ind. Cas. 899.

——S. 115—Execution sale—Bidder, if estopped from challenging the title of the purchaser.

Where in an execution sale, the defendant had made bids, he is not estopped from challenging the title of the purchaser. A.I.R. 1934 Lah. 202=154 Ind. Cas. 512.

——S. 115—Execution sale.

Where a judgment-debtor gets a postponement of the sale agreeing that a sale may be held after the time granted without a fresh proclamation for sale, it is no longer open to him to say that the sale, which took place without any fresh proclamation, is vitiated because there was some irregularity in the sale proclamation issued on the previous occasion. A.I.R. 1933 All. 546=1933 A. L. J. 1273=55 All. 519=143 Ind. Cas. 673.

——S. 115—Execution sale.

Attachment of usufructury mortgage under O. 21, R. 46, Civil P.C.—Sale without objection—Application to set aside sale:

Held, that even if the procedure adopted was irregular, as the order for sale was not objected to, it could not be impugned subsequently. A.I.R. 1931 Pat. 63=130 Ind. Cas. 265.

——S. 115—Execution sale.

In connexion, with the sale of immovable property subject to an incumbrance the auction-purchaser is entitled to contest the factum and the validity of the incumbrance. There is no rule of estoppel which can prevent him from impeaching the charge on the property. 120 Ind. Cas. 162=11 Lah. 90=31 P.L.R. 358=A.I.R. 1930 Lah. 40.

——S. 115—Execution sale.

Land-lord and Tenant — Suit for rent by land-lord co-sharer against tenant—Money decree passed—Decree executed as rent decree and holding sold without objection—On partition holding allotted to another co-sharer—Suit by co-sharer for recovery of possession alleging purchaser to be land-lord's **benamidar**—Co-sharer judgment-debtor is not estopped from setting up that decree was only money-decree and could not be executed as rent decree. 119 Ind. Cas. 882=A.I.R. 1930 Pat. 150.

——S. 115—Execution sale.

Judgment-debtor not objecting to low price advertised in proclamation cannot complain of it after sale. 117 Ind. Cas. 705=30 M. L. W. 995=A. I. R. 1929 Mad. 275.

——S. 115—Execution sale—A decree-holder, failing to mention charges in his favour is estopped from setting up such charges.

Where a decree-holder fails to mention in the sale proclamation, as required by O. 21, R. 66, any encumbrances or charges in his favour, he is estopped from denying that the property was sold free from such charges: 15 Mad. 412, **Foll.**; see also 47 Cal. 446. 100 Ind Cas. 493=38 M.L.T. 49=A.I.R. 1927 Mad. 1142=52 M. L. J. 222.

——S. 115—Execution sale.

Where the owner of a property sold in execution as the property of the judgment-debtor, stands by and allows the purchaser to buy it, he cannot question the sale and claim the property as his own. 94 Ind. Cas. 75=27 P.L.R. 260=A.I.R. 1926 Lah. 415.

——S. 115—Execution sale—Sale proclamation—Omission to mention encumbrance — Knowledge of auction-purchaser—No estoppel.

Where a property subject to a mortgage is sold in Court auction, and the auction purchaser has knowledge of the mortgage but through Court's mistake the sale proclamation does not mention that the property is subject to the mortgage, the mortgagee is not estopped from enforcing his mortgage as against the auction purchaser. Further, where the mortgage is one with possession, possession itself is sufficient notice to everybody concerned of the incumbrance and if the auction purchaser is to be deemed in law to have had notice of the mortgage, no plea of estoppel can be sustained. It is a

settled rule of law that if a person either knows a certain fact, or is presumed in law to know a certain fact, the principle of estoppel cannot apply. 93 Ind. Cas. 873=13 O.L.J. 154=3 O.W.N. 346= A.I.R. 1926 Oudh 330.

——S. 115—Execution sale.

Where a person purchases certain property in execution of a money decree expressly subject to a mortgage on it and admits the existence of the mortgage it is not subsequently open to him to challenge the mortgage in a suit, on the mortgage, by the mortgagee. 95 Ind. Cas. 563=A.I.R. 1926 Nag. 446.

——S. 115—Conduct—Execution sale.

Execution — Sale in purchase by decree-holders in lieu of decretal amount — One judgment-debtor entitled to interest in decretal amount—Conduct of parties showing purchase was only for benefit of decree-holders — Judgment-debtor is not entitled to any interest in the property. 87 Ind. Cas. 665=23 A.L.J. 257=A.I.R. 1925 All. 331.

——S. 115—Execution sale.

Execution of decree — Decree-holder's agent endorsing that property, need not be sold—Decree-holder is not estopped from executing, against the property. 82 Ind. Cas. 434=A.I.R. 1925 Mad. 270.

——S. 115—Execution sale—Failure to object.

A judgment debtor who might have raised objections to a sale in execution of a decree against him but has refrained from doing so or who might have appealed against the order for sale, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable. 29 All. 612 and 28 Bom. 125, **Foll.** 79 Ind. Cas. 106=A.I.R. 1924 All. 726.

——S. 115—Execution sale — Purchaser at execution sale is bound by the estoppel against judgment-debtor.

Where there was a sale in execution of a mortgage decree in 1907 but there was a clerical error in the description of the properties both in the mortgage as well as in the decree, and there was a sale of the same properties in 1908 in execution of a money decree:

Held, (i) that the mortgagor would be estopped from denying the title of the mortgagee and could not take advantage of the clerical error to nullify the security granted by him, (ii) that the purchaser in execution of the money decree purchased only the right, title and interest of the judgment-debtor and is in no better possession than the judgment debtor, and was bound by the estoppel against him. 70 Ind. Cas. 960=36 C. L. J. 421=A. I. R. 1923 Cal. 53.

——S. 115—Execution sale.

Mortgage pending attachment notified in sale proclamation—No notice to decree-holder—Latter is not estopped from contesting validity of mortgage. 68 Ind. Cas. 790=44 All. 714=20 A.L.J. 722=A.I.R. 1922 All. 443.

——S. 115—Execution sale.

Property sold in execution as belonging to one judgment debtor—Others not objecting, cannot afterwards sue for their share in the same they are estopped. 12 Mad. 19; 10 I. A. 25; 9 Cal. 656, **Foll.** 67 Ind.Cas. 797=9 O.L.J. 131=A.I.R. 1922 Oudh 11.

——S. 115—Execution sale.

Mortgagee bringing property to sale in execution of simple money decree without disclosing mortgage—He is estopped from setting up mortgage against auction-purchaser. 64 Ind. Cas. 953=4 U.B.R. 62= A.I.R. 1922 U.B. 1.

——S. 115—Execution sale.

C. P. Tenancy Act (1883), S. 42, requiring express words for passing **sir** rights—Express words not used, by agreement between the parties who wanted the question to remain open — Vendor cannot plead the statute as objection to vendee's claiming those rights. He is estopped. 61 Ind. Cas. 769=48 Cal. 591=48 I.A. 220=19 A. L. J. 361=34 C. L. J. 1=25 C.W.N. 938=14 M.L.W. 228=1921 M.W.N. 310=17 N.L.R. 84=A.I.R. 1921 P.C. 13=40 M.L J. 418 (P.C.).

——S. 115 — Execution sale — Sale subject to incumbrances.

Where an execution sale is held subject to mortgages which subsequently turn out to be invalid the purchaser is entitled to the benefit of his purchase. The judgment-debtor is not entitled to hold the purchaser accountable for the benefit and there is no estoppel. 31 All. 583=13 C.W.N. 1143=10 C. L. J. 313=6 A.L.J. 817=11 Bom. L.R. 1220=6 M.L.T. 277=19 M. L. J. 682=36 I. A. 203=3 Ind. Cas. 793 (P.C.).

[Reversing 27 All. 97=24 A.W.N. 174=1 A. L. J. 485.]

——S. 115—Execution sale—Subject to mortgage —Rights of auction purchaser.

In a sale in execution of a rent decree obtained by the mortgagee the purchaser gets the right and interests of the mortgagor if he knew of the mortgage at the time of purchase. The mortgagee can enforce his right against auction purchaser, who knew of the mortgage at the time of purchase. 17 A.L.J. 288= 1 U.P.L.R. (H.C.) 27=50 Ind. Cas. 777.

——S. 115—Execution sale—Continuation—Objection that property is not saleable.

Held, that defendant having allowed the auction sale to take place without objection and that sale having been confirmed it became conclusive as between the parties and the purchaser acquired a vested interest in the property sold and the defendant was precluded from questioning the validity of the sale and the title of the purchaser on the ground that it was exempt from attachment. 40 All. 680=16 A.L.J. 691=47 Ind. Cas. 947.

——S. 115—Conduct—Execution sale—Deposit by transferee — Withdrawal of deposit — Land-lord cannot dispute title of transferee of holding.

A land-lord who withdraws the amount deposited by the transferee of a non-transferable holding to set aside its sale under S. 310 A of the C. P. Code of 1882 without raising any objection cannot plead subsequently that the transferee did not by his purchase, acquire a valid title to the holding. 6 C.L.J. 601 Foll. 43 Ind. Cas. 742 (Cal.).

——S. 115—Execution sale—Mortgage.

A person bringing properties to an execution sale without disclosing a mortgage of his own on the property cannot set it up afterwards against the purchaser if the latter had no notice of it. 37 All. 72=13 A.L.J. 9=26 Ind. Cas. 427.

——S. 115—Execution sale—Mortgage deed notified at sale — Purchaser if can plead that the deed was fictitious—Estoppel.

A decree holder purchaser at an execution sale can plead that a mortgage deed notified at such sale is fictitious unless there was some act, declaration or omission on his part which operates as an estoppel. 28 A. 418, Foll. 35 All. 257=11 A. L. J. 357=20 Ind. Cas. 182.

——S. 115—Execution sale—Occupancy holding—Mortgage—Fixed rate tenure—Suit and sale—No objection.

An occupancy tenant mortgaged his holding to the Zemindar describing the holding as a fixed rate tenure. In execution of a decree, on the mortgage, the holding was purchased by a stranger. No objection was raised either in the suit or in execution that the holding was an occupancy holding. **Held**, that subsequently the judgment-debtor tenant could not say that it was an occupancy holding and not transferable. 34 All. 538= 10 A.L. J. 66=15 Ind. Cas. 227.

——S. 115—Execution sale—Decree-holder allowing sale advertisement in a particular way.

A rent decree-holder allowing a sale advertisement in execution of his decree to be drawn up in a particular way, i.e., as Mokarrari cannot be allowed to repudiate it afterwards and plead that the purchaser has bought something different from what was advertised for sale. The estoppel would not affect the land-lords who were not parties to the suit. 20. Ind. Cas. 753 (Cal.)

——S. 115—Execution sale—Incumbrance—Omission to notify.

The decree-holder, who is bound to notify before the sale all encumbrances on the property about to be sold, cannot subsequently set up, against the execution-purchaser, a secret encumbrance in his own favour. The principle of estoppel has no application to the case of an execution-purchaser of a homestead land under a **ghatwal** in a sale held under the Public Demands Recovery Act, where the land was described as rent free in the sale certificate. 40 Cal. 173=17 C.W.N. 137=16 C.L.J. 202=16 Ind. Cas. 365.

——S. 115—Execution sale—Purchase subject to mortgage—Purchaser can dispute mortgage.

Where a person purchases property subject to a mortgage he is not by that sole fact estopped from disputing the validity of or the consideration for the mortgage. But if the mortgagee has been thereby induced to suffer some detriment or if he foregoes a portion of his money then the purchaser may be estopped from disputing the mortgage. 28 P.W.R. 1919 =49. Ind. Cas. 997.

——S. 115—Execution sale—Mortgage not set up.

Where a mortgagee of certain properties stands by and does not assert his right at a sale in public auction of the said properties, held to his knowledge, he is estopped from afterwards enforcing his lien against and following the property in the hands of a **bona fide** purchaser at the public auction. 33 P.R. 1906=90 P.W.R. 1909=132 P.L.R. 1906=4 Ind. Cas. 891.

——S. 115—Execution sale—Incorrect statement in proclamation—Knowledge—Omission to object.

Where a judgment-debtor does not raise any objection to an incorrect statement in the sale proclamation he fails in his duty to the Court and he is estopped from complaining of any irregularity resulting from an erroneous statement which he would have corrected. This rule will not apply if the judgment-debtor was not aware of the facts. 38 Mad. 387=14 M.L.T. 320=25 M.L.J. 198=21 Ind. Cas. 389.

——S. 115—Execution sale — Judgment-debtor—Objection.

In executing a maintenance decree, the decree-holder applied for sale of certain properties alleging that they were liable to be sold under the decree. The J. D. did not object to the sale. On a subsequent similar application the J. D. raised the objection. **Held,** that he was estopped from doing so. 10 Ind. Cas. 632 (Mad.)

——S. 115—Execution sale—Approbate and reprobate—Judgment-debtor estopped from impeaching.

A party cannot take the benefit of a transaction and at the same time repudiate it when the transaction is one and indivisible. Where the property of a judgment-debtor is sold in execution of the decree and the proceeds go in satisfaction of the decree and the judgment-debtor accepts the payment of the decree, he cannot impeach a part of the sale. 43 Ind. Cas. 178 (Nag.)

——S. 115—Execution sale — Judgment-debtor—Decree amount—Omission to object.

There is no estoppel against a judgment-debtor by his acknowledging the decretal amount, unless it is shown that he knew the details of the amount. The judgment-debtor can subsequently plead that the amount was less. 2 O.L.J. 611=32 Ind. Cas. 754.

——S. 115—Execution sale—Omission—Charge not notified in sale proclamation—Effect of.

A party to a suit who having a charge or encumbrance on the property in suit ordered to be sold, fails to have that charge or encumbrance notified in the sale proclamation, is estopped from subsequently setting up his lien against the auction purchaser. The doctrine of estoppel cannot be said to rest absolutely upon any notion of duty on the part of the person sought to be estopped. And the word 'omission' used in S. 115 does not mean merely an omission to perform such a duty as is prescribed by law. 2 O.L.J. 22=27 Ind. Cas. 611.

——S. 115—Execution sale—Sale on subsequent mortgage—Prior mortgagees if bound to get their mortgages notified at the time of sale.

There is no duty on prior mortgagees to get their mortgage liens notified in a sale in execution and no estoppel can arise as against the auction-purchaser by reason of such non-notification. 1 O.L.J. 175=24 Ind. Cas. 2.

——S. 115—Execution sale—Purchase subject to mortgage.

An auction-purchaser of property subject to a prior mortgage is estopped from denying the validity of the mortgage on the ground of failure of consideration or undue influence; but, if he merely buys an estate which is under mortgage but does not take it subject to the encumbrance, he can impeach the validity of the mortgage.

Where property is sold in accordance with a decree for sale the purchaser cannot raise a plea of priority in respect of a mortgage, not set up by the mortgagee in his suit for sale. 15 O. C. 211=15 Ind. Cas. 5.

——S. 115—Execution sale—Sale under Public Demands Recovery Act.

Doctrines of estoppel and representation cannot be extended to cases of sales under the Public Demands Recovery Act. 13 C.W.N. 750=10 C.L.J. 201=1 Ind. Cas. 197.

——S. 115—Execution sale—Objection to—Consent to attachment before judgment.

A judgment-debtor is not estopped from objecting to the validity of an execution sale on the ground that the property is a non-transferable occupancy holding merely because he consented to an order of attachment before judgment of the property. The attachment merely prevented an alienation and the judgment-debtor by consenting to it merely fettered his right to deal with the property. 5 Pat.L.W. 185=47 Ind. Cas. 29.

——S. 115—Execution sale—Auction purchaser—Purchase subject to a mortgage—Right of purchaser to impeach validity of mortgage.

A purchaser at the court sale of attached property believed to be incumbered (S. 287, Civil Procedure Code) is not bound by estoppels which would have bound the judgment-debtor. There is nothing to prevent him from benefitting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgage. 11 Bom.L.R. 26=33 B. 311=1 Ind. Cas. 106.

——S. 115—Execution sale—Transferability of holding—Suit by mortgagee—Co-sharer land-lord—Purchaser in execution.

A co-sharer land-lord who has purchased the holding in execution of a decree of his own cannot raise the question of the transferability of the holding in a suit by the mortgagee. (1906) 11 C. W. N. 76 foll. (1904) 9 C.W.N. 24 S.N. foll. (1909) 11 C.L. J. 20=14 C.W.N. 71=5 Ind. Cas. 39.

——S. 115—Execution sale—Res judicata—Mortgage—Sale—Auction sale pending appeal against decree by mortgagee for larger amount—Modification of decree in appeal—Giving 6 months for redemption—Subsequent order directing auction purchaser to be placed in possession.

A decree for sale of mortgaged property was passed in 1900 for a sum less than the amount claimed. The mortgagee appealed against the dismissal of a portion of his claim. An order absolute for sale was made in 1902, the properties were sold in 1903 and purchased by the decree holders. The mortgagee-purchasers applied to be put in possession, which was refused by the Subordinate Judge, and an appeal was preferred therefrom; and on 18-4-04 the High Court allowed the appeal by the mortgagee-purchasers against the order refusing to place them in possession; but before the date, the High Court on 27th January 1904, allowed the main appeal of the appellants mortgagees directing the respondents-mortgagors to pay the whole amount adjudged within 6 months and in case of default directing the property to be sold. This decree and its forum was not apparently brought to the notice of the High Court on 18-4-04 when it disposed of the appeal of the mortgagees as regards possession in virtue of their purchase. The respondents (mortgagors) now claimed restoration of possession by setting aside the sale. **Held**, that the order dated 18-4-04 was not null and void and that the mortgagees were entitled to be in possession, the more so as there had been no offer to redeem by the respondents. (1908) 13 C.W.N. 321=9 C.L. J. 158=6 A.L. J. 30=11 Bom. L.R. 214=19 M.L. J. 178=1 Ind. Cas. 124=5 M. L. T. 129=36 C. 336=36 I. A. 27 (P.C.).

——S. 115—Execution sale of non-transferable holding.

If a judgment-debtor, with a full knowledge of the execution proceedings and full opportunity of raising an objection to the effect that the holding was on occupancy holding and not transferable, fails to raise the objection at the time of sale, it is not competent to him to resist the purchaser after confirmation of the sale and in such circumstances as between the purchaser and the judgment-debtor the title to the property vests in the purchaser after confirmation. (1907) 34 C. 199 =5 C.L J. 294=11 C.W.N. 513.

——S. 115—Execution sale—Mortgage—Sale in execution of a simple money decree of mortgaged property—Notification of mortgage—Purchaser not estopped from disputing the existence of the mortgage—Civil Procedure Code, Ss. 282, 283 and 287.

In execution of a simple money decree the rights of a mortgagor in certain property, ostensibly subject to a mortgage, were put up to sale. The property was not sold subject to the mortgage as contemplated by S. 282, C.P.C., but the existence of the mortgage was notified in the proclamation of sale for the benefit of intending purchasers. **Held**, on a suit brought by the mortgagee for sale, that the auction-purchaser was not under the circumstances, debarred from proving that the mortgage in suit was fictitious and without consideration. (1906) A.W.N. 68=3 A.L. J. 200=28 A. 418.

——S. 115—Execution sale—Mortgage subsequent, after decree on prior mortgage—Sale subsequent to second mortgage—Purchase by mortgagor from purchaser in execution sale.

A mortgagor who mortgages property a second time after a decree for sale on the property on a prior mortgage cannot by himself purchasing the property in execution sale of the prior mortgage decree directly or at second hand seek to defeat the second mortgage created by himself. (1905) 29 M. 113.

——S. 115—Execution sale—Mortgage decree—Sale in excess of the order for sale—Judgment-debtors standing by—Maintainability of suit to recover excess sold.

Lands in excess of the mortgaged property and of the decree were sold in execution of a mortgage decree. Purchase money was duly deposited and possession taken by the purchaser. The heirs of the mortgagor, who were parties to the decree for sale, did not object to any of the proceedings, but some time afterwards sold the excess portion included in the auction sale to the plaintiff, who sued for possession. **Held**, that the plaintiff was not a **bona fide** purchaser, inasmuch as he could have ascertained with ordinary diligence the true state of facts. **Held**, further, that the plaintiff ought to have offered to refund the proportionate sale price. **Held**, also that the heirs of the mortgagors and, as their representative, the plaintiff also, were estopped from denying the title of the purchaser, he being a purchaser for value. 1 A.L. J. 402=27 A. 62=1904 A.W.N. 186 (F.B.).

——S. 115—Execution sale—Purchaser at a court Sale—Judgment-debtor—Dunlop's proclamation, application of,

In a suit by the inamdars for a declaration of their ownership of the forest and trees in waste lands of the inam village, the lower appellate court held that the inamdars were estopped from contending that they were the owners by reason of certain mortgage deeds whereby the inamdars had taken certain lands from certain khat by way of mortgage and by reason of certain sale certificates whereby the inamdars had purchased some other lands in court sales in execution decrees against tenants. Per **Chandavarkar, J.— Held**:—That no estoppel is created. **To create an estoppel against a party, his declaration, act or omission must be of an unequivocal and unambiguous character.** A court sale cannot by itself be taken to create an estoppel either in favour of or against a court purchaser as against or in favour of the person whose right, title and interest the court purchaser buys from the court. And even if there is any estoppel at all, it can only be as to the parties with whom the inamdars dealt in the particular transactions to which the deeds in question relate and the estoppel will even then apply only to the specific lands dealt with. It cannot extend to other parties and other lands, unless by means of the particular transactions in question all the inamdars not only led the defendants in the case to believe that the inamadars had no right to the trees etc., in the village, but led them also to act upon such belief and alter their position, Mr. Dunlop's proclamation could not apply to villages which had been alienated by Government in favour of the inamdars before its date. (1903) 6 Bom. L.R. 864.

——**S. 115—Execution sale—Application to set** aside an auction sale—**Benamidar** purchaser alone a party—Some of the real purchasers assisting the **benamidar** in the proceedings — How far such owners bound by the order setting aside—Miror owners how far estopped—**See:** 6 C.W.N. 706; 29 C. 682.

——**S. 115—Execution sale—Sale of tenure—With** a notification stating a specified rate of rent—Purchaser how far bound to pay at that rate—Rate higher than old rate.

The principle that when a land-lord brings an occupancy holding to sale for arrears of rent, alleging that rent is payable at a certain rate, the auction-purchaser is bound to pay at that rate even though it may be in excess of the rate at which rent was payable by the defaulting tenant, may not be correct in its broad generality. (1902) 6 C.W.N. 877.

——**S. 115—Execution sale—Illegal transfer by a** tenant of his rights—Auction-purchaser of transferor's rights—How far bound by transfer.

An auction purchaser of a tenant's rights is not estopped from contesting the tenant's previous illegal transfer of his rights which is void according to law. (1902) 6 C.W.N. 916.

——**S. 115—Execution sale—Sale—Application to** set aside sale—Compromise—Time to pay—Right to proceed with application.

A person who obtains time to pay the decree amount and have the sale cancelled and undertakes not to press his petition to set aside the sale for irregularity is estopped from afterwards proceeding with the petition on failure to fulfil the terms of the compromise. (1901) 29 C. 577.

20. Executor.

——**S. 115—Executor—Person wrongly describing himself as executor.**

Where a defendant who has not been appointed executor of a will either expressly or by implication, describes himself as an executor, from a mistake about his legal position, this would not make him an executor or raise an estoppel against him. A.I.R. 1939 P.C. 238 =6 B R. 26=I. L. R. (1939) Kar. P.C. 391 Sup.=183 Ind. Cas. 885 (P.C.).

——**S. 115—Executor.**

An executor who has entered upon his duties an such is estopped from pleading immunity from his obligation as executor, on the ground that no probate has been taken out by him. 34 M. 211, **Ref. to.** 1931 M.W.N. 224=32 M.L.W. 768=128 Ind. Cas. 689=A.I.R. 1930 Mad. 956=59 M.L.J. 596.

——**S. 115—Executor—Trustee—Executor cannot** set up title adverse to the testator.

No person who has accepted the position of executor or trustee under a will and acquired property in that capacity can be permitted to assert an adverse title thereto on his own behalf until he has obtained a proper discharge from the trust with which he had clothed himself. 34 Mad. 257=15 C. W. N. 741=8 A.L.J. 774=13 Bom. L.R. 520=(1911) 2 M.W.N. 375 =14 C.L.J. 64=21 M.L.J. 669=10 M L.T. 263=11 Ind. Cas. 447 (P.C.).

[Affirming 29 Mad. 239=16 M.L.J. 238=1 M.L.T. 71]

——**S. 115—Executor—Legatee—Heir-at-law.**

As between the testator on the one hand and the legatee or the executor on the other, there is no estoppel, Nor is the heir-at-law of a testator **raiyat** estopped from questioning the transfer of a holding made by a will. 12 C.W.N. 1086, Not Foll. In every case of gift, the doctrine of estoppel does not apply as between donor and donee. 42 Cal. 254=18 C.W.N. 1290=21 C.L.J. 187=27 Ind. Cas. 235.

——**S. 115—Executor—Adverse—Title.**

An executor under a will who has accepted office as executor and has acted as such cannot set up an adver e title to the property disposed of by the will. 29 M. 239 Foll. 34 Mad. 211=20 M.L.J. 687=(1910) M.W.N. 233=8 M.L.T. 124=7 Ind. Cas. 176.

——**S. 115—Executor — Will — Adverse title by executor.**

Where the defendant, with full knowledge of all the circumstances bearing on his rights as the testator's son accepted the office of executor, obtained probate and under its authority collected assets and otherwise acted so as to cause the plaintiffs to alter their position, the defendant is estopped from impeaching the will and repudiating his fiduciary position or setting up in respect of the property dealt with by the will any right inconsistent with the dispositions and conditions contained therein. 16 M. L. J. 238=1 M. L. T. 71=29 M. 239.

21. Fraud.

——**S. 115—Fraud.**

The defrauding party cannot be allowed to disclose his fraud for the purpose of resiling from his position. The party fails who first has to allege the fraud in which he participated. A. I. R. 1938 Cal. 602=42 C.W.N. 1059=181 Ind. Cas. 102.

——S. 115—Fraud need not be pleaded.

It is not necessary for the purpose of S. 115, Evidence Act, that any fraud or deception should be pleaded. If it is found that any representation was intentionally made by one party and it was acted upon by the other party, the rule of estoppel will apply. A. I. R. 1938 Lah. 558=40 P. L. R. 848=178 Ind. Cas. 436.

——S. 115—Fraud—Estoppel from pleading one's own fraud.

The ordinary rule is that where the fraud has not been carried into execution, it may be pleaded by a party to it. But where during execution, some of the judgment-debtors object to execution on the ground that the assignee decree-holder is in fraudulent collusion with one of them, but the objectors plead that they had acquiesced in the two previous applications for execution because the decree-holder-assignee had promised them a share of the sale-proceeds if execution succeeded, this amounts to carrying the fraud into effect and they are, therefore, estopped from pleading that they are not bound by the rules of **res judicata**, and, what is more, they are estopped from pleading their own fraud entirely. A.I.R. 1936 Rang. 218= 163 Ind. Cas. 671.

——S. 115—Fraud—Plaintiff is estopped from alleging his own fraud and setting it up as against defendant.

Per **Sulaiman, C. J.**—Where a plaintiff comes to Court and wants to go back upon the terms of a contract entered into by him on the ground that such terms had been fradulently entered by himself in order to cheat a third person and such fraud has actually succeeded, the plaintiff would be estopped from alleging his own fraud and setting it up as against the defendant. A.I.R. 1935 All. 529=1935 A.W.R. 658=1935 A.L.J. 560=58 All. 1=156 Ind. Cas. 362 (F.B.).

——S. 115—Fraud—Estoppel against pleading one's own fraud.

As a general rule, plaintiff cannot plead his own fraud or illegal act as a basis of his claim or as a necessary step to the succees of his claim:

Held, the plaintiff could not be allowed to plead or take advantage of any invalidity in the registration of the deed. A I.R. 1932 Mad. 311=1932 M.W.N. 226= 35 M.L.W. 294=55 Mad. 507=63 M.L.J. 77=139 Ind. Cas. 404.

——S. 115—Fraud.

A party cannot plead his own fraud in order to invoke the assistance of the Court if the purpose of that fraud has been effected. ('31) 1931 M.W.N. 470.

——S. 115—Fraud.

Fraud committed upon creditors—Judgment-debtor cannot claim ownership of house (Subject of fraud) or equitable interest in sums spent for building it. 126 Ind. Cas. 279=A.I.R. 1930 Mad. 298.

——S. 115—Fraud upon registration land.

Where the parties intended to hoodwink the Sub-Registrar by entering a piece of property within his jurisdiction in the sale-deed, in order to give that officer jurisdiction, the parties contemplated a fraud on the law of registration and so should not be granted any relief in a Court of justice. 118 Ind. Cas. 589=A.I.R. 1929 All. 578.

——S. 115—Fraud.

It is not open to a party to plead his own fraud against another, not a party to the fraud. 115 Ind. Cas. 113=1929 A.L.J. 423=A.I.R. 1929 All. 237.

——S. 115—Fraud.

A participator in fraud, when the fraud is effected, cannot impeach the transaction on the ground of such fraud. 113 Ind. Cas. 229=53 Bom. 75=30 Bom. L.R. 1539=A.I.R. 1929 Bom. 1.

——S. 115—Fraud.

Party giving a particular form to a document for avoiding stamp duty cannot take aid of the principle that deeds and contracts of the people of India ought to be liberally construed. 108 Ind. Cas. 593=A.I.R. 1928 Lah. 678.

——S. 115—Fraud.

Unless a person is found guilty of either an overt act or of an act of omission which is likely to induce the other side to believe that he is entitled to commit the particular act complained of, there can be no question of estoppel. Plea of estoppel can be maintained only if the conduct of the person against whom estoppel is alleged, is found to be fraudulent. 21 All. 496, (P.C.); 30 Cal. 539 (P.C.), Foll.; A.I.R. 1927 Oudh. 66, Rel. on. 106 Ind. Cas. 244=3 Luck. 133=4 O.W.N. 1019=9 L.R.A. Rev. 336=A.I.R. 1928 Oudh 23.

——S. 115—Fraud—Collusive decree.

Where a person permits a collusive decree to be passed against him he and his representatives cannot thereafter be able as against the decree-holder, to assert the invalidity of such decree, although the decree is open to be impeached by a creditor. 11 Bom. 708, Foll. 101 Ind. Cas. 513=49 All. 640=25 A.L.J. 497=A.I.R. 1927 All. 538.

——S. 115—Fraud of the mortgagor.

It is no answer to an innocent plaintiff, seeking to recover money which has been paid by him through deceit by which the plaintiff was induced to enter into an invalid transaction, to say that the transaction being invalid, no action lies. Such a suit is not based upon the transaction. It is based upon the fraud of the defendant and is bound to succeed. 101 Ind. Cas. 257=25 A.L.J. 37=A.I.R. 1927 All. 190.

——S. 115—Fraud—Party to.

Where the plaintiff succeeded in carrying out the fraud by executing a sale-deed of his property he is precluded from putting forward his own title to the property by taking advantage of his own fraud. 36 C. 551 (P.C.), Foll. 71 Ind. Cas. 441= A.I.R. 1923 All. 411.

——S. 115—Fraud—One cannot take advantage of his own wrong or that of his predecessor.

Where it is necessary for a party who wishes to establish a certain state of things, in order to do so to set up his own wrong doing, he will not be allowed to do so. An adopted son who merely takes from the adoptive father can be in no better position than the adoptive father himself and he will not be allowed to set up that his adoptive father's consent was obtained by a promise of corrupt payment. The principle Nemo allegans tur pitudinem suam est adiendus is applicable in India. 32 M.L.J. 484 and 31 Bom. 305, Foll. 73 Ind. Cas. 954=18 M.L.W. 156=32 M.L.T. 349=1923 M.W.N. 423=A.I.R. 1923 Mad. 711=45 M.L.J. 161.

——S. 115—Fraud.

Transfer of Property Act, S. 53—Conspiracy between mortgagor and mortgagee—Object to defraud latter's creditor—Payment of mortgage falsely established—Mortgagee cannot sue for mortgage-money afterwards. 63 Ind.Cas. 921=19 A.L.J. 454=A.I.R. 1921 All. 140.

——S. 115—Fraud—Advantage from.

Estoppel and the above equitable rule are quite different. The former is no more than a rule of evidence, and its operation hardly extends to cases falling under the above equitable principle. The applicability of the maxim depends on the question whether any fraud was committed at all by the person and on the question whether any advantage was derived by him by the fraud assuming constructive fraud on his part. 41 Bom. 93=18 Bom. L.R. 954=37 Ind. Cas. 945.

——S. 115—Fraud—Benami, plea of—Defrauding creditors—Transaction successfully set up by defendant in a previous suit—Difference in the case of a plaintiff pleading benami.

Where a plaintiff asks for relief alleging that the transfer upon which the defendant relied was a **benami** transaction, he is precluded from alleging the benami character of the transaction and obtaining relief, if he had successfully set up the benami transaction to defeat or defraud creditors. 27 C. 231 ref. to. The same principle does not hold good where the defendant in possession seeks to show the real nature of the transaction to defend his possession. 18 B. 372 ref. to and explained. (1903) 8 C.W.N. 620.

22. Ignorance of Law.

——S. 115—Ignorance of Law.

No estoppel can arise from ignorance of the law which both parties are supposed to know. 95 Ind. Cas. 879=5 Bur. L.J. 56=A.I.R. 1926 Rang. 131.

——S. 115—Ignorance of law.

No estoppel can arise in favour of party misled only by his own ignorance of law. 87 Ind. Cas. 445 =2 O.W.N. 83=28 O.C. 265=A.I.R. 1925 Oudh 568.

——S. 115—Ignorance of law.

Where the defendants, transferees of certain tenures were ignorant of the fact that the tenures were inalienable and liable to forfeiture on alienation but the land-lord was in no way responsible for such ignorance.

Held, that this cannot raise any estoppel against him nor can the fact that he did not exercise his right of enforcing forfeiture prior to the suits bar him from doing so now or raise any estoppel against him. If the tenures, the defendants purchased, are forfeitable ones, they must take the consequence and cannot complain even if they paid full value. 15 M.L.W. 164=A.I.R. 1922 Mad. 290=55 Ind. Cas. 380 =27 M.L.T. 111=38 M.L.J. 275.

23. Inconsistent pleas.

——S. 115—Inconsistent pleas.

Where, in a suit, a party takes a certain plea and obtains a decision on a point on the strength of the plea, he cannot be allowed, in a subsequent suit in which the same point is raised, to adopt a plea which is inconsistent with that which was raised in the former suit. A.I.R. 1936 Pat. 10=2 B. R. 192= 17 P.L.T. 77=160 Ind. Cas. 355.

——S. 115—Inconsistent pleas — Plaintiff cannot place evidence in alternative.

A plaintiff cannot appear in a witness-box in a Court of law and state in the alternative; "I executed this document as a genuine sale" and also "I executed this document merely as a fictitious document." When it is a question of evidence, a statement must be precise. A.I.R. 1935 All. 529=1935 A L J. 560=1935 A.W.R. 658=58 All. 1=156 Ind. Cas. 362 (F.B.).

——S. 115—Inconsistent pleas — Party alleging that land is not estate and getting decree in Civil Court cannot subsequently turn round and invoke jurisdiction of Revenue Court.

Where the plaintiff, a **zemindar**, instituted a suit in a civil Court for ejectment alleging that the village in question was not an estate and obtained a decision in his favour, though the defendants had denied his allegation and expressly pleaded that the village was an estate:

Held, that it was not open to the plaintiff in subsequent proceedings against the same defendants to turn round and say that the land was an estate and invoke the jurisdiction of the Revenue Court. A.I.R. 1935 Mad. 367=1935 M.W.N. 377=68 M.L.J. 441=41 L.W. 589=157 Ind. Cas. 783.

——S. 115 — Inconsistent pleas — Acceptance of specific share in preliminary decree — Subsequent attempt to show its incorrectness—Whether estopped.

Where in the preliminary decree a person accepted a specific share at the proper time, he could not be permitted to show its incorrectness at the close of the case. 9 S.L.R. 218=34 Ind. Cas. 928.

——S. 115—Inconsistent pleas—Appeal — Objection to forum—Subsequent change of contentio —Estoppel.

A preferred an appeal to the Commissioner from an order rejecting certain objections to the confirmation of a sale. The appeal was opposed by **B** on the ground that the case was governed by the new Tenancy Act and that the appeal should have been filed in the High Court. The appeal was returned and presented to the High Court. **B** then changed his position and contended that the case was not governed by new law but by old law and no appeal lay to the High Court.

Held, that **B** was estopped from raising any question of jurisdiction inasmuch as it was on his own insistence that the appeal was returned by the commissioner. By his objection he had accepted the jurisdiction of the High Court as the proper forum of appeal. 120 Ind. Cas. 125=1930 A.L.J. 224=A.I.R. 1930 All. 15.

——S. 115—Inconsistent pleas.

Where a party got a revision dismissed on the ground that an order could be attacked in appeal he is estopped from raising a plea in appeal that the proper remedy was by way of revision because that order could not be attacked in appeal. 120 Ind. Cas. 594 (Lah.).

——S. 115—Inconsistent plea.

Where a person advances one plea and afterwards finds it prejudicial to him, he cannot by giving it up avoid its consequences. 106 Ind. Cas. 229=39 M.L.T. 415=27 M.L. W. 30=A.I.R. 1928 Mad. 27.

——S. 115—Inconsistent pleas—Appeal.

A female claiming inheritance in the lower courts as the daughter's daughter of the penultimate male holder is not estopped on appeal from shifting her position and claiming as the sister of the last male holder. 134 P.R. 1907, Foll. 29 P.R. 1911=94 P.L.R. 1911=124 P.W.R. 1911=9 Ind. Cas. 608.

——S. 115—**Inconsistent pleas.**

A litigant cannot be allowed to take up in appeal positions inconsistent with the position taken by him in the Lower Court. 2 P.W.R. 1911=15 P.L.R. 1911 =9 Ind. Cas. 36.

——S. 115—**Inconsistent pleas—Appeal.**

A party litigant cannot be permitted to assume inconsistent positions in Court to the detriment of his opponent. A party who has induced a Court to act without jurisdiction, cannot when the validity of its order is challenged on appeal, take up an inconsistent position and defeat the appeal by proof that the order was made without jurisdiction. 9 C. 482; 23 M. 517; 28 M. 127 Foll. 15 C.W.N. 725=8 Ind. Cas. 26.

——S. 115 — **Inconsistent pleas — Contrary plea** cannot be allowed in appeal so as to place opponent at a disadvantage.

A litigant who has all along maintained a position in support of one branch of his suit cannot be permitted when he fails upon this branch to withdraw from the position and assert the contrary more especially when he thereby places his opponent at a great disadvantage. 94 Ind. Cas. 501=49 Mad. 249= 53 I.A. 64=43 C. L. J. 378=28 Bom. L.R. 865=24 M.L.W. 9=1926 M.W.N. 585=A.I.R. 1926 P.C. 18= 50 M.L.J. 391 (P.C.)

——S. 115—**Inconsistent pleas.**

Where a person has successfully opposed an application under S. 47, Civil P. C., on the ground that that section did not apply, he cannot subsequently raise a plea in a suit brought by the applicant that the suit was barred by S. 47. 117 Ind. Cas. 285=A.I.R. 1929 Nag. 79.

——S. 115—**Inconsistent pleas.**

A party having claimed on basis of investment in commercial speculations cannot claim on another basis when he finds that the first basis is prejudicial to him. 114 Ind. Cas. 565=1929 A.L.J. 406=49 C. L. J. 335= 33 C.W.N. 493=31 Bom. L. R. 710=1929 M.W.N. 422 =30 M.L.W. 835=A.I.R. 1929 P.C. 77=57 M. L. J. 581 (P.C.).

——S. 115—**Inconsistent pleas.**

Consignor taking delivery of goods on strength of bill-of-lading and basing his suit on it—He cannot say he is not bound by its terms. 117 Ind. Cas. 851=33 C.W.N. 169=A.I.R. 1929 Cal. 260.

——S. 115—**Inconsistent pleas.**

Where a person claims a certain property by challenging a certain trust deed, he cannot, on failure of the claim, claim the property under the trust deed. 100 Ind. Cas. 648=A.I.R. 1927 Mad. 498.

——S. 115—**Inconsistent pleas—Construction of decree.**

Where a particular construction has been given by the Court to a decree and it has been enforced the parties shall be estopped from claiming that it should be construed otherwise. 29 M. L. J. 219=30 Ind. Cas. 357.

——S. 115—**Inconsistent pleas.**

Where plaintiff has obtained a decree on the representation that a Court had jurisdiction, subsequently he cannot go back upon it and urge want of jurisdiction. 113 Ind. Cas. 229=53 Bom. 75=30 Bom.L.R. 1539= A.I.R. 1929 Bom. 1.

——S. 115—**Inconsistent pleas.**

Appeal rightly filed in Revenue Court dismissed on respondent's objection to jurisdiction—Appeal subsequently filed in Civil Court—Respondent cannot plead want of jurisdiction of Civil Court. 3 O.C. 32 and 2 O. C. 188, **Foll.** 114 Ind. Cas. 120=5 O.W.N. 897=4 Luck. 159=10 L.R.A. Rev. 211=A.I.R. 1928 Oudh 503.

——S. 115—**Inconsistent pleas—Joinder of parties.**

Where defendants in a redemption suit opposed plaintiff's application for joining other part-proprietors of the land in suit, and the Court therefore rejected plaintiff's application.

Held, defendants afrerwards cannot attack the decree on the ground of non-joinder of parties. 84 Ind. Cas. 293 =3 Pat. 818=6 P.L.T. 237=A.I.R. 1925 Pat. 57.

——S. 115—**Inconsistent pleas.**

A decree-holder filed a suit against a son of his judgment-debtor for ousting him from possession, which he had acquired as a stranger under O. 21, R. 100, in a previous execution proceedings. The decree-holder contended that the son was separate and was not the legal representative of his father and succeeded in getting possession of part of the property. He next started execution proceedings with respect to the rest alleging that the son as a legal representative was bound by the decree.

Held, that the decree-holder cannot be allowed to come forward on his new and entirely inconsistent allegations with his previous one, there being no provision either of law or equity to justify the extraordinary volte face. 113 Ind. Cas. 146 (Nag.)

——S. 115—**Inconsistent pleas.**

Statement in the pleading would be a bar to a different averment in the course of the proceeding. 83 Ind. Cas. 260=28 C.W.N. 104=A.I.R. 1924 Cal. 427.

——S. 115—**Inconsistent pleas—Decree by instalments—Payment.**

Where a judgment-creditor under an instalment decree had permitted his debtor to make thirty consecutive payments on the second or third of every month though the payments were due on the first of every month, in the belief that they were being accepted as regular payments he could not afterwards be allowed to deny that they were regular payments. 3 S.L.R. 137= 4 Ind. Cas. 479.

——S. 115—**Inconsistent plea—Decree payable by instalments—Change in plea of decree-holder.**

Where a decree-holder has accepted some instalments regularly under a decree payable by instalments, he cannot change and contend that he accepted the money in part satisfaction of the decree. 15 C.W.N. 10=13 C. L. J. 206=6 Ind. Cas. 138.

——S. 115—**Inconsistent pleas—Different litigation.**

Plaintiff was estopped by his own proceeding in the arbitration wherein he received his full half of the properties belonging to his father upon the footing of the exclusion of the mother from claiming a share therein through his mother. 11 L. W. 421=24 C.W.N. 321=(1920) M.W.N. 189=27 M.L. J. 204=2 U.P.L.R. (P. C.) 48=58 Ind. Cas. 843 (P.C.)

——S. 115—**Inconsistent pleas—Effect of.**

In a suit for ejectment in a Civil Court defendant pleaded that he was an agricultural tenant, upon which the Munsif acting under S. 202 of the Agra Tenancy Act directed defendant to establish his plea in a Revenue Court within a time. On default the suit was decreed. The Appellate Court finding that defendant was a tenant of plaintiff and that no notice of the termination of the tenancy had been given to him, under S. 106, T.P. Act dismissed the suit. **Held**, that it was not open to the Lower Appellate Court to find as it did having regard to the pleading of the defendant. 13 A.L.J. 249 =28 Ind. Cas. 568.

—S. 115—Inconsistent pleas—Estoppel by conduct.

A plaintiff who by objecting to the admissibilty of a certain document in a previous suit by the defendants practically compelled them to withdraw their previous suit, is estopped from asking the Court to grant him a declaratory decree upon basis of that very agreement. 63 P.W.R. 1913=114 P.L.R. 1913=18 Ind. Cas. 804.

——S. 115—Inconsistent pleas—Execution proceedings.

In execution the decree-holder applied for sale of two mortgage bonds, and the judgment-debtors (being representatives of the deceased debtor) prayed for time to pay the decree amount and the Court granted him and struck off the execution application. Subsequently the decree-holder applied for the same relief and the judgment-debtors contended that the mortgage bonds were their own property and could not be sold under the decree. **Held,** that the objection was not barred either by **res judicata** or estoppel. 4 A.L.J. 400, **Foll.** 8 A.L.J. 844=11 Ind. Cas. 980.

——S. 115 — Inconsistent pleas— Incumbrancer involving purchaser in litigation.

An incumbrancer who disputes the title of the purchaser of the holding at a new sale and thereby causes delay in the issue of notices to annul the incumbrances cannot be allowed to say that the title under which the purchaser claimed to issue the notices was perfected on the date of actual sale and not on confirmation. 10 C.L.J. 640, **Foll.** 9 Ind. Cas. 503 (Cal.)

——S. 115—Inconsistent pleas—Jurisdiction.

A defendant is precluded from raising the question of jurisdiction when the case is transferred to the Higher Court according to his objection in the Lower Court. 9 S.L.R. 164=32 Ind. Cas. 629.

——S. 115—Inconsistent pleas—Jurisdiction.

Where in a previous suit for ejectment brought in a Revenue Court, the suit was dismissed on the objection of defendant as to the jurisdiction and the plaintiff was directed to bring his suit in the Civil Court, it is not open to the defendant to plead that the suit, when brought in the Civil Court, was not maintainable. 13 A.L.J. 854=30 Ind. Cas. 551.

——S. 115—Inconsistent pleas—Land-lord and tenant—Settlement record.

When an alteration in the record was made by the settlement authorities upon the joint application of a land-lord and a tenant, it is not open to the latter to turn round and contend that the order was made without jurisdiction and is not binding upon him. 9 All. 191 Ref. 30 C.L.J. 1=53 Ind. Cas. 39.

——S. 115—Inconsistent pleas—Legal pleas.

Per **Sadasiva Aiyar, J, Quaere**:— Whether the principle that a party ought not to be allowed to 'blow hot and cold' in pleadings in two successive proceedings involving the same question of rights can be availed of as regards pleas based on a pure abstract question of procedure law. 17 M.L.J. 314; 27 A. 544 Ref. to. **Quaere**: Whether even assuming that the doctrine can be availed of in such cases its effect is to entitle the party taking the first or infructuous proceeding to the deduction of the time taken therein for the purposes of calculating the limitation period for the second proceeding. 33 M.L.J. 463=6 L.W. 696=(1917) M.W.N. 822=43 Ind. Cas. 6.

——S. 115—Inconsistent pleas—Litigants not allowed to set up.

The mother of the last Hindu owner sued for a declaration of the invalidity of an alleged adoption made to him. The mother died and an application was made by the present plaintiffs' reversioners to be brought on record as her legal representative and to continue the suit. The application was dismissed on the objection raised by the present defendant. The present plaintiffs thereupon brought a fresh suit. **Held**, that the defendant was estopped from contending in the second suit that the decision in the previous suit was erroneous, that the plaintiff's proper remedy was to continue the first suit and that the second suit was barred inasmuch as the first suit had abated. 17 M.L.J. 314 and 22 Mad. 394 Ref. 25 M.L.T. 360=9 L.W. 345=52 Ind. Cas. 465.

——S. 115—Inconsistent pleas—Mortgage decree —Execution.

A subsequent sale in execution of properties comprised in a mortgage will not be allowed when there has already been a sale in execution of the same decree at the instance of the mortgagee even though they were not the properties comprised in the mortgage. 3 Ind. Cas. 22 (All.)

——S. 115—Inconsistent pleas—No estoppel—If only applying facts established at a trial.

The doctrine of estoppel by reason of inconsistent positions does not apply where the plaintiff is only applying the law to the facts established at the trial, though he failed to prove what he came to prove. 34 Ind. Cas. 897 (Pat.)

——S. 115 — Inconsistent pleas—Parties not allowed to take.

It is an elementary principle of justice and equity that parties litigants should not be allowed to take up inconsistent positions in Court to the detriment of their opponents. A defendant cannot be allowed to defeat, the claim of the plaintiff on proof that, contrary to their previous allegation, a decree for recovery of possession might and should have been made in favour of the plaintiff in the previous suit. 27 C.L.J. 535=44 Ind. Cas. 159.

——S. 115—Inconsistent pleas—Party added on his own motion if can claim exoneration.

Where a person is on his own motion or without objection impleaded as a party to a mortgage suit, he cannot after an adverse decision is given against him undo its effect by pleading that he is an unnecessary party and that he ought to be permitted to retire from the suit. 47 Ind. Cas. 536 (Nag.)

——S. 115—Inconsistent pleas—Prompt and deferred power.

Where a Mahomedan husband in a suit by his wife, to recover from him the prompt portion of her dower, contended that the whole of the dower settled was deferred. **Held**, in a second suit by the wife to recover the deferred portion that he was estopped from raising the contention that the whole dower was prompt in view of his defence in the prior suit. 34 All. 289=(1912) M.W.N. 417=11 M.L.T. 316=9 A.L.J. 450=15 C.L.J. 468=14 Bom. L.R. 460=23 M.L.J. 11=16 C.W.N. 913=15 Ind. Cas. 196 (P.C.).

[On appeal from 29 All. 640=27 A.W.N. 221=4 A.L.J. 521].

——S. 115—Inconsistent pleas—Suit for dower—Prompt and deferred.

Where in a previous suit for part of the dower as prompt, the plea had been raised that the whole was deferred, the defendant's representatives in interest in subsequent suit cannot plead that the whole was prompt, 33 All. 291=8 A.L.J. 27=9 Ind. Cas. 200.

——S. 115—Inconsistent pleas—Remedy by execution or by suit.

Where a claim in a suit is held on the objection of the party to be barred by S. 47, C.P.C., he cannot in a subsequent application for execution set up that the remedy is by a suit. A suitor should not be allowed to take up a position inconsistent with that on which he has succeeded in defeating a claim in a previous proceeding brought to enforce it. 21 O. C. 188=47 Ind. Cas. 558.

——S. 115 — Inconsistent pleas — Rescission of lease.

Where the lessor who had instituted a suit for rescission of a lease on the ground that it had been obtained by bribing his servant, had after the institution of such suit conducted two appeals in which he had treated the lease as a valid one; **held**, that this would not estop him from suing for rescission of the lease since the suits on which the appeals arose were prior to the suit for rescission. Where it is impossible to put the defendant back in his original position the plaintiff should ask for damages and not for rescission. 37 Cal. 81=14 C.W.N. 101=3 Ind. Cas. 316.

——S. 115—Inconsistent pleas—Residence.

Where the defendants ejected plaintiff from the house she was occupying on the ground that it was not the family residence, they are estopped from denying her right to a residence in the family house in a subsequent suit by her for a right of residence. 8 S.L.R. 306=29 Ind. Cas. 25.

——S. 115—Inconsistent pleas—Rule against.

The rule against a party being allowed to take up inconsistent positions applies only where a party seeks to defeat his opponent by successive inconsistent positions or having obtained a benefit by adopting a position he afterwards tries to assume a different and contradictory position while retaining the advantage gained by his former position. 14 M.L.T. 229=25 M.L.J. 324=(1913) M.W.N. 776=5 L. W. 299=21 Ind. Cas. 219.

——S. 115—Inconsistent pleas—Rule when applicable.

It must be shown before applying the rule of estoppel that a previous inconsistent statement affected the result of that litigation. A person therefore who was not a proper party to a litigation is not estopped from subsequently pleading something inconsistent with a statement made by him in the course of the former litigation. 13 N.L.R. 69=39 Ind. Cas. 849.

——S. 115—Inconsistent pleas—Scope.

Where the tenants of a holding take up a position in proceedings under S. 105, Ben. Ten. Act, that the application does not lie and the application is withdrawn, they will not be allowed to say in subsequent proceedings in suit that the application operated as a bar to it. The principle is that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponents and that this wholesome doctrine applies not only to successive stages of the same suit but also to another suit other than the one in which the position was taken up provided the second suit grows out of the judgment of the first. A. I. R. 1924 Cal. 600, **Foll.** 56 Cal. 584=A.I.R. 1930 Cal. 32=120 Ind. Cas. 249.

——S. 115—Inconsistent pleas—Section not exhaustive.

The section does not contain the whole of estoppel. If a person without mistake takes a particular position in litigation he cannot be allowed to change that position and the principle will still apply in another suit growing out of the judgment of the first. 23 M. L. J. 335=(1912) M.W.N. 967=17 Ind. Cas. 513.

[On appeal 38 Mad. 374=25 M.L.J. 264=21 Ind. Cas. 24.]

——S. 115 — Inconsistent pleas — Small cause—Original side.

On the objection of the defendant to the jurisdiction of a Small Cause Court the District Munsiff returned the plaint to the ordinary side. Against the decree of the Munsiff there was an appeal to the Subordinate Judge. Against the appellate order of the latter a revision petition was filed in the High Court and plaintiff raised the objection that the suit was of a small cause nature and that no appeal lay to the subordinate Judge. **Held**, that the plaintiff was estopped from raising the objection. 52 Ind. Cas. 829 (Mad).

——S. 115—Inconsistent pleas.

Suit filed in Small Cause Court—Defendant contending suit is not small cause—Plaint returned and refiled in ordinary Court—Defendant estopped from contending that suit is small cause. 95 Ind. Cas. 846=A.I.R. 1926 All. 664.

——S. 115—Inconsistent pleas—Transfer of holding.

Where a zemindar who does not recognise a transferee of a **patni**, refuses to take the rent that he pays and sues the transferor for rent with interest and costs without making the transferee a party, he cannot again sue the transferee for rent for the period between the date of suit and the date of the sale on the ground that the tenure was in the possession of the transferee. 10 C. L. J. 538=3 Ind. Cas. 346.

——S. 115—Inconsistent pleas—Trial of issue—Evidence of custom.

Though the defendant does not object to one witness setting up a custom, he can object to another witness giving evidence at a late stage. When parties have interpreted an issue once in a narrower sense they cannot insist on a wider interpretation at the next stage of suit but they may contest this case on such wider interpretation. 35 C. 232 (P.C.) Dist.

Where an issue is ambiguous and a party once relies on a narrower interpretation he cannot subsequently be allowed to contend that wider interpretation is applicable. Such contention at an early stage may be allowed. Though a party does not object to one witness giving evidence of custom, he can object to another witness. (1915) M.W.N. 968=2 L.W. 1214=19 M.L.T. 296=30 M.L.J. 451=31 Ind. Cas. 833.

——S. 115—Inconsistent pleas—Undue influence—Denial or execution.

A **pardanashin** lady after pleading that she did not understand the nature of the deed she was asked to sign cannot afterwards plead that she did not at all execute the deed. Where the second plea is disallowed the case in its original form will not become inconsistent. 12 C.L.J. 115=3 Ind. Cas. 330.

——S. 115—Inconsistent pleas—Valuation of suit—Acceptance by defendant—Plaintiff cannot re-open the same in P. C. Application.

On an application by the defendant for leave to appeal to the Privy Council against the appellate decree in a suit where the suit was for declaration without consequential relief falling under Sch. II, Cl. 17 of the Court Fees Act, the value given in the plaint for purposes of jurisdiction must be held to be the market value of the subject-matter of the suit, and where it has been stated to be Rs. 10,000 the defendant having accepted the valuation so given, it is not open to the plaintiff to show that the value of the subject-matter is less than Rs. 10,000. 91 Ind. Cas. 572=A.I.R. 1925 Mad. 1223=49 M.L.J. 309.

——S. 115—Inconsistent pleas—Admission as to valuation by a party will bind him.

Defendants who accept the value of property for purposes of jurisdiction cannot be heard to question that value subsequently. The value of the property is a question of fact. It is not proper for a party by an admission as to a lower valuation to suffer an appeal to be heard by a single Judge and then to claim a higher valuation for the purpose of obtaining an appeal to the Privy Council. 74 Ind. Cas. 214=9 O.L.J. 531=26 O.C. 24=A.I.R. 1923 Oudh 93.

——S. 115—Inconsistent pleas — Denial of locus standi.

The plaintiff who denies the *locus standi* of the deceased defendants' sons to proceed with an appeal, as they did not come on record as representatives in the first Court is estopped from seeking the execution of his decree against the sons. 14 C.L.J. 589=10 Ind. Cas. 406.

——S. 115—Inconsistent pleas—Approbation and reprobation.

It is a sound principle of law that as between the same litigants a defendant cannot defeat the claim of the plaintiff by a plea negativing a contention successfully advanced by him in former suit, if he thereby approbates and reprobates. (1904) 6 Bom. L.R. 1103.

——S. 115—Inconsistent pleas—Appeal — Locus standi to appeal.

When a person made another a party to his suit and obtained a decree against him, an appeal by the latter cannot be objected to on the ground that he has no interest in maintaining the appeal. *A* and *B* were first mortgagees—*A* and *C* were puisne mortgagees. *A* and *B* obtained a foreclosure decree. *C* paid off the debt and brought a suit for foreclosure impleading *A* as a party defendant on foot of the first mortgage. *A* objected to the suit as barred by S. 244, C. P. Code, and appealed against the decree for foreclosure in favour of *C*:

Held, that it did not lie in the mouth of *C* to question the right of *A* to appeal, when he himsef made *A* a party and obtained the decree against him. 1902 A.W.N. 3=24 A. 179.

——S. 115—Inconsistent pleas—Legal representative—Person claiming as legal representatives of another in certain cases and disclaiming it in certain other cases.

Where a person claimed to be and had himself recorded as the legal representative of another person, but objected to his being brought as a legal representative of the same person in cases where the deceased person was the judgment-debtor.

Held, by *Woodroffe, J.*, that there was no question of estoppel involved in the case. (1904) 8 C.W.N. 843.

——S. 115—Inconsistent pleas—Objection to locus standi to appeal—Party joined by plaintiff—Plaintiff's objection on appeal that the party had no legal existence.

Where plaintiff made a person party to his suit, and such party appealed against the decree of court in plaintiff's favour, the plaintiff cannot object to the appeal on the ground that the party has no legal existence and therefore cannot appeal. (1901) A.W.N. 207=24 A. 160.

24. Interpretation.

——S. 115—Interpretation—'Representative', whether includes bona fide purchaser for value.

The term 'representative' in S. 115 is not confined to a gratuitous transferee, or volunteer or a transferee with notice but includes even a *bona fide* purchaser for value without notice of the circumstances creating the estoppel. A.I.R. 1934 Mad. 302=39 M.L.W. 431=1934 M.W.N. 316=66 M.L.J. 563 =148 Ind. Cas. 612.

——S. 115—Interpretation — "Permitted another person to believe a thing"—Meaning.

By the words "permitted another person to believe a thing", etc., the section contemplates that not merely may there be active inducement on the part of the declarant for a belief in the mind of another person but it is enough if the declaration is such by which the declarant in the ordinary course permits somebody else to believe in the truth of the declaration and to act on that belief. 33 C.W.N. 873=A.I.R. 1929 Cal. 819.

25. Judgment.

——S. 115—Judgment.

A prior purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against the vendor commenced after the purchase. A.I.R. 1942 Pat. 317=23 P.L.T. 213= 201 Ind. Cas. 560.

——S. 115—Judgment—Recitals in—If operates as estoppel.

Where a dispute between parties in a suit is referred to arbitration and one of the parties alleges partition, which is subsequently mentioned in the award, the other party is not estopped from denying the partition in a subsequent suit. 123 Ind. Cas. 698=A.I.R. 1930 Sind 182.

——S. 115—Judgment—A party to a decree creating a charge on his property is estopped from saying that he is not entitled to create the charge or mortgage on the property. 119 Ind. Cas. 186=31 Bom. L.R. 439=A.I.R. 1929 Bom. 227.

——S. 115—Judgment—It is a well-known rule of law that where a party has asserted a certain position in a previous litigation he cannot re-agitate the matter on the assumption of fresh facts against persons who were parties whether as plaintiffs or defendants in the previous suit. 106 Ind. Cas. 484 (Lah.).

——S. 115—Judgment—Estoppel by record.

Estoppel by record operates as an estoppel to the whole right and not to a fragment of it which might

be given effect to or repealed by the decree of Court. (1909) A.C. 615 and (1923) Ch. D. 117, Foll. 112 Ind. Cas. 169=3 Luck. 487=5 O.W. N. 265=A.I.R. 1928 Oudh 359.

——S. 115—Judgment – Symbolical possession given by Court though actual possession should have been given—Judgment-debtor is bound by the order —Principle of estoppel applies. 89 Ind. Cas. 596= 26 P.L.R. 546=A.I.R. 1926 Lah. 35.

——S. 115—Judgment—Case decided by appellate Court on one ground—Other grounds though relied on by lower Court are not estoppel by record. 78 Ind. Cas. 353=A.I.R. 1925 Cal. 530.

——S. 115—Judgment — A plea unnecessarily raised by a party and decided by the Court also equally unnecessarily does not estop the party from putting the same in a later suit. 73 Ind. Cas. 854 =A.I.R. 1923 Lah. 248.

——S. 115—Judgment—Estoppel can be proved by a judgment given by consent as by a judgment given after opposition. In either case the estoppel consists of the establishment of facts by order of the Court either by an agreed statement by the parties, or by the adjudication of the Court upon the controversy being fully heard. A.I.R. 1921 P.C. 231 (P.C.).

——S. 115—Judgment—Party not bound by the judgment cannot plead.

Per *Kumaraswamy, J.*—Estoppel must be mutual and it is difficult to see how a party not bound by a judgment can set it up in bar against a party to it.

Whatever would estop or bar persons whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record, deed or *in pais*. 67 Ind. Cas. 971=44 Mad. 778=14 M.L. W. 128=14 M.L.W. 188=1921 M.W.N. 576=A. I.R. 1921 Mad. 248=41 M.L.J. 223=41 M.L.J. 278 (F.B.).

——S. 115—Judgment—Award—Estoppel.

Two brothers of a Muhammedan family agreed to partition their property by arbitration. The award of the arbitrators was decreed by the Court. The award contained the terms that both had to contribute to their mother's maintenance, for exclusion from inheritance in her late husband's property. In a claim by one of the brothers after their mother's death, to her property, it was held that, by his acceptance of the award, he was estopped. 24 C.W.N. 321=(1920) M.W.N. 189=11 L.W. 421=27 M.L.T. 204=2 U.P.L.R. (P.C.) 48=58 Ind. Cas. 843 (P.C.).

——S. 115—Judgment—Assignment of decree

A judgment in a suit by one creditor to cancel the assignment as being in fraud of himself cannot be relied upon by another creditor (not a party to the said suit) as deciding upon his rights also. 42 Ind. Cas. 498 (Mad.) [Compare 33 Mad. 483=20 M.L.J. 546=6 Ind. Cas. 229; 29 M.L.J. 558= 30 Ind. Cas. 962=43 Mad. 381=38 M.L.J. 108= 55 Ind. Cas. 452.]

——S. 115—Judgment—Vendor and purchaser—Sale.

Where a vendor is a party to the impeachments of the purchaser's title and the suit goes against the purchaser, in a subsequent suit by the purchaser to recover the purchase-money, the vendor is stopped from saying that his former admission was improvident. The purchaser not being at fault, the vendor is liable to refund purchase-money. 3 Pat. L.J. 358=47 Ind. Cas. 37.

——S. 115—Judgment — Revenue Court — Co-sharers—Partition.

A partition effected through a Revenue Court between the co-sharers of a village creates a new title in each co-sharer to whom a share in the village is allotted and the parties cannot subsequently be allowed to set up a title other than what they got at the time of partition. 4 O.L.J. 365=41 Ind. Cas. 171.

——S. 115—Judgment — Estoppel — Binding on parties whose title is later in origin—Nullity — Jurisdiction.

Where a link in the chain of a party's title consists of a decree of a Court of competent jurisdiction pronounced against the only person or persons who at the time of such decree had an interest which would entitle them to resist the plaintiff's title no person whose claim is subsequent in origin can challenge that decree or go behind it or challenge the plaintiff's title as that date on any ground which was determined by that decree as a necessary step in its result.

Per *Srinivasa Ayyangar, J.*—It is open however to such party to show that the judgment is a nullity but the only ground on which a judgment as distinguished from a conveyance can be declared a nullity is the want of jurisdiction in the Court over the parties or the subject-matter. A judgment rendered after trial recognizing the alienation of an office in the presence of all the parties interested in questioning the same cannot be questioned by a stranger on the ground that such alienation is against public policy. 29 M.L.J. 558=18 M.L.T. 402=(1915) M.W.N. 829=2 L.W. 1005=30 Ind. Cas. 962.

——S. 115—Judgment—Parties and privies—Creditor—Adjudication against debtor.

A creditor is bound by an adjudication against his debtor on his title to property in the absence of fraud, collusion, etc. It is not necessary that the adjudication should have been on the merits. It is enough if the adjudication has the effect of effectually depriving the debtor of his right to the property so long as the judgment stands. 33 M. 167; 36 M. 141; 29 M.L.J. 558, Foll. 38 M.L.J. 266 =11 L.W. 139=54 Ind. Cas. 565.

——S. 115—Judgment—Res judicata—Claim suit —Decision in—Auction-purchaser.

Where a claim suit under O. 21, R. 63, C.P.C., is decided against the claimant and the property is sold in auction the decision operates as an estoppel against the claimant in a subsequent suit. 36 M. 141, Rel. 19 C.L.J. 441=18 C.W.N. 954=20 Ind. Cas. 815.

——S. 115—Judgment—Findings in.

An estoppel is not restricted to the judgment but extends to all facts in it and the judgment operates as estoppel for all the findings essential to sustain the judgment. 6 C.L.J. 621 at 631, Foll. 14 C. L.J. 220=12 Ind. Cas. 9.

——S. 115—Judgment—Extent of—Estoppel.

A judgment is an estoppel upon a party not only for a question decided adversely to him but even where it sustains his theory or claim and it stops him afterwards from taking a different position against the same opponent. 7 Ind. Cas. 781 (Cal.).

——S. 115—Judgment—Creditor—Decree against legal representative.

If a creditor obtains a decree for a debt against a person whom he believes to be the legal representative of his deceased debtor, the real legal representative who has not raised in time to set aside the decree cannot question its validity afterwards. 152 P. W. R. 1909=150 P.L.R. 1909=4 Ind. Cas. 1013.

——S. 115—Judgment—Mutuality.

An estoppel must be mutual; if a judgment is not binding upon a party he cannot take advantage of any findings in that judgment. 13 C.W.N. 281 =4 Ind. Cas. 92.

——S. 115—Judgment—Decree allowed to be final —Decree dismissing suit set aside ex parte—Reversing decree set aside in appeal by High Court —Application to set aside ex parte decree and a fresh reversing decree on merits by lower appellate Court—No appeal from order setting aside as part decree—Objection in execution.

A suit was brought for posession of lands and was dismissed. Plaintiff appealed, and in the absence of defendant an *ex parte* decree was passed in plaintiff's favour. The defendant appealed against that decree to the High Court and the High Court restored the Munsif's decree of dismissal. Meanwhile, on an application by defendant to the lower appellate Court under S. 108, C. P. Code order was passed restoring the appeal to file, and after hearing on the merits, a decree again in plaintiff's favour passed. This was before the decree of the High Court, and no mention of the lower Court's decree was made too the High Court at the time of hearing; and no appeal was filed against the order setting aside the *ex parte* decree.

Held, that the execution of the lower appellate court's second decree cannot be resisted in the circumstances. 9 C.L.J. 460=4 Ind. Cas. 167.

——S. 115—Judgments.

Defendants, who were not bound by the judgment, could not be permitted to take advantage of any findings in it, for an estoppel must be mutual. (1908) 13 C. W. N. 281=8 C.L.J. 478=4 Ind. Cas. 92.

——S. 115—Judgment-debtor is estoppel of bona fide auction-purchaser without notice—Auction-purchaser—Mortgage debt.

A purchaser in execution of a money decree is bound by the estoppel which binds the judgment-debtor. A judgment-debtor will be estoppel from disputing his liability of a mortgage executed by another on property belonging to himself (the judgment-debtor) if he (the judgment-debtor) had himself induced the mortgagee to believe that the property was that other's and advance the loan. (1908) 35 C. 877.

——S. 115—Judgment — Former judgment need not relate to same property—Question of adoption, partition, validity of lease, etc., decided in one suit *'res judicata'* though subject-matter is different. 12 C.W.N. 739=9 C.L.J. 597=4 Ind. Cas. 81.

——S. 115—Judgment—Sale before litigation—Purchaser not party—Purchaser acting as pleader to vendor in suit—Silence how far an estoppel.

A purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against his vendor commenced after the purchase. But where the purchaser intentionally leaves the vendor in possession with a view to mislead the plaintiff, and the plaintiff, in ignorance of the transfer and in reliance upon the possession of the vendor, sues him, the vendor, the decree will be binding on the purchaser on the ground of fraud. (1904) 2 C.L.J. 23=32 C. 357.

26. Jurisdiction.

——S. 115—Jurisdiction—Question of jurisdiction not decided—Defendant, if estopped from objecting to Jurisdiction in subsequent suit.

Where all that was decided in the previous suit claiming a share of the profits was that the claim for canal dues could not be joined with the claim for profits in a suit under S. 108, Cl. 15 of the Oudh Rent Act and no question of jurisdiction was raised by the defendant in the previous suit, it cannot be said that he is estopped from objecting to the jurisdiction of the Civil Court to try the subsequent suit. A.I.R. 1937 Oudh 322=1937 O.W. N. 239=1937 R.D. 141=13 Luck. 190=167 Ind. Cas. 274.

——S. 115—Jurisdiction—Asking for security for costs does not estop the respondent from thereafter contending that the Court has no jurisdiction to entertain the appeal. A.I.R. 1935 Mad. 723=1935 M.W.N. 552=156 Ind. Cas. 916.

——S. 115—Conduct—Jurisdiction.

Small Cause suit filed on regular side—Appeal—Want of jurisdiction cannot afterwards be pleaded. 85 Ind. Cas. 481=12 O.L.J. 265=2 O.W.N. 8= 29 O.C. 14=A.I.R. 1925 Oudh 403.

——S. 115—Jurisdiction—Taking part in partition proceedings by Revenue Court—Party can afterwards deny Revenue Court's jurisdiction to proceed with partition. 84 Ind. Cas. 151=2 Pat.L.R. (Civ.) 266=A.I.R. 1925 Pat. 137.

——S. 115—Jurisdiction—Decision invited on an issue—Jurisdiction cannot be questioned later.

A party who has insisted upon the trial of an unnecessary issue in a case cannot at the stage of appeal be allowed to get rid of the adjudication on that issue by urging that it should not have been investigated. Neither party who has taken the chance of a favourable decision, when defeated, can ask reversal on the ground that the issue was not properly triable in that action. 33 Cal. 425; 9 N.L.R. 38; 9 W.R. 338 and 3 M. I. A. 229 (P.C.) and A. I.R. 1924 P.C. 144, Foll. 89 Ind. Cas. 1009=A. I.R. 1926 Nag. 164.

——S. 115—Jurisdiction — Civil Court value of property—Value mentioned in plaint—Trial in court which would have no jurisdiction if the value was correct—Parties raising no objection to trial —In appeal jurisdiction cannot be questioned—Evidence Act (I of 1872), S. 58.

The plaintiff filed a suit in the Court of the first class Subordinate Judge for partition of a certain property. In the plaint the market value of the property stated was such as to make the suit triable only by the first class Subordinate Judge. That Judge, however made over the trial of the suit, to the joint Subordinate Judge of Thana, who had no jurisdiction to try it, if the property was correctly valued in the

plaint. Neither party raised any objection on the ground of jurisdiction and no issue was raised relating to it. The trial proceeded on merits and the Subordinate Judge passed a decree for partition in favour of plaintiff. The defendants in their appeal to the District Court raised for the first time the question of jurisdiction on the strength of the market value stated in the plaint. The objection having been overruled, they appealed to the High Court:

Held, that as neither party raised any objection as to want of jurisdiction arising from the allegation in the plaint, and as they by their conduct and silence treated the market value to be of the amount sufficient to give jurisdiction to the Court, they dispensed with proof on the question by their tacit admissions and thus the principle of law laid down in S. 58 of the Indian Evidence Act, 1872, came into operation and prevented the result of the statement of the market value in the plaint. The market value stated in the plaint *prima facie* determines the jurisdiction. It is not conclusive and binding on the plaintiff so as to estop him from disputing its correctness or seeking its amendment merely because he has stated it in the plaint. When the trial commences it is open to the defendant if he is so minded, to rely on the statement in the plaint and dispute the jurisdiction of the Court. If he does not, and allows the trial to go on, he cannot subsequently dispute the jurisdiction. As a rule parties cannot by consent give jurisdiction where none exists. This rule applies only where the law confers no jurisdiction. The law does not prevent parties from waiving inquiry by the Court as to facts necessary for the determination of the question as to jurisdiction where that question depends on facts to be ascertained. (1910) 12 Bom. L.R. 712=35 Bom. 24=7 Ind. Cas. 950.

——S. 115—Objection to jurisdiction by plaintiff in second appeal by reason of plaintiff's own under-valuation—Prejudice—Suits Valuation Act, S. 11—Appeal from lower appellate court's decision to deal with the case.

A plaintiff cannot be heard to say that his own under-valuation of the claim prejudicially affected the disposal of the suit on the merits in a case where he himself instituted the suit in a Court which had no jurisdiction to try it and the decision in the suit was in his favour. 15 M.L.J. 487.

——S. 115—Jurisdiction—Objection to jurisdiction in execution—Court competent to try the suit but without territorial jurisdiction—Waiver.

A party cannot be allowed in execution to object to the jurisdiction of the Court that passed the decree if that Court was competent to try a suit of the nature and value thereof, even though it had not territorial jurisdiction over the subject-matter. (1903) 27 M. 118.

27. Laches.

——S. 115—Laches—Allowing ex parte decree to be passed—Effect of.

Where a party allows a decree to be passed *ex parte* against him by omission to defend a suit, it is too much to suggest therefrom that a further estoppel would also arise against him because somebody chooses to put a particular interpretation on that omission. A.I.R. 1937 Mad. 158=44 M. L. W. 859=1937 M.W.N. 82=168 Ind. Cas. 842.

——S. 115—Laches.

Where the delay or silence of the respondent had not prejudiced the appellant:

Held, that there was no question of estoppel. A. I.R. 1936 P.C. 193=44 M.L.W. 128=1936 M.W. N. 844=1936 A.L.J. 944=1936 A.W.R. 937=163 Ind. Cas. 295 (P.C.).

——S. 115—Laches.

The delay of nearly five years prior to the suit for rescission of contract on the grounds of defect in title of plaiiff's vendors and onerous covenants is highly prejudicial to the defendants-vendors, especially when the plaintiff was previously seeking to enforce the contract against his vendees notwithstanding the defects. Plaintiff's conduct in enforcing the contract against his vendee and laches of five years work out an estoppel against him and equally debar him from enforcing his claim. 126 Ind. Cas. 737=A.I.R. 1930 Sind 66.

——S. 115—Laches.

Length of delay and nature of acts done during the interval are material for estoppel. 116 Ind. Cas. 470=6 Rang. 643=A.I.R. 1929 Rang. 17.

——S. 115—Laches.

A mere delay in filing a suit does not *per se* constitute acquiescence. 1 All. 82, Foll. 105 Ind. Cas. 286=A.I.R. 1927 Nag. 400.

——S. 115—Laches—Length of delay and nature of acts done during interval are material.

Thus the doctrine of laches in Courts of equity is not an arbitrary or technical doctrine. In a case in which it would be practically unjust to grant a remedy either because the party has by his conduct done that which might fairly be regarded as tantamount to a waiver of the remedy or where, he has by his conduct and neglect, though perhaps not waived the remedy yet has rendered the situation of the other party such as it would not be reasonable to render it, in both these cases, lapse of time and delay are most material if afterwards the remedy is asserted by the party making delay. 78 Ind. Cas. 299=A.I.R. 1925 Mad. 360.

——S. 115—Laches—Proof of.

The plea of laches on the part of the plaintiff as barring his right to enforce some remedy must be establilshed by evidence of facts amounting to waiver, abandonment or acquiescence on the part of the plaintiff and such evidence must be plain and unambigous. 80 Ind. Cas. 607=A.I.R. 1925 Nag. 104.

——S. 115—Laches.

Lessee entitled to renewal not asking for same but continuing in possession and willing to do his part of agreement is not guilty of laches. 60 Ind. Cas. 591=44 Mad. 230=1921 M.W.N. 31=A.I. R. 1921 Mad. 541=41 M.L.J. 94.

———S. 115—Laches—Sale — Agreement to reconvey after payment of the amount stated in the sale-deed—Redemption after a long time.

Land transferred to another by a sale-deed with an agreement to reconvey after the payment of money stated on the sale-deed cannot be redeemed by the vendor or his transferee after a very long time when there is evidence to show that the vendor or his transferee treated the transaction as a sale during all the time. 57 Ind. Cas. 681 (Cal.).

——S. 115—Laches—No estoppel.

Delay in filing a suit does not amount to estoppel

125 P.W.R. 1917=11 P.R. 1918=41 Ind. Cas. 636.

——S. 115—Laches—In filing suit—Effect.

A bailor is not entitled to any damages for wrongful use, beyond getting the value of the goods, if after issuing notice of demand, he causes a long delay to ensue, before filing the suit. 9 Bur.L.T. 224=34 Ind. Cas. 297.

——S. 115—Laches—Limitation.

A defence of laches cannot prevail where a statutory period of limitation is prescribed. 41 Cal. 771=18 C.W.N. 631=26 Ind. Cas. 284.

——S. 115—Laches—Mortgagee's laches in suing.

Laches in suing does not prevent the mortgagee from asserting his rights. 111 P.W.R. 1914=216 P.L.R. 1914=4 P.R. 1915=25 Ind. Cas. 856.

——S. 115—Laches—Long inaction.

A daughter is not estopped from claiming her property from the collaterals by her inaction for 11⅓ years. 64 P.L.R. 1911=212 P.W.R. 1911 10 Ind. Cas. 819.

——S. 115—Laches—Acquiescence— Administrator—Payment to person not entitled.

Mere delay is no bar to legal relief if the claim is not time-barred. But delay with other circumstances and the conduct of the party claiming relief may give rise to an inference of acquiescence or waiver. Where the next-of-kin with full knowledge of the facts, but under a mistake as to their legal rights authorize the administrator to pay to a third person not legally entitled to the money, and the administrator pays the money, he acts in the due course of administration and is not accountable. 12 Bom.L.R. 53=5 Ind. Cas. 633.

——S. 115—Laches when bar to a legal remedy —Injunction—Mandatory — Projecting eaves on another's land—Pardah lady and minor plaintiffs.

Mere delay is no bar to a legal remedy unless it amounts to a waiver or abandonment of the right sought to be enforced or to acquiescence in the act complained of. 29 B. 245, foll. It is not the practice of the Courts in India or of the Privy Council to press either against an infant or a Hindu or Mahomedan female a presumption by acquiescence in a rival claim from the mere non-contestation for a limited time of an adverse title. This principle holds good as to waiver or abandonment. Mere laches unless it amounts to one of these three is not sufficient to disentitle a person to equitable relief. Where there is a vested right or interest in any party he cannot waive or abandon that right except by acts which are equivalent to an agreement or license. The defendants erected a house in 1900 and projected the eaves on plaintiff's land. Plaintiffs were one of them, a purdah woman and the others minors. The suit was brought in 1904:

Held, that the plaintiffs were entitled to an injunction. (1907) 9 Bom. L.R. 1117.

——S. 115—Laches and acquiescence—When bar to right to equitable relief.

Delay and acquiescence should not bar a defendant's right too equitable relief unless he knew he had the right or being a free agent at the time, deliberately determined not to enquire what his rights were or to do or act upon them. (1906) 17 M.L.J. 19=2 M.L.T. 4=30 M. 169 (F.B.).

——S. 115—Laches—Effect of—Enhanced interest.

Mere delay in instituting a suit by the mortgagee is no ground for holding that there was no intention on his part to enforce the enhanced rate of interest. (1906) 29 M. 491.

——S. 115—Laches—Bar to suit—Waiver—Abandonment—Acquiescence.

Laches means a neglect to do something which by law a man is obliged to do. To bar a remedy it must amount either to waiver, abandonment or acquiescence. To raise the presumption of any of these, the evidence of conduct must be plain and unambiguous. (1905) 7 Bom.L.R. 200=29 Bom. 234.

——S. 115—Laches, plea of, when good.

To operate as a bar to relief the delay should be such as to amount to a waiver of the plaintiff's right by acquiescence, or where by his conduct or neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted. When such is not the case, any lapse of time short of the period allowed under the Limitation Act, should not disentitle the claimant to relief to which he is otherwise entitled. 5 P.C. 221; 2 B. 133, Foll. (1905) 33 Cal. 633.

——S. 115—Laches—Trust deed by father and son—Impeachment of deed by son after death of father more than thirteen years after the date of deed.

Held, per *Subrahmanya Aiyar, J.*—That a Hindu, who kept quiet, acquiescing in a deed of trust executed by himself and his father in 1887 dedicating certain properties to charity is estopped from impeaching its validity after the death of the father 18 years later, inasmuch as the father would have effected a partition and given effect to the trust if the son had impeached it earlier. (1905) 29 M. 1

28. Land acquisition.

——S. 115—Land acquisition—Scheme for construction of road—Part of land acquired intended for recouping cost of scheme—Notification under S. 4, Land Acquisition Act—Scheme cancelled and revised scheme introduced—Persons allowed to build on land included in notification—Notification under S. 6, Land Acquisition Act without first notice under S. 4—Notices, held not illegal—Municipality, held not estopped from proceeding with acquisition proceedings by allowing persons to build on land. A.I.R. 1938 Bom. 148=39 Bom. L.R. 1257=174 Ind. Cas. 67.

——S. 115—Land acquisition — Government of Bombay acquiring land belonging to defendant—Compensation paid to defendant—Government discovering that land was their own and suing for recovery of money paid to defendant:

Held, Government could not sue as money was paid under pressure of legal process and further that, in view of the position taken up by Government in land acquisition proceedings and consequent alteration in position of defendant, the Gevernment was barred by estoppel. A. I. R. 1932 Bom. 386=34 Bom.L.R. 791=56 Bom. 501=140 Ind. Cas. 171.

——S. 115—Conduct—Land acquisition—Declaration as to Government right to quarry for certain purposes—Owner receiving compensation on that basis — Purpose exhausted—Subsequent suit—No estoppel.

Consequent upon a declaration under S. 6, Land Acquisition Act, 1894, that land was needed for a public purpose, *viz.*, quarries in connexion with certain constructions with an insertion in it of statement under S. 3 (*i*) under Land Acquisition (Mines) Act, 1885, excluding certain mines and making necessary reservation, the owner of the land claimed compensation for minerals or an express order excluding them from acquisition and the Judge to whom reference was made under S. 18 of the Act held that the minerals has not been acquired. The owner also claimed compensation for a special stone which had high commercial value lying under the land, part of which was leased to a stone company and some part was in the occupation of tenants. The Superintending Engineer made a fair estimate of the quantity of stone available which it would have been profitable to remove to the railway siding, which was made the measure of compensation allowed in the award under S. 11 for the total value of the entire quantity of the available stone. The amount awarded was accepted by the owner. On the completion of the proposed construction the owner gave notice to Government under S. 4 of the Act of 1885 of his intention to work the minerals of the land covered by the declaration. The right of the owner was denied and consequently the owner sued for possession of the sub-soil including stones and other minerals lying in, upon or under the land. The defence was that the compensation already granted included all the value of all minerals and stones lying in, upon or under the surface of the land acquired. It was not denied that the stones were minerals.

Held, that on the construction of the declaration and the subsequent conduct of parties the stones other than those required for construction of the proposed work vested in the owner and he was not estopped from claiming to work them by reason of the course adopted in the proceedings under the Land Acquisition Act. 8 Pat. 742=A.I.R. 1930 Pat. 112.

——S. 115—Land acquisition — Claimant is not estopped from showing proper value though he had shown less value in former proceedings of other nature. 101 Ind. Cas. 269=A. I. R. 1927 Sind 168.

29. Landlord and tenant.

——S. 115—Landlord and tenant.

Where a person who had no right to a certain absolute occupancy filed took possession of the property only as a devisee in pursuance of the will of an absolute occupancy tenant and had acted in accordance with the conditions laid down in the will, it is not open to him to repudiate one of the conditions on the ground that since the will was invalid under S. 5, C.P. Tenancy Act, the condition was also invalid. (1938) N.L.J. 181.

——S. 115—Landlord and tenant—Landlord condoning breach of covenant.

Where, on one occasion, the landlord condones the breach of covenant in restraint of alienation in a lease, estoppel does not arise. A.I.R. 1936 Pat. 493=17 P.L.T. 502=2 B.R. 750=15 Pat. 673 =164 Ind. Cas. 811 (2).

——S. 115—Landlord and tenant—Grantor, if can dispute his own title.

A grantor or a lessor cannot be allowed to dispute, his own title with either the grantee or the lessee. A person cannot be allowed to make contradictory allegations or to blow hot and cold and to affirm at one time one thing and to disaffirm it at another time so as to found a claim on it. A.I.R. 1938 Bom. 37=39 Bom.L.R. 1072=174 Ind. Cas. 24.

——S. 115—Landlord and tenant—Acceptance of rent at rate specified in unregistered document—Ejectment—Estoppel.

Even though the rent is accepted at a rate specified in a document which is compulsorily registrable, and is not registered, it creates no estoppel in an ejectment suit by a landlord against his tenant, for, there is no representation that the acceptance of the rent would confer tenancy on the terms suggested. A.I.R. 1934 Bom. 194=36 Bom.L.R. 359=58 Bom. 419=150 Ind. Cas. 555.

——S. 115—Landlord and tenant — Mortgage of grove — Landlord's right of reversion—Admission of right to redeem.

A portion of certain plot of land was *sir* land of which plaintiff was the owner and *zamindar*, and the remaining portion of the said plot was held by the plaintiff as a tenant. A sub-tenant who was allowed to plant a grove on the plot mortgaged it in 1885 to the father of the defendants and died in 1903 without heir. In 1906, the plaintiff mortgaged this and other plots to same mortgagee with the stipulation that the mortgagee would retain possession of the disputed plot until the plaintiff redeemed the mortgage of 1885. In a suit by plaintiff for redemption of mortgage:

Held, that it was not open to the defendants to contest the plaintiff's right to redeem as they had in 1906 and 1922 admitted his right to redeem and agreed to continue as mortgagees. A.I.R. 1932 All. 437=1932 A. L. J 474=16 R.D. 463=138 Ind. Cas. 366.

——S. 115—Landlord and tenant—Acquiescence —Malguzari village — Non-proprietor building house in abadi.

The provisions of S. 115 apply, if the owner causes a person aware of his ownership to believe that he has been given a license to build and to act on such belief.

Where the defendant, who was managing a shop in *malguzari* village and paying rent to the *malguzar*, openly built, first a shed and then a house on a site, and the *malguzar* of the village, with full knowledge of his proceedings, offered no objection, though he knew that the defendant was spending a comparatively large sum of money and took no steps for about ten years:

Held, the *malguzar* was estopped from pleading that he had not given license to the defendant to build.

Sites in the *abadi* of a *malguzar* village are ordinarily given on license to persons residing in the village. A.I.R. 1931 Nag. 158=27 N.L.R. 183= 134 Ind. Cas. 852.

——S. 115—Landlord and tenant—A purchasing non-transferable occupancy holding in execution of mortgage-decree against tenant—On landlord proceeding to execute rent-decree by sale of holding. A depositing decretal amount—Withdrawal of deposit by landlord — Acceptance of deposit even under protest held to amount to recognition of A's tenancy.

A purchased a non-transferable occupancy holding in execution of a mortgage decree against the original tenants. The landlord of the holding obtained a rent decree against the original tenants and proceeded to sell the holding in execution of the decree. *A* put in an application praying to deposit the decree-holder's dues under S. 170. The Court after making a remark, "Heard pleaders on both sides" permitted the deposit. The landlord withdrew the deposit, but after *A* instituted a suit for declaration of his title contended that the withdrawal was made under protest and did not amount to recognition by him of *A's* tenancy.

Held, that the fact of the withdrawal of the deposit by the landlord amounted to a recognition by him of the tenancy of *A*.

Held also: that from the remark of the Court, "Heard pleaders on both sides," it could not be assumed that the withdrawal had been made on protest.

Held, further that assuming there was a protest by the landlord the acceptance of the deposit by him amounted to recognition of tenancy on the principles of estoppel. 6 C.L.J. 601; 7 Ind. Cas. 477; 28 Ind. Cas. 343, Rel. on. A. I. R. 1930 Cal. 745=52 C.L.J. 153=129 Ind. Cas. 843.

——S. 115—Landlord and tenant—Parole agreement of permanent lease in 1913—No formal lease executed—Landlord giving possession of land in accordance with agreement—Tenant on faith of oral agreement erecting permanent structures on land—Landlord knowing erection of structures but not objecting to them—In 1918 landlord giving notice of refusal to perform his contract and suing in 1923 for ejectment—Landlord's allowing to erect permanent structures on land would be such acquiescence as would disentitle him from asking for ejectment.

In 1913 the landlord contracted to grant a permanent lease in respect of certain land. No formal lease was executed under the terms of S. 107, T. P. Act. Pursuant to the contract the tenant obtained possession of the land and erected permanent and costly structures thereon. The landlord was aware of the erection of those structures and must have realized that the tenant would not have constructed such a building unless he was assured of the possession of a permanent right in the land. In December, 1918, the landlord gave notice to the tenant of his refusal to specifically perform the contract. The landlord in 1923 brought a suit for ejectment against the defendant.

Held, that the landlord having allowed the tenant to erect structures on his land would not be allowed to eject the tenant as he acquiesced in tenant's conduct. 55 Cal. 1090=33 C. W. N. 333=112 Ind. Cas. 865=A.I.R. 1929 Cal. 101.

——S. 115—Landlord and tenant.

A tenant cannot refuse to pay the rent, because the landlord for a number of years made no claim for rent for the land occupied by the tenant. 117 Ind. Cas. 287=A.I.R. 1929 Nag. 123.

——S. 115—Landlord and tenant.

Where the tenancy under the plaintiff is once denied, the tenants would not be entitled to claim on a future occasion that the tenancy under the plaintiff was subsisting. 113 Ind. Cas. 13=32 C. W.N. 391=A.I.R. 1928 Cal. 312.

——S. 115—Landlord and tenant.

Tenant is not estopped from disputing landlord's title if he executed the *kabuliyat* through fraud or mistake. 91 Ind. Cas. 669=A.I.R. 1926 Cal. 720.

——S. 115—Landlord and tenant.

Acceptance of rent by landlord from mortgagee of tenancy—Landlord is not estopped from contending that mortgage was invalid. 87 Ind. Cas. 959=A.I.R. 1926 Oudh 37.

——S. 115—Landlord and tenant.

A claim for rent is a recurring claim and it is open to the tenant at any time to take an objection on the ground that the claim contravenes the provisions of the law. 84 Ind. Cas. 361=3 Pat. 825 =6 P.L.T. 537=A.I.R. 1925 Pat. 185.

——S. 115—Landlord and tenant—Acceptance of rent.

There is no peculiarity in the law of estoppel in India as distinguished from that of England. The law of India is compendiously set forth in S. 115 of the Indian Evidence Act, Act I of 1872. Taking of a rent each year under a mistaken belief may bar by estoppel the owner from any claim for mesne profits during the particular year or years for which such rent was received. It would estop the owner from maintaining that the person who paid the rent possessed the property with a liability to account or possessed on any other or further terms than on payment of the rent made and taken. In cases of estoppel the onus of establishing the facts and circumstances from which estoppel arises rests upon the person pleading it. 82 Ind. Cas. 946=46 All. 728=51 I.A. 326=23 A. L.J. 172=6 L.R. P.C. 12=26 Bom.L.R. 1134= 40 C.L.J. 468=20 M.L.W. 566=1924 M.W.N. 703=35 M.L.T. 247=27 O.C. 208=29 C. W. N. 533=3 P.L.R. (Civ.) 169=A.I.R. 1924 P.C. 213 =47 M.L.J. 591 (P.C.).

——S. 115—Landlord and tenant.

Where in a lease, lessor stated that description of land by acreage was conjectural and subsequently in the transaction with a third party the acreage was determined, lessor is not estopped as against lessee from adhering too his statement in the original lease. 77 Ind. Cas. 403=1 P.L.R. 377=5 P. L.T. 437=A.I.R. 1924 Pat. 226.

——S. 115—Landlord and tenant.

Where the lessees had a right to build on the land, but they did not produce the lease deed in their possession which will show under what terms they had such a right, the mere fact that the landlord stood by while the tenants built on the land will not estop the landlord from pleading that the lease was only a temporary one. 68 Ind. Cas. 653=3 P.L.T. 485=A.I.R. 1923 Pat. 111.

——S. 115—Landlord and tenant.

Where the entry in the *Thakpust khasra* has been made in fraud of the owner, the withholding of the

rent collected by the *thikadar* of the proprietor does not create an estoppel or destroy the relationship of landlord and tenant. 71 Ind. Cas. 984=1923 M.W.N. 361=27 C.W.N. 925=3 P.L.T. 605=49 I.A. 399=36 C.L.J. 499=32 M.L.T. 1=2 Pat. 38=A.I.R. 1922 P.C. 272=46 M.L.J. 460 (P. C.).

——S. 115—Landlord and tenant.

Person suing another for rent is estopped from questioning tenancy afterwards. 64 Ind. Cas. 262=2 P.L.T. 780=A.I.R. 1921 Pat. 470.

——S. 115—Landlord and tenant—Raiyati holding — Record as —Zerait by Collector—Co-sharers, estopped.

If the plaintiffs who were co-sharers with the defendants allowed the Collector to record their raiyati holding as the zerait land of the latter, a question of estoppel will arise. 3 Pat.L.W. 266=(1918) P.H.C.C. 164=43 Ind. Cas. 359.

——S. 115—Conduct—Landlord and tenant—Purchaser of non-transferable holding under a mortgage decree — Paying amount of subsequent rent decree against recorded tenants—No notice to landlord of the payer's interest—Landlord not estopped from disputing the payer's interest.

The mere fact that the landlord withdraws the deposit of the amount of his rent decree, made by the plaintiff purchaser of a non-transferable holding in execution of his own mortgage decree, to prevent a sale of the holding by the landlord in execution of his rent decree against the recorded tenants (obtained subsequent to the purchase by the plaintiff under his mortgage decree) does not estop the landlord from disputing the plaintiff's right, in the absence of any notice as to the plaintiff's interest in the holding. 34 Ind. Cas. 337 (Cal.).

——S. 115—Conduct — Landlord and tenant — Mortgagee of non-transferable holding.

Where in respect of lands mortgaged by a person who holds them with a heritable but non-transferable right, the landlord receives rent from the mortgagees on behalf if the mortgagor or jointly from the mortgagor and mortgagee, such receipt of rent by itself merely does not estop the landlord from questioning the validity of the mortgagee. 3 O. L.J. 219=34 Ind. Cas. 764.

——S. 115—Landlord and tenant—Conduct—Accepting rent—Starting point.

Acceptance of an illegal enhancement of rent operates as estoppel when the tenant sets up a fresh statutory period from the date of enhancement in contesting a notice of ejectment. 2 O.L.J. 725=33 Ind. Cas. 163.

——S. 115—Conduct—Landlord and tenant.

Where a landlord mortgagee of the holding sues his mortgagee, he is estopped from questioning the validity of a prior mortgage of the holding on the ground of its non-transferability and that it was effected without his consent. 33 Ind. Cas. 112 (Cal.).

——S. 115—Landlord and tenant—Ejectment.

If in a suit for enhancement, the zemindar entered into a compromise stating that the tenancy was a fixed-rate tenancy describing certain of its incidents without mention of the grounds in Cl. (*d*) of S. 57 of the Agra Tenancy Act, he is subsequently estopped from asserting that it was not a fixed rate tenancy but only an occupancy tenancy in a suit for ejecting the tenant on the ground of his transferring the holding by way of mortgage. 29 Ind. Cas. 677 (U.P.B.R.).

——S. 115—Landlord and tenant—Ejectment.

Where a zemindar agreed not to eject his tenants so long as he paid rent and in consideration received a large amount of arrear-due from a previous tenant, he is estopped from ejecting his tenant so long as he paid rent. Such an agreement need not be in writing. 29 Ind. Cas. 656 (U.P.B.R.).

——S. 115—Conduct—Landlord and tenant—Separate holdings treated as one—Notice of ejectment.

Where a landlord has once treated separate holdings of a tenant as one and sued for arrears of rent in respect of all of them in one suit, he is estopped from subsequently serving notice of ejectment in respect of some only of the holdings. 1 C.L.J. 722=27 Ind. Cas. 382.

——S. 115—Landlord and tenant—Tenancy by estoppel.

When lands belong to Government, no question of estoppel can arise against the landlord so as to interfer with the rights of a subsequent grantee from the Government. 33 M.L.J. 370=40 Ind. Cas. 581.

——S. 115—Landlord and tenant—Tenant if can dispute landlord's possession—Grant by Government.

A tenant who has got into possession under a lease from the landlord, is bound to restore the landlord's possession, before he can set up an independent title. Where defendants got into possession under a *kanom* deed from plaintiff and after execution of the *kanom*, plaintiff accepted quit-rent *pattahs* from Government in respect of some of the lands demised.

Held, the arrangement between the plaintiff and Government does not bar the plaintiff's right to possession from the defendants. 15 Ind. Cas. 844 (Mad.).

——S. 115—Landlord and tenant—Rent.

Where the kabuliyat showed the rent to be higher than what was incorrectly stated to be in the sale-certificate granted to the purchaser of the holding in execution of the decree for rent, the purchaser cannot in a suit against him for rent by the landlord contend that the landlord was estopped from demanding a higher rent. 10 C.L.J. 605=4 Ind. Cas. 739.

——— S. 115—Landlord and tenant—Occupancy holding non-transferable—Purchase by landlord in execution of money-decree—Whether subject to previous mortgage.

Where, in execution of a money decree, the landlords of a non-transferable occupancy purchased the holding after it had been mortgaged by the tenants in favour of a third party.

Held, that in a suit by the latter to enforce the mortgage, the landlords were not estopped from setting up the defence that the holding was not transferable without their consent, that the sale of the holding by the landlord did not amount to a representation that it was transferable without their consent, but only that it was transferable with their consent that the landlords did not merely purchase the equity of redemption, the English law of mortgage not being applicable to the case. The

law of estoppel in force in this country is contained in S. 115 of the Evidence Act. 12 C. W. N. 721=8 C.L.J. 29=35 Cal. 904.

30. Licensor.

——S. 115—Licensor and licensee—License under Burma Municipal Act.

A licensee cannot object to the terms of a license which gives him rights and privileges which he would not enjoy without such license. 18 Cr.L.J. 1012=11 Bur.L.T. 208=42 Ind. Cas. 756.

——S. 115—Licensor and licensee—Employees and contrating parties—Assignee or licensee of a right.

The rule of estoppel applies also to employees and contracting parties generally who therefore, cannot accept the benefits of the contract and yet when called upon to perform their duties under it, repudiate it as made without right. The assignee or licensee of a right accepted and acted under, is estopped from denying the authority from which the right proceeds. 18 C.W.N. 1194=19 C.L.J. 313=24 Ind. Cas. 387.

31. Minor.

See also EVIDENCE ACT, S. 115 — NONE-AGAINST LAW.

——S. 115—Where a minor misrepresents his age and claims to be a major and enters into a contract, he is not estopped from proving that he was really a minor on the date of the contract. A.I.R. 1940 Nag. 327=I. L. R. (1940) Nag. 632=1940 N.L.J. 358=193 Ind. Cas. 178.

——S. 115—Minors—Jagir inalienable—Compromise between decree-holder and some of judgment-debtors including minors consenting execution to proceed against immovable property—Court not observing provisions of O. 32, R. 7, C. P. Code — Other judgment-debtors remaining ex parte — Portion of property mortgaged by previous jagirdar to decree-holder.

The decree-holder in execution attached the jagir and pleaded that the judgment-debtors were estopped from pleading that the jagir was inalienable:

Held, (per Abdûr Rahman, J.).—That the plea of estoppel could not prevail as against the minors or other judgment-debtors who remained ex parte. A.I.R. 1938 Mad. 623=(1938) 1 M.L.J. 686=1938 M.W.N. 440=I.L.R. (1938) Mad. 767=182 Ind. Cas. 587.

——S. 115—Minor—Where an infant has induced a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract and though S. 115, Evidence Act, is general in its terms, it must be read subject to provisions of Contract Act, declaring a transaction entered into by a minor as void. A.I.R. 1936 Cal. 567=I.L.R. (1937) 1 Cal. 283=41 C.W.N. 115=165 Ind. Cas. 363.

——S. 115—Minor—Partnership—Family consisting also of minor members carrying on business —Mortgage deed by family—Defendant minor present along with mother guardian—Minor not committed to any liability specifically—Money not applied to minor's benefit:

Held, there was no estoppel on the mere omission of the minor to raise any objection or protest at the time when the deed was executed. A. I. R. 1936 Mad. 595=1936 M.W.N. 468=44 M. L.W. 725=165 Ind. Cas. 478.

——S. 115—Minor—Vendee not using due diligence in ascertaining minor vendor's age:

Held, that the vendor was not estopped from pleading minority at the time of the transaction impeached. A.I.R. 1934 Lah. 304=150 Ind. Cas. 968.

——S. 115—Minor—A person was a minor at the time of an agreement but was a major at the time when a suit was instituted in respect of it—Defence that there was a compromise in a previous suit and the plaintiff was bound by it—It was clear from his written statement that the compromise was deemed binding on him as well:

Held that he should be held to have ratified the agreement and was estopped from denying its binding character. A.I.R. 1934 Lah. 218=35 P.L. R. 150=152 Ind. Cas. 263.

——S. 115—Minor—No suit will lie for recovery of money paid to a minor on a primissory note executed by him on the ground that the minor obtained the money by a fraudulent misrepresentation as to age. There is also no estoppel against the minor in such a case. A.I.R. 1934 Mad. 560=67 M.L.J. 257=1934 M.W.N. 672=40 M.L. W. 261=152 Ind. Cas. 262.

——S. 115—Minor — Where a Muhammadan mother entered into an Ekrarnama on behalf of her minor son who was a Mutawalli under waqf deed regarding property including waqf properties and the son, on attaining majority derived some benefits under the Ekrarnama to which he would not be entitled under waqfnama:

Held, that son was estopped from questioning the validity of the Ekrarnama although the estoppel would be only personal to him and would not be operated against waqf property. A.I.R. 1933 Cal. 102=36 C.W.N. 972=58 C.L.J. 259=140 Ind. Cas. 799.

——S. 115—Minor.

There can be no decree against a person on a contract made during his minority. And this cannot be avoided either on the ground that the minor having represented himself to be a major is estopped from showing that he was a minor or on the ground that by such representation, he was guilty of cheating or fraudulent conduct. A.I.R. 1933 Mad. 94=1932 M. W. N. 1338=140 Ind. Cas. 325.

——S. 115—Minor —Fraudulent misrepresentation of age—Estoppel.

An infant is not estopped from setting up the plea of his infancy where he has fraudulently represented that he is of age and thereby induced another to enter into a contract with him. A I. R. 1932 All. 710=139 Ind. Cas. 718.

——S. 115—Minor.

Where an infant represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him, then in an action founded on contract, the infant is not estopped from setting up infancy. S. 11, Contract Act being a matter of substantive law, it must prevail over S. 115, Evidence Act which is merely a matter of procedure. A.I.R. 1931 Bom. 561=33

Bom.L.R. 1313=55 Bom. 741=135 Ind. Cas. 161 (F.B.). [Overrules (1) A.I.R. 1923 Bom. 169=64 Ind. Cas. 457. (2) 21 Bom. 198. (3) A.I.R. 1917 Bom. 221=41 Bom. 480=19 Bom. L.R. 561=41 Ind. Cas. 180.]

——S. 115—Minor—False representation.

When a contract has been entered into by a minor, representing himself to be a major the contract is void as against him and he is not estopped from pleading minority: A.I.R. 1928 P. C. 152, Foll.; 21 Bom. 198; 41 Bom. 480; 46 Bom. 137; A.I.R. 1923 Bom. 169; 64 I.C. 457, deemed overruled. 118 Ind. Cas. 698=31 Bom. L. R. 340=A.I.R. 1929 Bom. 201.

——S. 115—Minor—Returned of benefit.

Where a minor representing himself as of age executes a mortgage-deed, the mortgage is void and he is not estopped from pleading minority but the Court can on equitable grounds order restitution of benefit received by himself if the circumstances of the case so require: A.I.R. 1928 Lah. 609, Foll. 30 P.L.R. 584=A.I.R. 1929 Lah. 880.

——S. 115—Minor—No estoppel—Sale by guardian—Minor's letter stating necessity—If operates as estoppel.

Where at the time of sale of property by a guardian of a minor, the latter signed a letter which stated in detail that necessity for sale existed and where the object of taking the letter from the minor was not to assure the vendee that necessity existed but was to prevent the minor from bringing a suit to set aside the sale, the minor in a suit for possession of property is not estopped from denying the existence of legal necessity as he is not shown to have caused or permitted the vendee to believe that necessity existed. 115 Ind. Cas. 175=A.I.R. 1929 Nag. 221.

——S. 115—Minor.

A contract entered into by a minor is void and the minor is not estopped from pleading his minority as a bar to a contract entered into by him even though he had falsely represented himself to be of age and thereby induced the other party to enter into the contract: 15 N.L.R. 149, Foll.: 21 Bom. 198; 41 Bom. 480; A.I.R. 1923 Bom. 169, Not foll.; A.I.R. 1928 Lah. 609 (F.B.), Appr.; 1 Lah. 389; 59 Ind. Cas. 393, Overruled by A. I.R. 1928 Lah. 609 and 15 C.W.N. 239, Diss. from in 20 C.W.N. 418. 25 N.L.R. 85=A.I. R. 1929 Nag. 156.

——S. 115—Contract—Contract Act, S. 11.

A deed executed by minors is a nullity and incapable of founding a plea of estoppel. 109 Ind. Cas. 387=26 A.L.J. 685=47 C.L.J. 628=32 C. W.N. 874=5 O.W.N. 547=28 M.L.W. 17=30 Bom.L.R. 1346=A.I.R. 1928 P.C. 152=55 M. L.J. 88 (P.C.).

——S. 115—Minor—Minor between 18 and 21 is not estopped from pleading his minority—Court may relieve the other party on general principles of equity. 110 Ind. Cas. 373=50 All. 862=26 A. L.J. 837=A.I.R. 1928 All. 626.

——S. 115—Minor—Representative of.

Guardians and Wards Act, S. 30 — Mortgage without permission—Later sale with permission—Vendee undertaking to pay mortgage is not estopped from contesting validity of mortgage: 8 A.L.J. 754, Rel. on. 108 Ind. Cas. 728=50 All. 218=25 A.L.J. 1017=A.I.R. 1928 All. 77.

——S. 115—Minor—Return of benefit.

Where an infant has induced a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract. Though S. 115, Evidence Act, is general in its terms, it must be read subject to the provisions of the Contract Act declaring a transaction entered into by a minor to be void: 59 Ind. Cas. 393; 1 Lah. 389 and 60 Ind. Cas. 267, Overruled. 111 Ind. Cas. 175=9 Lah. 701=10 L.L.J. 413=30 P.L.R. 60=A.I.R. 1928 Lah. 609 (F.B.).

——S. 115—Minor.

But the minor, in equity is required to return the benefit he has received by making a false representation as to his age, if he wants to challenge his own act: A.I.R. 1928 Lah. 609 (F.B.), Foll. 111 Ind. Cas. 344=29 P.L.R. 608.

——S. 115—Minor—Applicability.

The rule of estoppel is a rule of evidence and it must be taken subject to the Contract Act, and it is doubtful whether S. 115 of the Evidence Act applies to infants.

In order to support the plea of estoppel in the case of infants, fraud operating to deceive must be found as a fact. 25 Cal. 616, Foll. 102 Ind. Cas. 449=6 Pat. 388=8 P. L. T. 730=A.I.R. 1927 Pat. 271.

——S. 115—Minor—Attestation by.

The law relating to estoppel must be read together with, and subject to other laws in force, such as those relating to contract and transfer of property, and that where such laws declare an infant to be free of liability in respect of a particular transaction, he cannot be made liable by virtue of an estoppel, for an estoppel cannot alter the law.

Attestation of a sale-deed by minor does not estop him from subsequently claiming the property sold. 26 Cal. 381, Rel. on. 99 Ind. Cas. 148=5 Bur.L.J. 141=A.I.R. 1927 Rang. 108.

——S. 115—Minor—Description as.

Minor becoming major one month before suit and having common interest with the other plaintiff, his brother, and taking active part in prosecuting the case; is estopped from challenging the validity of the decree passed in such suit. 96 Ind. Cas. 606=48 All. 661=24 A.L.J. 847=A. I.R. 1926 All. 673.

——S. 115—Minor.

Where a minor selling his property dishonestly represents to the vendee that he is a major and that vendee believes that representation and acts on it in taking the sole-deed from the minor as a major, the minor is not estopped under S. 115 from denying that he was a major at that date. [A.S. No. 89 of 1920, Foll.] But if he claims a declaration that the sale is void under S. 41 of the Specific Relief Act that relief may be granted to him on the condition that he makes such compensation to defendant as justice may require: 94 Ind. Cas. 853=23 M.L.W. 521=A.I.R. 1926 Mad. 607.

——S. 115—Minor.

Section 115 of the Evidence Act is no more than a rule of evidence and a rule of evidence cannot

be so construed as to nullify the express provisions of S. 11 of the Contract Act.

In a suit upon a promissory note executed by the defendant while he was a minor, although he misrepresented his age to the plaintiff, the defendant is not estopped from pleading his minority in defence to the suit: 8 A.L.J. 1058, Foll. 96 Ind. Cas. 893=A.I.R. 1926 Nag. 491.

——S. 115—Minor.

Principle of estoppel cannot be applied to an infant who is incompetent to contract under S. 11 of the Contract Act. 43 I.A. 256 (P.C.); 15 A.L.R. 149, Foll. 89 Ind. Cas. 143=A.I.R. 1926 Nag. 108.

——S. 115—Minor.

Pro-note by — Misrepresentation as to age—Minor may be estopped from pleading minority. 64 Ind. Cas. 457=46 Bom. 137=23 Bom.L.R. 975=A.I.R. 1923 Bom. 169.

——S. 115—Minor.

No estoppel against statute—Minor is not estopped from pleading minority. 71 Ind. Cas. 161=16 S.L.R. 112=A.I.R. 1923 Sind 5 (F. B.).

——S. 115—Minor.

The word "person" as used in S. 115 should not be narrowed down to exclude an infant. (1859) 4 De G. & J. 458 and 25 Cal. 371, foll. other cases discussed. 59 Ind. Cas. 393=1 Lah. 389=51 P.W.R. 1920=50 P.L.R. 1921=A.I.R. 1921 Lah. 312.

——S. 115—Minor.

If a minor obtains a loan on the representation that he is of age, he cannot plead his infancy as defence to a suit on the loan. 60 Ind. Cas. 267 (Lah.).

——S. 115—Minor — Contract—Conveyance.

If in any suit on a transfer of immoveable property or a contract of sale, the execution of the deed of transfer or the contract of sale, is admitted but infancy at the time of execution, is set up as a defence, the defendant is under S. 115, prima facie estopped the denying his authority. Before the defendant can overcome the bar of estoppel, he must prove his minority. 26 B. 109, Foll. 9 S.L.R. 214=34 Ind. Cas. 890.

——S. 115—Minor—Estoppel against.

Where a minor contracts there is no estoppel against him, since the contract is void. 11 L.W. 596=57 Ind. Cas. 678.

——S. 115—Minor—Estoppel.

Quaere:—Whether a minor who obtains a benefit under a conveyance by himself should be refused the relief of cancellation of the sale on the ground that he misrepresented his age at the time and thereby induced the other party to part with his property. 7 L.W. 124=43 Ind. Cas. 908.

——S. 115 — Minor — Plea of estoppel against minor.

Estoppel cannot be pleaded against a minor. (1908) 12 C.W.N. 481.

——S. 115—Minor — Lease taken by guardian—Possession of minor if adverse.

Though in a case of contract of transfer of property a minor cannot be held to be estopped by his conduct within S. 115 of the Evidence Act, yet when he enters into possession of property on a lease obtained on behalf by his guardian he cannot be allowed to set up his title to the property as a bar to a suit in ejectment on the expiry of the lease. 53 Ind. Cas. 412 (Mad.).

——S. 115 — Minor — Guardian-ad-litem if bound by estoppel against himself—Ad litem of minor if estopped from suing in his personal capacity about same right.

A decree against a minor represented by his guardian-ad litem can be contested by the guardian in his individual and personal capacity on rights peculiarly his own; and the fact that he acted as guardian-ad litem before will not estop him from claiming his right. 1 P.R. 1914=118 P.L.R. 1914=22 Ind. Cas. 955.

——S. 115—Minor—Acts of guardian.

There can be no estoppel against an infant except in cases of fraud committed by him. An infant cannot be estopped by the acts or admissions of his guardian or of another person. 16 C.L.J. 185=17 C.W.N. 10=16 Ind. Cas. 825.

——S. 115—Minor — Guardian—Age of minor.

In a suit by a ward to recover property from guardian appointed by Court, the guardian is not estopped from disputing the age of the word unless he has caused the ward to believe anything about his age by his declaration act or omission. 213 P.L.R. 1910=86 P.W.R. 1910=7 Ind. Cas. 505.

——S. 115—Minor — Contract Act—Estoppel with a minor.

The law of estoppel is subject to other laws, e.g., Contract Act and a minor's contract being void, he is not estopped. 20 C.W.N. 418=32 Ind. Cas. 388.

——S. 115—Minor — Misrepresentation as to age—Liability.

Where a minor executes a mortgage fraudulently representing himself to be a major, he is not estopped afterwards from showing he was a minor at the time. The mortgagee cannot obtain any relief against the minor on the ground of fraud. (1916) 2 A.C. 575=21 C.W.N. 257=(1917) M.W.N. 162=19 Bom.L.R. 157=86 L.J.P.C. 15=115 L.T. 564=32 T.L.R. 678=43 I.A. 256=39 Ind. Cas. 401 (P.C.).

——S. 115—Minor—Misrepresentation.

Where a minor obtains money on a pro-note by misrepresenting his age, he is not liable on it. 16 A.L.J. 441=45 Ind. Cas. 761.

——S. 115—Minor — Representation — Minor not bound.

A minor is not bound by any false representation made by his father, brother, or cousin; even if any of those persons acted as the natural guardian of the minor. 11 A.L.J. 202=19 Ind. Cas. 55.

——S. 115—Minor—Misrepresentation as to age.

The defendant, in a suit on a promissory note executed by him is not estopped from pleading his infancy at the time of the execution of the note, by reason of the fact that he was guilty of fraudulent misrepresentation as to his age, Ss. 64 and 65 of the Act have no application to such a case. 8 A.L.J. 1058=8 Ind. Cas. 888.

——S. 115—Minor.

There can be no estoppel on account of an act done by a minor which is void and the minor can

plead his infancy. 31 All. 21=1908 A.W.N. 267=5 A.L.J. 674=1 Ind. Cas. 562.

——S. 115—Minor — Conveyance by — Vendor aware of real facts.

A minor is not estopped from contending that she was a minor at the date of a sale executed by her inasmuch as the defendant who was her brother-in-law and who must be presumed to know her age was not deceived by what the plaintiff had told him as to her age. 44 Bom. 175=22 Bom.L.R. 49=55 Ind. Cas. 271.

——S. 115—Minor — Representation that he is major—'Person' meaning of.

The word 'person' in the section is used in its ordinary sense and includes a minor. No limitation can be placed on the term so as to exclude from its connotation all persons declared under the Contract Act incompetent to contract. 41 Bom. 480=19 Bom.L.R. 561=41 Ind. Cas. 180.

——S. 115—Minor.

Where a minor appeared old enough to act for himself and for whom no fresh guardian was appointed after the resignation of the guardian appointed under the Guardians and Wards Act and where the District Judge ordered that his minority would continue till the age of 21 and where he entered into monetary dealings with plaintiff and represented himself to be of full age and misled the plaintiff by that false representation to advance a loan on the defendants executing a bond; held, that the plea of minority cannot be heard and that S. 115 of the Evidence Act applied to the case. 25 Cal. 393, foll. 24 Cal. 265, 26 Cal. 381, 25 Cal. 371 (F.B.) and 76 P.R. 1910 not foll. 1 Lah. 389=59 Ind. Cas. 393=A.I.R. 1921 Lah. 312.

——S. 115 — Minor — False representation as to age—Mortgage.

A mortgage made by a minor is wholly void and the mortgagee is not entitled to enforce his security created under the mortgage. The false representation by the minor as being of full age made to the mortgagee, who knew it to be false, was not such a fraud as to take away the privilege of infancy. 30 Cal. 539 (P.C.), foll. 1 Lah.L.J. 122=162 P.R. 1919=2 U.P.L.R. (Lah.) 40 =54 Ind. Cas. 876.

——S. 115 —— Minor — Misrepresentation as to age—Liability to refund.

A minor mortgagor who enters into the transaction misrepresenting his age is under no equitable obligation to refund the money when the transaction turns out to be void. 26 M.L.T. 245 =10 L.W. 225=53 Ind. Cas. 14.

——S. 115—Minor — Shareholder of a company —Receipt of dividend.

A shareholder in a limited company who was a minor at the time of the allotment of shares to him, and who after attaining majority received dividends and raised no objection to his name being included in the register is estopped from denying as against the company's representative that he is a shareholder. 39 Bom. 331=16 Bom.L.R. 730=27 Ind. Cas. 335.

——S. 115—Minor — 'Person'—Meaning.

S. 115 of the Evidence Act has no application to contract by infants. 'Person' in that section mean 'person competent to contract'. 26 C. 386 Foll. 15 C.W.N. 239=13 C.L.J. 228=9 Ind. Cas. 110.

——S. 115—Minor—Estoppel, plea of, against minor.

Estoppel cannot be pleaded against a minor. (1908) 12 C.W.N. 481.

——S. 115—Minor — Statement known to be false to person to whom it is made—Minor's false representation as to age — Contract Act, Ss. 11, 19, 64 and 65—Mortgage by minor void—Repayment of advances on mortgage declared invalid.

S. 115 of the Evidence Act does not apply, and there is no estoppel where the person to whom a false statement is made knows it to be false. A false representation, as made to one who knows it to be false, is not such a fraud as to take away the privilege of infancy. 4 De. G. & J. 458, foll. A minor's contract is void. So a mortgage by him is void; and a money-lender who has advanced him money on the security of the mortgage is not entitled to a repayment of the money on a decree being made declaring the mortgage invalid, as Ss. 64, 65 of the Contract Act apply only where there is a contract. The maxim that he who seeks equity must do equity does not apply as it is not equitable to compel a man to pay money in respect of a transaction which, as against him, the Legislature has declared to be void. (1902) 1 Ch. 1; foll. (1903) 5 Bom.L.R. 421=7 C.W.N. 441=30 C. 539=30 I.A. 114. See also 31 A. 21 Col. 1090.

——S. 115—Minor—Debt due to minor's estate—Collection by minor—Suit by minor's guardian for same debt—Representation by minor that he was over age.

Where a minor has collected a debt due to his estate representing himself to be a major, the minor cannot sue again with his guardian as his next friend for the same debt. (1901) 6 C.W.N. 132=29 C. 126.

——S. 115—Minor — Misrepresentation as to age.

If a person, under the mistake that he was a minor, when in fact he was a major, stood by and allowed his mother to act as his guardian and mortgage his properties for the purpose of discharging a family debt, he cannot afterwards be permitted to say that his mother had no power to mortgage the estate, and the fact that the representation by conduct is due to a bona fide mistake does not affect the estoppel. (1901) 3 Bom.L.R. 535.

32. Mistake.

——S. 115—Witness omitting to notice difference between 12 years and 12 months—Mistake apparent from earlier part of disposition.

Witnesses are often slow thinking and the strange atmosphere of a Court is enough to confuse them. In such a state of mind, a witness could quite easily omit to notice the difference between 12 years and 12 months when his statement is rapidly interpreted to him. The mistake is, therefore, more than understandable; and it is for a Judge of fact to determine whether it was

really a mistake or not. A.I.R. 1937 Nag. 281 =173 Ind. Cas. 680.

——S. 115—Mistake — Grant by Government—Mistaken interpretation and consequent mistaken action by Government Officers.

A mistaken interpretation made by the Government Officers of a grant by the Crown and their consequent mistaken acts would not create an estoppel as against the Crown. A.I.R. 1934 Bom. 434=36 Bom.L.R. 761=154 Ind. Cas. 278.

——S. 115—Mistake.

Vendor and vendee both advised by same solicitors—Both sharing same mistake as to vendor's title due to solicitor's advice — Vendee paying purchase money and vendor utilising it to obtain transfer—Defect in title of vendor discovered—Vendee is not estopped from claiming back purchase money as vendor did not act on faith of vendee's representation. 90 Ind. Cas. 189=26 Bom.L.R. 1019=A.I.R. 1925 Bom. 64.

——S. 115—Mistake.

Talukdari watan lands liable to payment of jama recorded as rent-free lands by mistake—No estoppel arises against Government. 99 Ind. Cas. 293=28 Bom.L.R. 1213=A.I.R. 1926 Bom. 590.

——S. 115—Mistake — Wrong statement as to one's rights—No estoppel is created.

Plaintiff made a statement in mutation proceedings in the Court of Assistant Collector that he and his nephews were heirs of one Mt. R and that mutation of one-sixth of the property may be made in his favour and of the rest in the names of the defendants.

Held, the statement did not prevent the plaintiff from asserting his right to the entire property in a Civil Court subsequently. 72 Ind. Cas. 832 =A.I.R. 1924 Oudh 168.

——S. 115—Mistake—Execution sale.

A decree-holder brought up his own properties for sale as belonging to appellant,

Held, the fact that respondent was himself under a mistake when he filed his sale application will not prevent an estoppel. Unless it is found that appellant was not in fact misled, respondent must be held to be estopped. 70 Ind. Cas. 569 =1922 M.W.N. 121=15 M.L.W. 272=A.I.R. 1922 Mad. 63.

——S. 115—Mistake.

A person is always entitled to prove if he can, that there was a mistake in the accounts and that he signed them as correct by mistake. 71 Ind. Cas. 45=A.I.R. 1922 Nag. 265.

——S. 115—Mistake.

The intention mentioned in S. 115 of the Evidence Act does not exclude an intention which is based on a mistake. 20 Cal. 296, Foll. 65 Ind. Cas. 477=18 N.L.R. 27=A.I.R. 1922 Nag. 79.

——S. 115—Mistake—Representation — Common mistake.

To establish estoppel, mere fact of sharing erroneous belief with others is not sufficient. 22 Bom. L.R. 974=58 Ind. Cas. 394.

——S. 115—Mistake—Payment for a long time on mistake as to the area of lands possessed—Effect of.

A payment made to the temple for a long series of years upon the footing that the defendant and his family had the same extent of lands as they were supposed to posses at the time of the arrangement would not bar the defendant and his family from showing that they had not such extent even at the time of the original arrangement. 14 M. L.J. 379.

——S. 115—Mistake — Mortgage—Redemption of mortgages—Revenue sale of mortgaged properties —Purchase by mortgagor benami—Receipt of surplus under a mistake of fact by mortgagee—Execution sale of mortgaged property.

Where a mortgagor allows the mortgaged property to be sold for arrears of revenue and buys it himself benami in the name of another, the fact that the mortgagee in execution of his mortgage decree receives the surplus proceeds of the sale under a mistake of fact as to the real person who purchased cannot estop him from recovering the balance of his decree debt by the sale of the same property so purchased by the mortgagor. (1903) A.W.N. 75=25 A. 371.

33. Mortgagor and mortgagee.

——S. 115—Mortgagor and mortgagee.

The mortgagee has a security which he can enforce as against the mortgagor, who is estopped from denying his mortgagee's title. A similar estoppel operates against the Official Receiver who succeeds to the title of the mortgagors. A.I.R. 1940 Mad. 785=(1940) 1 M.L.J. 913=52 M.L.W. 71=1940 M.W.N. 569.

——S. 115—Mortgagor and mortgagee—Plaintiff mortgaging property to two persons at different times — Property sold to defendant and some amount out of consideration left with defendant for payment in full to subsequent mortgagee—On defendant's failure, mortgagee obtaining decree — Execution — Sale proclamation mentioning existence of prior incumbrance—Personal decree—Suit by plaintiff against defendant for damages for breach of contract—Court finding that prior mortgage was paid off before sale to defendant—Defendant, held liable for damages—On the facts of the case question of estoppel held did not arise. A.I.R. 1939 All. 289=1939 A.W.R. 161=181 Ind. Cas. 790.

——S. 115—Mortgagor and mortgagee—Intention to work fraud upon mortgagee—Mortgagor is estopped from contending that transfer of portion thus included, was not intended.

If the mortgagor puts in the mortgage bond a plot of land situated in another district in order to work a fraud, not on the registration law but upon the mortgagee, by persuading the mortgagee to accept so small an item to register the mortgage in the district in which the item is found, he cannot afterwards say that he did not intend the document to relate to the plot. A.I.R. 1939 Nag. 57=1939 N.L.J. 44=I.L.R. (1939) Nag. 64= 179 Ind. Cas. 933 (F.B.).

——S. 115—Mortgagor and mortgagee—Suit for possession by avoidance of mortgage.

A rule of estoppel cannot be invoked in a case

where the suit for possession is not based on the mortgage but is one in repudiation of the mortgage, being one in ejectment by avoidance of the mortgage in question. A.I.R. 1937 Oudh 431=1937 O.W.N. 237=13 Luck. 178=167 Ind. Cas. 79.

——S. 115—Mortgagee in the Punjab not getting mortgage recorded in Revenue Records—Mortgagor making alienation to persons who find property unencumbered in the records:

Held, that the mortgagee is estopped by conduct from challenging the alienations. A.I.R. 1936 Lah. 405=38 P.L.R. 1097=166 Ind. Cas. 147.

——S. 115—Mortgagor and mortgagee—Mortgagor representing that he had power to mortgage—He cannot contend that he had no power.

Where the mortgagor himself mortgaged the property, representing to the mortgagee that he had the power to mortgage and that the property was such that could be mortgaged, he is estopped from derogating from his own grant and from pleading that his representation, on which the mortgagee advanced the money, was incorrect. But it cannot be rightly said that he is likewise estopped from objecting to the Court selling the property. A.I.R. 1935 All. 678=1935 A.W.R. 867=58 All. 98=157 Ind. Cas. 511.

——S. 115—Mortgagor and mortgagee.

Where a widow who succeeded to her husband's turn of worship in certain temples granted a mortgage over that right in favour of first defendant's father and the plaintiff who obtained a deed of transfer from the widow of the right of worship sought to redeem the right of worship from the first defendant:

Held, that first defendant was not estopped from contending that the sale to plaintiff was invalid and of no effect being opposed to public policy. A.I.R. 1935 Mad. 5 (2)=1934 M.W.N. 1062=67 M.L.J. 759=40 M.L.W. 799=153 Ind. Cas. 464.

——S. 115—Mortgagor and mortgagee—Mortgagee agreeing to sale of portion of mortgaged property free of mortgage—Sale proceeds accepted—Assignee of mortgagee is estopped from denying that such property does not form part of security for mortgage debt. A.I.R. 1935 Rang. 279=158 Ind. Cas. 492.

——S. 115—Mortgagor and mortgagee—Mortgagor's power to deny the title of his mortgagee—Mortgagor, if estopped — Legal representative, if under the same disability.

A mortgagor cannot, as against the mortgagee, deny his title to the mortgaged property. The rule is based upon the general principle that a person cannot derogate from his own grant. If a person is estopped from denying his title, the legal representatives and all persons privy to him are subject to a like disability. A.I.R. 1934 Oudh 460=11 O.W.N. 1097=151 Ind. Cas. 576.

——S. 115—Mortgagor and mortgagee — Acceptance of payment.

Having accepted payment of the amount due upon a simple mortgage decree on the footing that the prior mortgage was still alive, the mortgagee cannot turn round and say that redemption under that mortgage had become barred. A.I.R. 1933 P.C. 167=37 C.W.N. 797=35 Bom.L.R. 807=57 C.L.J. 454=1933 M.W.N. 739=65 M.L.J. 103=38 M.L.W. 29=60 I.A. 266=56 Mad. 737=143 Ind. Cas. 433.

——S. 115—Mortgagor and mortgagee.

An usufructuary mortgagee cannot deny the title of the mortgagor and set up adverse possession unless he actually leaves the holding and enters under a different status. 119 Ind. Cas. 568=10 L.R.A. Rev. 289=A.I.R. 1929 All. 305.

——S. 115—Mortgagor and mortgagee.

The mere fact that the mortgagee brought a suit against purchaser of mortgaged property to have the sale set aside does not estop mortgagee from instituting a suit to enforce his mortgage claim against the mortgage property. 113 Ind. Cas. 904=A.I.R. 1929 Cal. 392.

——S. 115—Mortgagor and mortgagee.

Where a mortgagor refused possession when according to the terms of the contract he was bound to give possession, the mortgagor is precluded from asserting that the property is not liable to sale in satisfaction of the mortgage debt. 41 Mad. 259 (F.B.), Rel. on. 116 Ind. Cas. 214=A.I.R. 1929 Lah. 289.

——S. 115—Mortgagor and mortgagee—A suing on his mortgagee joining his co-mortgagee B as defendant—B not appearing in Court and decree passed exclusively in favour of A—A executing decree receiving money and giving discharge—B cannot urge that this position was not legally available to A. 115 Ind. Cas. 97=6 O.W.N. 133=4 Luck. 597=A.I.R. 1929 Oudh 160.

——S. 115—Mortgagor and mortgagee—Equitable mortgagee entering into possession with consent of mortgagor—The former leasing the property to a third person—Auction-purchaser of the equity of redemption is bound by the mortgagor's consent and his suit for rent and damages against the third person is not maintainable. 107 Ind. Cas. 72=46 C.L.J. 515=A.I.R. 1928 Cal. 158.

——S. 115—Mortgagor and mortgagee.

Mortgagor not raising issue of limitation as to personal remedy at the hearing cannot raise it after sale when the proceeds are found insufficient and mortgagee applies under C. P. Code, O. 34, R. 6. 111 Ind. Cas. 808=A.I.R. 1928 Lah. 653.

——S. 115—Mortgagor and mortgagee.

Where the mortgagee is let into possession by the mortgagor, the former is estopped from denying the title of the latter at the commencement of his possession, though he is not debarred from showing that the title has since determined. 18 All. 329, Rel. on. 99 Ind. Cas. 561=A.I.R. 1927 All. 270.

——S. 115—Mortgagor and mortgagee.

If after a preliminary decree for foreclosure has been passed the mortgagee enters into possession before the day appointed for payment has arrived, the mortgagor would certainly have a right to demand a fresh account and the appointment of a further day for payment; but if he allows many years to pass before making his application, it must be considered that he acquiesced in the mortgagee holding the property as his own and induced him to believe that it was no longer necessary either

to excute the decree he had obtained or to obtain an order absolute for foreclosure. 94 Ind. Cas. 96=28 Bom.L.R. 347=A.I.R. 1926 Bom. 273.

——S. 115—Mortgagor and mortgagee—Mortgagor estopped from denying consideration of the mortgage—Transferee from mortgagor is also estopped. 95 Ind. Cas. 264=23 M.L.W. 749=1926 M.W.N. 315=A.I.R. 1926 Mad. 808=50 M.L.J. 511.

——S. 115—Mortgagor and mortgagee—Mortgage suit—Agreement entered into by mortgagor before final decree to pay higher interest to get extension of time.

Held, the mortgagor was estopped, in an application by the mortgagee for execution of the agreement, from contending that the agreement could not be enforced in execution. 2 I.A. 219 and 5 C. 27, Rel. on.

The question whether such an agreement does or does not violate the rule, that a Court cannot add to its decree, becomes under the circumstances one which the Court will not enter into, the party who seeks to raise such question being estopped by his own conduct and the action of the Court taken thereunder. 86 Ind. Cas. 723=1925 M.W.N. 86=A.I.R. 1925 Mad. 457=48 M.L.J. 121.

——S. 115—Mortgagor and mortgagee—Assignee of mortgagee not giving notice or assignment to mortgagor—Mortgagor continuing to pay the old mortgagee—Assignee cannot refuse to give credit for such payments. 78 Ind. Cas. 127=A.I.R. 1924 Nag. 401.

——S. 115—Mortgagor and mortgagee—Mortgagor though trustee is estopped from setting up trust.

Even where the mortgagors are trustees acting in a public capacity and not for their own benefit, they are estopped from denying their title and cannot set up as a defence against the mortgagee that the property so mortgaged is trust property which the mortgagors had no right to mortgage. Where the mortgage deed clearly and unmistakably purports to be executed by the mortgagor as the proprietor of the property in his own interest, he is estopped from denying the interest which he represented as his own proprietary right in the deed. 71 Ind. Cas. 944=1923 P.H.C.C. 49=1 P.L.R. 225=4 P.L.T. 457=A.I.R. 1923 Pat. 203.

——S. 115—Mortgagor and mortgagee.

If a person professes to have an interest in a property whatever interest he may have is bound by the mortgage and must be enforced against him and he cannot claim that a personal decree should have been passed. 70 Ind. Cas. 932=27 C.W.N. 607=18 M.L.W. 48=1923 M.W.N. 525=31 M.L.T. 306=A.I.R. 1922 P.C. 382=47 M.L.J. 258 (P.C.).

——S. 115—Mortgagor and mortgagee.

Even though a mortgage by a tenant-at-will is not binding on the landlord, it is open to him to recognise it as valid. Such a mortgage is not ab initio void. A mortgagee cannot go behind his mortgage and dispute the mortgagor's right to enforce redemption. 68 Ind. Cas. 558=9 O.L.J. 331=A.I.R. 1922 Oudh 287.

——S. 115—Mortgagor and mortgagee—Denial of title.

A mortgagee who accepts a mortgage from a mortgagor cannot question the title of the latter to redeem the property on payment of the sum due under the mortgage. 29 C.L.J. 434=53 Ind. Cas. 59.

——S. 115—Mortgagor and mortgagee — Representative of mortgagee.

A mortgagee sued for possession of the mortgaged property against a person as the successor of the original mortgagor and obtained a decree. Subsequently when the said representatives sued the mortgagee for redemption. The mortgagee disputed his right to represent the original mortgagor; Held, that the mortgagee was estopped from raising the plea. 6 O.L.J. 1=1 U.P.L.R. (J.C.) 22=49 Ind. Cas. 356.

——S. 115—Mortgagor and mortgagee—Estoppel.

The mere fact that the mortgagee under an anamolous mortgage was not inducted into possession by the mortgagor does not entitle the mortgagee to deny the title of the mortgagor which he has acknowledged. 40 Mad. 561, Foll. 37 M.L.J. 617=24 M. L. T. 472=(1919) M.W.N. 20=49 Ind. Cas. 312.

——S. 115—Mortgagor and mortgagee — Title to redeem.

A mortgagee cannot go behind the mortgage and dispute the right of the mortgagor to redeem. 2 O.L.J. 338=30 Ind. Cas. 234.

——S. 115 — Mortgagor and mortgagee—Attornment of mortgagee to superior landlords—Effect of—Redemption suit.

A mortgagee is not entitled to resist a claim for redemption impugning the title of the mortgagor to the mortgaged property. But the mortgagee may establish that the title of the mortgagor has expired since the creation of the mortgage, i.e., that the equity of redemption is no longer vested in him so as to entitle him to redeem the mortgage.

As between a mortgagor and a mortgagee, the attornment by the latter to the superior landlohd cannot in any way prejudice the rights of the mortgagor. 29 Ind. Cas. 746 (Cal.).

——S. 115—Mortgagor and mortgagee—Invalidity of mortgage—Plea of, if open.

A mortgagor cannot set up against his mortgagee the title of a third person. Even a trustee cannot set up as a defence for himself against the mortgagee that the mortgaged property is trust property which he had no right to mortgage. The principle however is inapplicable when the mortgage is void as contrary to statute. 42 Cal. 455=19 C.W.N. 208=20 C.L.J. 183=27 Ind. Cas. 400.

——S. 115—Mortgagor and mortgagee—Occupancy holding.

Where a tenant of a non-transferable holding mortgaged a portion and subsequently sold the same to the plaintiff who sued for possession, he could not repudiate the mortgage as beyond his competence. 18 C.L.J. 512=21 Ind. Cas. 960

——S. 115 — Mortgagor and mortgagee—Title, denial of—Estoppel.

A mortgagee is not in all cases estopped from disputing the title of his mortgagor. 7 S.L.R. 11=20 Ind. Cas. 523.

——S. 115—Mortgagor and mortgagee—Denial of title—Purchaser of equity of redemption who is also a co-sharer.

The purchaser of an interest in the equity of redemption cannot deny the title of the mortgagee to the interest created under the mortgage. But if the purchaser has a different capacity such as that of a co-sharer with the mortgagor in the properties mortgaged he can question the title in that capacity. 20 Ind. Cas. 241 (Cal.).

——S. 115—Mortgagor and mortgagee — Mortgagee — Deshagat Inams — Enfranchisement—Mortgagee in possession estopped from question—Mortgagor's right.

Deshgat Inam lands were mortgaged in 1855 and in 1856 forfeited by Government. The mortgagee continued in possession and paid assessment to Government. In a suit to redeem in 1901;

Held, that the order of forfeiture had merely the effect of converting the lands from a service tenure into lands liable to pay assessment to Government. It did not deprive the plaintiff of all right and title to the lands, and extinguish the relation of mortgagor and mortgagee which existed between the parties. 1 Bom.H.C.R. 22; 9 B. 119 Foll. The defendant who came into possession of the lands as mortgagee of the plaintiffs could not turn round after the order of forfeiture and take the benefit of it and challenge the validity of the mortgage in virtue of which his title to the land as mortgagee had begun. 36 Bom. 539=14 Bom.L.R. 563=16 Ind. Cas. 348.

——S. 115—Mortgagor and mortgagee—Suit by mortgagor for sale—Plea of jus tertii.

In a defence to a mortgagee's suit for sale the mortgagor or his representative cannot plead that the mortgagor had no power to mortgage the whole or part of the property which he purported to mortgage nor can they plead the *jus tertii*. 16 C.L.J. 264=16 Ind. Cas. 246.

——S. 115—Mortgagor and mortgagee—Not estopped by deed when other party alleges deed as void.

The estoppel against a mortgagor based upon the contract between the parties can have no operation when the contract is alleged by the other party to be void. The other party cannot both approbate and reprobate the mortgage. 17 P.R. 1912=56 P.W.R. 1912=88 P.L.R. 1912=14 Ind. Cas. 495.

——S. 115—Mortgagor and mortgagee—Inam—Inalienability.

A mortgagee defendant holding under mortgage by an inamdar is not estopped from contending by reason of the mortgage, that the plaintiff, a purchaser in auction sale of such inam, acquired no title to the inam, as the inam, grant is inalienable. (1911) 2 M.W.N. 473=12 Ind. Cas. 710.

——S. 115—Mortgagor and mortgagee—Absolute title—Setting up of—Liability to be redeemed.

A mortgagee cannot acquire any higher right as against the mortgagor merely by setting up an absolute title in himself to the mortgaged property. Purchase of mortgage property from a third party could not enlarge mortgagee's right so far as his obligation to surrender the land to the demisor was concerned. (1911) 2 M.W.N. 61=10 Ind. Cas. 339.

——S. 115—Mortgagor and mortgagee.

A mortgagor is estopped from denying his mortgagee's title and the existence of the lien which he has created or from defeating it enforcement against the property upon which it was placed. The question of the mortgagee's right to mortgage cannot arise in a suit between the mortgage and the mortgagor. 10 C.L.J. 150 Rel. 13 C.L.J. 481=15 C.W.N. 703=10 Ind. Cas. 49.

——S. 115—Mortgagor and mortgagee.

A mortgagor is estopped from disputing the validity of mortgage executed by himself. 35 Mad. 75=(1911) 1 M.W.N. 290=9 M.L.T. 487=21 M.L.J. 709=9 Ind. Cas. 875.

——S. 115—Mortgagor and mortgagee—Conduct—Mortgage—Redemption of previous mortgage—Prior mortgagee not setting up his purchase as defence.

If the sub-mortgagees purchase the shares of the heirs of the mortgagor in the mortgaged property and all the heirs sue for redemption of the mortgage and pending the suit for redemption the property is mortgaged with third parties and out of the consideration the sub-mortgagees are paid up and redemption of the previous mortgage is allowed, the sub-mortgagees are estopped from setting up their purchase from the heirs of the mortgagor against claim for possession made by the subsequent mortgagees as their acceptance of the whole mortgage money amounts to an admission that the redeemed land had not been sold to them. 36 P.L.R. 1910=11 Cr.L.J. 597=8 Ind. Cas. 229.

——S. 115—Mortgagor and mortgagee—Occupancy holding—Mortgagee put in possession—Mortgagor's right to recover possession without paying he mortgage money.

Where a mortgagee of an occupancy holding is put in possession of the mortgaged property by the mortgagor the mortgagor cannot recover possession unless he pays the mortgage money on the ground that the mortgage is void. 11 Bom.L.R. 695, Foll. 7 Ind. Cas 738 (All.).

——S. 115—Mortgagor and mortgagee—Purchaser in execution sale of mortgagor's interest.

In regard to the relation of mortgagor and mortgagee when the mortgagor retains possession a relation is created similar to that of landlord and tenant and the mortgagor is estopped from denying the title of the mortgagee. A mortgagor must, from the very nature of the mortgage contract, preserve the property pledged for the purpose of the original security and is therefore estopped, independently covenants of warrantee, from denying the mortgagee title and the existence of the lien which he had created, or from defeating its enforcement against the property upon which it was placed. Although a purchaser of mortgaged premises is not estopped by his mere acceptance of the deed from disputing the validity of the mortgage or the amount due under it on the ground of objections which were open to the mortgagor, yet he is limited to such objection defences only as could have been pleaded by the mortgagor himself and he cannot even set up all these for he is not permitted to urge defences strictly personal to the mortgagor. The purchaser at the execution sale is bound by the same rule of estoppel as the judgment-debtor on the principle that the former has purchased merely the right, title and interest of the latter and does not consequent occupy a position of greater advantage. The execution purchaser

of the interest of the mortgagor is as much bound by the rule of estoppel not to dispute the validity of the mortgage as the mortgagor himself. The purchaser at an execution sale may take advantage of an estoppel arising from the deed by which the debtor acquired title and is, in his turn, estopped by deed made by the debtor before the sale; in other words the levying creditor is bound by an estoppel against the debtor as grantor. (1909) 10 C.L.J. 10=1 Ind. Cas. 264.

——S. 115—Mortgagor and mortgagee—Landlord and tenant—Pleadings inconsistent.

A person who lawfully came into possesion of land as tenant from year to year or for a term of years, or as mortgagee, cannot, by setting up during the continuance-of such relation, acquire any title adverse to that of the land lord or mortgagor, inconsistent with the real legal relation between them, by the operation of the law of limitation, however notoriously he might have set up such inconsistent title. Where a plaintiff came into court alleging that a mortgage is invalid he cannot afterwards, when it is found that his title to recover the property independent of the mortgage is barred by limitation, turn round and say that the title prescribed for by the defendant was only as mortgagee and that, therefore, he has sixty years to redeem. (1903) 16 M.L.J. 5.

34. None against law.

——S. 115—Statute—No estoppel against—Agreement opposed to S. 6 (a), Transfer of Property Act—Estoppel based on—Right to invoke.

The principle of estoppel cannot be invoked by a party to an agreement which in law falls within the mischief of S. 6 (*a*), Transfer of Property Act. A.I.R. 1950 Pat. 488.

——S.115—None against law—Statute—No estoppel against—Order passed by Court without jurisdiction—If can be pleaded as estoppel—Consent or waiver—If can give jurisdiction to Court lacking it.

There can be no estoppel against a statute ; the doctrine of approbate and reprobate, or consent or waiver, which would apply to the conduct of the parties, is not applicable to the case of a statute or an order passed without jurisdiction there being a complete lack of jurisdiction, no consents or acquiescence can cure the illegality. An order which is not an order of a Court of competent jurisdiction can never be pleaded as an estoppel. 13 I.A. 134 ; 14 I.A. 160 ; I.A. (Supp. Vol.) 47 ; 21 All. 285 ; 54 All. 25 ; A.I.R. 1932 Pat. 267, Rel. on. 29 Pat. 318 =A.I.R. 1950 Pat. 318.

——S. 115—None against law—Statute—No estoppel against—Municipaltax—Corporation mentioning by mistake smaller amount as due from owner of premises—Whether estopped from recovering actual amount due—Purchaser of premises—Position of—Calcutta Municipal Act, Ss. 149, 205 and 213.

Where in answer to a letter from an owner of certain premises the calcutta Corporation informed him that a certain amount was due on account of the arrears of the municipal consolidated rates, and the amount mentioned by it was by a mistake less than the amount that was actually due,

Held, (*i*) that the Coproration was not estopped from recovering the sum actually due. It is an elementary principle that there is no estoppel against the law, Under the provisions of Ss. 149, 205 and 213 of the Calcutta Municipal Act there is a statutory obligation imposed respectively on the corporation and the rate-payer to collect and pay the rates—these rates being secured by a first charge on the premises and there being no power to remit the taxes unless they appear to be irrecoverable ; (*ii*) that a purchaser of the premises from the owner was in no better position than his vendor and could not, therefore, defeat his statutory liabilities by a plea of estoppel. 81 C.L.J. 155=50 C.W.N. 263=A.I.R. 1947 Cal. 273.

——S. 115—None against law—Statute—No estoppel against. 223 Ind. Cas. 458=47 P.L.R. 385=A.I.R 1946 Lah. 73.

——S. 115—None against Law—Local Body realising less than what is actually due—Whether estopped from recovering full amount due.

It is an elementary principle that there is no estoppel against the law. When a Municipal Corporation through mistake charged an owner of a building rates less than what were legally recoverable it was held, that the Corporation was not estopped from recovering the entire amount. There is a statutory duty on the Corporation to realise, and similar one on the owner to pay taxes legally levied. 81 C.L.J. 155=A.I.R. 1947 Cal. 273=50 C.W.N. 263.

——S. 115—None against law—No rule of estoppel between parties can compel the Court to take any action contrary to express words of a statute. A.I.R. 1943 Bom. 54=44 Bom.L.R. 907=I.L.R. (1943) Bom. 19 =205 Ind. Cas. 577.

——S. 115—None against law.

Per *Full Bench.*—If the agreement is found to be in contravention of a statutte or against public policy a party cannot be held estopped from pleading or proving facts which would render the agreement void *ab initio*. The fact that a party may thereby be enabled to take advantage of his own wrong cannot be allowed to militate against the mischief which would otherwise follow. There can be no estoppel against pleading or relying upon a statute. A.I.R. 1943 Lah. 268=45 P.L.R. 432=I.L.R. (1944) Lah. 379=211 Ind. Cas. 291 (F.B.).

——S. 115—None against law—Exeception to rule.

Although there is no estoppel against a statute a party to a document may be estopped from putting forward the fact that he was or was not an occupancy tenant. A.I.R. 1943 Pat. 386=9 Cut.L.T. 67=22 Pat. 532=10 B.R. 156=24 P.L.T. 418=209 Ind. Cas. 438.

——S. 115—None against law—The principle of estoppel cannot be invoked to evade the plaint provisions of a statute

Hence the mere transfer of possession is not a sufficient substitute for a registered document in the case of a gift of immovable property. A.I.R. 1943 Sind 177=I.L.R. (1943) Kar. 227=210 Ind. Cas. 35.

——S. 115—None against law—A represnetation on question of law does not amount to an estoppel. A.I.R. 1941 Pat. 276=195 Ind. Cas. 428=7 B.R. 924.

——S. 115—None against law—There can be no estoppel against a statutory provision.

Where, threfore, there is no written and registered lease of bazar dues in favour of the plaintiff, the mere fact that the defendant had. on ertain previous occasions paid something to the plaintiff on account of bazar dues does not estop him from questioning the plaintiff's right to recover them. A.I.R. 1940 Oudh 409=1940 O.W.N 782=1940 A.W.R. 357=16 Luck. 191=190 Ind. Cas. 143.

——S. 115—None against law—There could be no estoppel on the statement of law. A.I.R. 1939 P.C. 201 =1939 O.W.N. 624= 939 A.W.R. 106=43 C.W.N. 1037=1939 A.L.J. 809=42 Bom.L.R. 1=5 B.R. 868= I.L.R. (1939) Kar. (P.C.) 350 (Sup.)=182 Ind. Cas. 753 (P.C.).

——S. 115—None against law—According to the rule of a Municipality, chemicals were liable to Terminal Tax, Municipality did not tax the defendant shop-keeper

whenhe received the consignment of the chemicals. Municiplaity sued him subsequently. Defendant contended that as he was not taxed bfore he concluded that he wa not liable and sold the goods on this basis and that the plaintiff Municipality was estopped from subsequently holding him liable.

Held, that Municiaplity was not so estopped as there cannot be an estoppel on a point of law. A.I.R. 1939 Nag. 195 =1939 N.L.J. 265=183 Ind. Cas. 443.

——**S. 115**—None against law—The doctrine of estoppe cannot be invoked against statutory provisions, and it has its foudation on representation of facts being made. A.I.R. 1938 Cal. 172=65 C.L.J. 590=174 Ind. Cas. 790.

——**S. 115—None against law—Misrepresentation on point of law.**

Everybody is supposed to knwon the law or at least to have as much opportunity of knowing the law as another so that a wrong belief on a point of law cannot strictly be said to be caused by a misrepresentation on the part of another within the meaning of S. 115, Evidence Act. Where therefore, *A*, who according to the Hindu Law is entitled to a one-fourth share in the property is acknowledged as an owner of one-half by *B* in a certain application *B* is not estopped from questioning *A*'s right to more than one-fourth share and claiming his real share. *B* cannot be said to have caused *A* to believe a thing which was not true. A.I.R. 1938 Oudh 110= 1938 O.W.N. 355=173 Ind. Cas. 991.

——**S. 115—None against law—Statute imposing positive duty for doing of the very act which plaintiff seeks to do—Defendant, whether can prevent it.**

Where a statute enacted on grounds of public policy imposes a duty of a positive kind, for the doing of the very act which the party suing seeks to do, it is not open to the defendant to set up an estoppel to prevent it. An estoppel is only a rule of evidence which under certain special circumstances, can be invoked by a party to an action. It cannot avail in such a case as this to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The Court should, first of all, determine the nature of the obligation impsed by the statute, and then consider whether the admission of an estopppel would nullify the statutory provision. A.I.R. 1937 P.C. 114=1937 M.W.N. 663=46 M.L.W. 105= 168 Ind. Cas. 616 (P.C.).

——**S. 115**—None against law—No estoppel can be pleaded against a statute. If the Contract Act declares that a contract by a minor is void, nothing can prevent the minor from pleading that such a contract is void on the ground of his minority. A.I.R. 1937 All. 610=1937 A.L.J. 688=1937 A.W.R. 661=I.L.R. (1937) All. 860= 170 Ind. Cas. 934 (F.B.).

——**S. 115—None against law.**

Estoppel cannot be relied upon to defeat the prohibition of law on the ground of public policy. A.I.R. 1937 Mad. 918=46 M.L.W. 544=1937 M.W.N. 891= 173 Ind. Cas. 659.

——**S. 115—None against law.**

An alienation of immovable property of a Muhammadan minor by his *de facto* guardian is void. There can be no ratification on minor's attaining majority. There can, therefore, be no estoppel on account of any such ratification and the alienation can be subsequently challenged by the minor when he attains majority. A.I.R. 1936 All. 837=1936 A.L.J. 1099=1936 A.W.R. 961=I.L.R. (1937) All. 195=166 Ind. Cas. 61 (F.B.).

——**S. 115—None against law.**

—Plaintiff recorded as *raiyats* in Record of Rights—Suit for ejectment on ground that defendant was under-*raiyat* Defendant induced to take permanent lease contrary to Chota Nagpur Tenancy Act :

Held that the plaintiffs having represented themselves as tenure-holders, could not be permitted to enter into a discussion of question of fact whether they were tenure-holders or *raiyats* but must be held bound by their own representation. No question, therefore of the operation of the statute that under the Chota Nagpur Tenancy Act, a *raiyat* cannot grant any permanent right, could arise. A.I.R. 1936 Pat. 417=17 P.L.T. 380=15 Pat. 589=2 B.R. 403=162 Ind. Cas. 177 (S.B.).

——**S. 115—None against law.**

Mere fact that the judgment-debtor was negligent at an earlier stage and did not object to the attachment itself may affect the question of costs but would not necessarily amount to an estoppel against him, as there should be no estoppeal against a statutory right. A.I.R. 1935 All. 1016=1935 A.W.R. 1105=58 All. 360=1935 A.L.J 1137=158 Ind. Cas. 202.

——**S. 115—None against law—Plea of equitable estoppel, if can be taken against provisions of statute.**

The plea of equitable estoppel cannot be taken against the provisions of a statute. When the Act requires that enhancement of rent can be effected only by means of a registered agreement, the principle of estoppel cannot be allowed to override such a specific provision. A.I.R. 1935 All. 127=1935 A.L.J. 21=4 A.W.R. 997=152 Ind. Cas. 508=18 R.D. 590.

——**S. 115—None against law—Both parties labouring under same erroneous view.**

Mere mis-representation of a matter of legal inference from facts which are known to both parties is not a ground of estoppel.

Where a party made a representation that he had no title to a certain property under the influence of an erroneous view as to his legal rights under a will, which erroneous view was entertained by the other party also.

Held, (1) that he was not estopped from contending, after the will had been properly interpreted by the Courts, that on the right interpretation of the will, he was entitled to the property. Nor could in such a case acts of acquiescence in the possession of the other party estop him as he was ignorant of his legal rights and did not deliberately allow the latter to suffer any detriment by suppressing any knowledge of a defect in his title;

(2) in any event, an admission that he had no title to certain properties could not estop him from claiming title to other properties though his title to the latter was also based on his rights under the will. A.I.R. 1935 Mad. 1062=42 M.L.W. 725=1935 M.W.N. 1265 =70 M.L.J. 592=161 Ind. Cas. 682.

——**S. 115—None against law.**

Suit for declaration against minor who represented himself to be a major and sold property to the plaintiff —Vendee not using due diligence in ascertaining minor vendor's age.

Held, that the vendor was not estopped from pleading minority at the time of the transaction impeached. A.I.R. 1934 Lah. 304 (1)=150 Ind. Cas. 968.

——**S. 115—None against law—Lands burdened with dasbandham service are inalienable.**

Lands burdened with *dasbandham* service are inalienable as being against public policy. The *inamdar* is not estopped from questioning a Court sale of *dasbandham inam* land which he had allowed to be held without protest, inasmuch as estoppel cannot be relied upon to defeat a prohibition in law on the ground of public policy. A.I.R. 1935 Mad. 252=1934 M.W.N. 1407=40 M.L.W. 918=68 M.L.J. 46=58 Mad. 389= 153 Ind. Cas. 817.

——**S. 115—None against law—Parties ignorant of their rights, acquiescing in acts of others.**

Where a person who is ignorant of his right acquiesces in the acts of others with regard to the rights of

the property belonging to him, such acquiescence cannot be taken as estoppel because no estoppel can arise from ignorance of law regarding rights. A.I.R. 1935 Rang. 423=161 Ind. Cas. 221.

——S. 115—None against law.

Railway Company accepting goods for carrying—Bill of lading mentioning "goods received in good condition" and also providing that no English Common Law was applicable—Goods found damaged before being taken into custody by company :

Held, that the clause in the bill of lading did not affect the Railway as their liability did not depend upon the bill of lading or the English Common Law, and therefore, no question of estoppel arose. A.I.R. 1935 Sind 218=159 Ind. Cas. 951.

——S. 115—None against law.

In a suit for declaration against the attachment, the decree-holder is not estopped from raising the objection that the proceeding must be under S. 47 even though he did not raise the plea in proceedings under O. 21, R. 58. A.I.R. 1934 All. 699=153 Ind. Cas. 851.

——S. 115—None against law.

There can be no estoppel against the statute, and the same principle must be applied to a person, who has requested to allot shares on terms of a certain bye-law and subsequently contends that the bye-law is *ultra vires*. A.I.R. 1934 Cal. 537=38 C.W.N. 459=151 Ind. Cas. 165.

——S. 115—None against law—Infringement of right allowed on previous occasion.

Plaintiff is not estopped from asserting his legal rights at any time on the ground that he himself permitted its infringement on some previous occasion. A.I.R. 1934 Lah. 900=155 Ind. Cas. 951.

——S. 115—None against law.

Release deed dones no effect the relinquishment of property existence of which is not disclosed by executee of the deed and in a suit for declaration of title for possession by the executor, the defendant cannot set up the plea of estoppel. A.I.R. 1933 Cal. 253=55 C.L.J. 420=36 C.W.N. 758=143 Ind. Cas. 402.

——S. 115—None against law.

An infant is not estopped from setting up the plea of infancy where he has fraudulently represented that he is of age and thereby induced another to enter into contract with him. A.I.R. 1932 All. 710=139 Ind. Cas. 718.

——S. 115—None against law—Admission on point of law.

An admission on a point of law is not an admission of a thing so as to make the admission a matter of estoppel within S. 115. It is not the case of a person who knows or must be deemed to know the real state of things, creating by his representation, a belief in the mind of a person who does not know the real state of things ; for, quite apart from any representation made by the plaintiff the defendants must be deemed to have known what their legal rights were. A.I.R. 1932 Pat. 267=140 Ind. Cas. 687.

——S. 115—None against law.

Where a deed is presented for registration on behalf of executants by a person not duly authorised by them, the registration is invalid and the fact that executants had represented to the other party that the person who presented it had been duly authorised by them cannot estop the executants from challenging the validity of registration. A.I.R. 1931 P.C. 52=35 C.W.N. 354=53 C.L.J. 198=60 M.L.J. 441=1931 M.W.N. 241 =8 O.W.N. 548=33 M.L.W. 596=33 Bom.L.R. 434= 1931 A.L.J. 489=12 P.L.T. 543 =10 Pat. 481=58 I.A. 58=131 Ind. Cas. 321 (P.C.).

——S. 115—None against law.

The principle of estoppel cannot be allowed to defeat the provisions of statutory enactment which affects the jurisdiction of a Court as a party cannot, by his admission or previous conduct, confer jurisdiction on a Court where none exists. A.I.R. 1931 All. 490=1931 A.L.J. 715=54 A 25=134 Ind. Cas. 236 (F.B.).

——S. 115—None against law.

Section 11 of the Contract Act, being a matter of substantive law, must prevail over S. 115 of Evidence Act, which is merely a matter of procedure. A.I.R. 1931 Bom. 561=33 Bom.L.R. 1313=55 B 741=135 Ind. Cas. 161 (F.B.).

[**Overrules** (1) A.I.R. 1923 Bom. 169=64 Ind Cas. 457.

(2) 21 B. 198.

(3) A.I.R. 1917 Bom. 221=41 B. 480=19 Bom.L.R. 561=41 Ind. Cas. 180.]

——S. 115—None against law.

A promissory note payable to the bearer on demand is illegal under S. 25, Paper Currency Act (10 of 1923). No claim can be founded upon such an instrument against the maker of the same and even an endorsee cannot a claim on the basis of such an instrument against endorser as there can be no estoppel against a clear injunction of a statute. A.I.R. 1931 Cal. 791=58 Cal. 1453=35 C.W.N. 587=135 Ind Cas. 288.

——S. 115—None against law jurisdiction.

In the matter of jurisdiction there cannot be any estoppel simply because a plaintiff undervalued his previous suit. 1930 A.L.J. 1254=A.I.R. 1931 All. 21.

——S. 115—None against law—Transfer of property.

Where the Collector grants a lease of the judgment-debtor's property in execution of the decree transferred to him under Sch. 3, C. P. Code and during the continuance of that lease, the judgment-debtor mortgages the leased property, though such mortgage is prohibited by this schedule, the judgment-debtor must raise the defence that the mortgage is void in the suit on the mortgage, and if he does not do that at that stage he cannot be allowed to do so in the execution of the decree passed in the mortgage suit. 1930 A.L.J. 1594=A.I.R. 1931 All. 38.

——S. 115—None against law—Will.

Dispute relating to genuineness of will in probate proceedings was referred to arbitration by lower Court. No objection was taken to the award on the ground of illegality. But party to arbitration raising the point in appeal.

Held, that he was not estopped from raising the point of illegality of reference in appeal. 128 Ind. Cas. 817 =1930 A.L.J. 1584=A.I.R. 1930 All. 840.

——S. 115—None against statute.

There can be no estoppel against an Act of Parliament or against an Act of Legislature and the principle of estoppel cannot be invoked to defeat the plain provisions of the statute. 122 Ind. Cas. 113=53 Bom. 676=31 Bom.L.R. 778=A.I.R. 1930 Bom. 135.

——S. 115—None against law—Miscellaneous.

There can be no estoppel against Legislature. 31 P.L.R. 842=A.I.R. 1930 Lah. 1034.

——S. 115—None against statute.

There is no estoppel against a statute. 124 Ind. Cas. 250=A.I.R. 1930 Nag. 191.

——None against statute—Transfer of property.

The sale of an occupancy holding is contrary to law and absolutely void and no estoppel arises against a statute. A person resisting suit for possession of an occupancy on the ground that it has been sold to him cannot raise the plea of estoppel. 123 Ind. Cas. 53=7 O.W.N. 438=A.I.R. 1930 Oudh 300.

——S. 115—None against statute—Stamp Act.

It being the duty of a Court to give effect to a statute in spite of the conduct of the parties, there can be no

estoppel against a statute (*e.g.*, the mandatory provisions of S. 336, Stamp Act). 119 Ind. Cas. 472=A.I.R. 1929 Mad. 622.

——S. 115—None against law.

There can be no estoppel contrary to a statutory enactment. 115 Ind. Cas. 642=1929 A.L.J. 889=A.I.R. 1929 All. 549.

——S. 115—None against statute.

The Nawab of Murshidabad executed a lease to the defendants of certain lands and premises to which the Murshiba Act 15 applied for a term of 21 years in consideration of the sum of rupees five lacs as advance of the total rent payable for during the said term of 21 years. The Nawab then sued to recover possession of the demised property and mesne profits, upon the ground that the lease was null and void by reason of the provisions of condition (1) of the Murshidabad Act, 15 of 1891.

Held, that the lease contravened condition (1) of the Act and was therefore null and void,

Held, further, that as the Nawab was a person under disability, he was not estopped from denying the validity of the lease. 118 Ind. Cas. 561=56 Cal. 252=A.I.R. 1929 Cal. 433.

——S. 115—None against statute.

An estoppel cannot have the effect of making a void transfer valid. 6 O.W.N. 233=4 Luck. 622=A.I.R. 1929 Oudh 185.

——S. 115—None against law—Assessment.

Section 31, Act 31, 1858 empowers the Government either to add the revenue assessed upon the alluvial increment to the jumma of the parent estate enter into a new engagement with the proprietor for the payment by the latter of the aggregate amount, or to make a separate settlement for the alluvial increment and to make this increment as a separate estate accordingly. Although on previous occassions to Government chose to exercise their tight in the manner first described, they are not under any obligation to exercise their discretion in the same way on a subsequent occasion when a fresh survey is made of all the accretions. 110 Ind. Cas. 8=32 C.W.N. 906=48 C.L.J. 163=55 I.A. 289 =55 Cal. 1037=A.I.R. 1928 P.C. 193 (P.C.).

——S. 115—None against law—Void contract.

Where a particular act is declared to be void and unlawful by statute a party cannot by representation, any more than by other means, raise against him an estoppel so as to create a state of things, which he is under a legal disability from creating. 111 Ind. Cas. 175=9 Lah. 701=10 L.L.J. 413=30 P.L.R. 160= A.I.R. 1928 Lah. 609 (F.B.).

——S. 115—None against law—Estoppel.

Transfer which is void cannot be validated by recourse to ordinary doctrine of estoppel. 107 Ind. Cas. 897=A.I.R. 1928 Nag. 262.

——S. 115—None against law.

Where sanction of the Court was obtained to sell the properties for a certain amount to pay off the debts due from the estate but the administratrix mortgaged the properties for the amount as fixed for sale at a high rate of interest, *viz.*, 15 p.c., while properties were really worth less than the mortgage amount,

Held, that permission of sale could not be utilized for mortgaging the properties and the administratrix could successfully plead want of sanction, in a suit by the mortgagee to enforce the mortgagee, . 98 Ind. Cas. 915=51 Bom. 16=28 Bom.L.R. 1360=A.I.R. 1927 Bom. 49.

——S. 115—None against law—Acquiescence.

The doctrine of acquiescence cannot be invoked to defeat a clear statutory provision. 99 Ind. Cas. 643 = 1 Luck. 444=13 O.L.J. 553=3 O.W.N. 514=A.I.R. 1926 Oudh 388.

——S. 115—None against law.

An estoppel cannot be invoked to defeat an express provision of law. 92 Ind. Cas. 732=13 O.L.J. 138= A.I.R. 1926 Oudh 311.

——S. 115—None against statute—Succession.

Buddhist Law (Burmese)—Succession—Agreement by father, and son to enjoy property equally—Survivor to succeed excluding heirs—Agreement is invalid as defeating the law, and son's widow is not stopped from questioning the agreement . 95 Ind. Cas. 879=5 Bur. L.J. 56=A.I.R. 1926 Rang. 131.

——S. 115—None against Law—Duty of Court.

No Court can enforce as valid, that which competent enactment have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outest. 86 Ind. Cas. 545=27 Bom.L.R. 770= 29 C.W.N. 893=23 A.L.J. 105=52 I.A. 126=1925 M.W.N. 257=6 L.R.P.C. 66=A.I.R. 1926 P.C. 83 =49 M.L.J. 136 (P.C.).

——S. 115—None against law.

There cannot be any estoppel against a statute nor can the parties contract themselves out of any statute. 87 Ind. Cas. 565=A.I.R. 1925 Cal. 1262.

——S. 115—None against statute—Jurisdiction.

A party to a submission to arbitration through Court can question the validity of the arbitration proceedings on the ground that the Court had no jurisdiction to refer to arbitration. 87 Ind. Cas. 633=29 C.W.N. 886=52 Cal. 559=42 C.L.J. 26=A.I.R. 1925 Cal. 812.

——S. 115—No estoppel against law.

No estoppel exists on a point of law—Grantor can derogate from grant if transaction is expressly forbidden by statute: 12 N.L.R. 100 and 44 Bom. 488, *Foll.* 82 Ind. Cas. 126=20 N.L.R. 162=A.I.R. 1925 Nag. 125.

——S. 115—None against law.

A contract which void cannot create estoppel: 31 Bom. 165, Foll. 78 Ind. Cas. 850=11 O.L.J. 219= A.I.R. 1925 Oudh 16.

——S. 115.—None against law—Contract.

An estoppel cannot operate to override an express provision of law. Where under the Agra Tenancy Act an agreement to pay enhanced rates had to by registered instruments but the tenant paid the enhanced rent in the absence of such an agreement,

Held, that he was not estopped in a subsequent proceeding for rent from asserting that rent was payable only on the old scale. 13 R.D. 859.

——S. 115—None against law.

Representation by disqualified proprietor of his competency to transfer cannot create an estoppel against him. 80 Ind. Cas. 800=11 O.L.J. 502=28 O.C. 34=A.I.R. 1924 Oudh 438.

——S. 115—None against law—Hundi invalid under S. 26, Paper Currency Act.

There can be no estoppel against a clear injunction of a statute and therefore the endorser of a hundi drawn on him which is invalid under S. 26 of the Paper Currency Act is not estopped from denying the validity of the instrument. 42 Mad. 470, Not foll: 40 Mad. 585, Foll. 60 Ind. Cas. 130=44 Mad. 187=39 M.L.J. 573=A.I.R. 1921 Mad. 382.

——S. 115—None against law.

There cannot be any estoppel against a statute and a statutory defence not set up in a prior suit can be set up in a subsequent suit. 65 Ind. Cas. 581 (Cal.).

——S. 115—None against law—Oral gift—Actings of parties.

As there was no registered deed of gift as required by S. 123 of the T. P. Act the gift was not complete in

law and the title to the land still vested in the plaintiff donor. The mere consent of the plaintiff's father to make a gift of the land was not sufficient to vest the land in the Municipality, and in as much as defendant had occupied the land and constructed a part at any rate of the road before the plaintiff's father was induced to make an oral gift of the land, the plaintiff was not estopped from denying the validity of the gift. 22 Bom. L.R. 654=58 Ind. Cas. 403.

——S. 115—None against statute.

The principle of estoppel cannot be invoked to defeat the plain provisions of S. 82 (2) of the B. T. Act. 23 C.W.N. 437=51 Ind. Cas. 408. [But *See* 25 C.W.N. 4=32 C.L.J. 296 (F.B.).)]

——S. 115—None against law.

There is no estoppeal against a statute ; it is Court's duty to give effect to a statute in spite of conduct of the parties in consenting to a decree. (1919) M.W.N. 332=37 M.L.J. 65=50 Ind. Cas. 577.

——S. 115—None against statute—Mortgage—Inclusion of fictitious property—Mortgagor—Estoppel.

In a suit on the mortgage defendants set up that a plot of land and belonging to the mortgagor was fictitiously included so as to give jurisdiction to the registering officer and that the registration was void. *Held*, that the onus lay on the defendants to disprove the existence of the plot of land. The defendants failed to discharge the onus and therefore the suit should be decreed with costs. The principle of estoppel cannot be invoked to defeat the plain a provisions of a statute. 22 C.W.N. 894=48 Ind. Cas. 520.

——S. 115—None against law.

There is no estoppel in Criminal Law. 40 All. 393 =16 A.L.J. 414=19 Cr.L.J. 614=45 Ind. Cas. 519.

——S. 115—None against law.

There can be no estoppel from pleadings against the provisions of a statute. 38 M. 374, Foll. 40 Mad 701=31 M.L.J. 231=20 M.L.T. 129=4 L.W. 48= 35 Ind. Cas. 575.

——S. 115—None against law—Awara—Objections.

A judgment ordering a decree on an award on the receipt of the award from the arbitrators but before the expiry of the period of time allowed for filing on application to set aside the award, on the ground that the parties have in the meantime stated that they have no objections to urge or have already urged their objections, is illegal as such statements of the parties do not amount to an estoppel preventing them from retracting them within the time allowed on the ground of fraud or mistake. 9 S.L.R. 183=34 Ind. Cas. 845

——S. 115—None against law—Limitations to the doctrine—No esteppel against law.

If the parties by their agreement do not make a law for themselves in violation of the law of the land there is nothing to prevent the application of the section to such agreement , and the doctrine that there can be no estoppel against a plain provision of law shall not be taken to far. 29 M.L.J. 219=30 Ind. Cas. 357.

——S. 115—None against law.

There is no estoppel against an act of the legislature. 38 Bom. 709=16 Bom.L.R. 586=28 Ind. Cas. 134.

——S. 115—None against law—Oral agreement to lease—Eviction of tenant.

Where there is only an oral agreement to lease and not a lease registered under S. 17, or the Registration Act there is no lease and the supposed landlord is not estopped from evicting the tenant. 24 Ind. Cas. 790 (Mad.).

——S. 115—None against statute.

The doctrine of estoppel between parties litigating cannot be invoked to nullify an express statutory provision. 24 B. 575, Foll. 19 C.L.J. 126=21 Ind. Cas. 926.

——S. 115—None against law.

No amount of acquiescence will validate a void transaction. It is doubtful if S. 115 applies to transaction expressly declared to be void by the Legislature. 7 S.L.R. 58=21 Ind. Cas. 517.

——S. 115—None against law.

There can be no estoppel against an Act of Legislature. An agreement not to take advantage of the statute of limitation cannot affect the original cause of action unless it in effect acknowledges liability. 36 Cal. 20 ; 38 Cal. 512, Foll. There can be no estoppel against an Act of the Legislature like the Limitation Act and limitation can be pleaded in spite of an agreement to waive it. 38 Cal 512, Foll. 38 Mad. 374= 25 M.L.J. 264=(1913) M.W.N. 676=21 Ind. Cas. 24.

[**Reversing** 23 M.L.J. 335=1912 M.W.N. 967= 17 Ind. Cas. 513].

——S. 115—None against the law—Sale—Illegality—Judgement-debtor's right to apply.

Where, overruling the judgment-debtor the Court orders the sale of certain property in execution contrary to the provisions of a statute, the judgment-debtor is not prevented from pleading its invalidity as being opposed to law. 40 Cal. 534=21 Ind. Cas. 117.

——S 115—None against law.

The rule that there can be no estoppel against a statute, does not apply unless both the parties are aware of the fact that a statutory provision is being violated. 1913 M.W.N. 525=24 M.L.J. 664=14 M.L.T. 237 =20 Ind. Cas. 385.

——S. 115—None against law—Consent—Illegal order—Consent to an ultra vires order of a Municipality.

Consent given to an order of a Municipality which is *ultra vires* cannot estop the person from suing for a declaration that the order is *ultra vires* especially when the Municipality has not acted on the consent to its prejudice. 20 C.L.J. 138=20 Ind. Cas. 358.

——S. 115—None against law.

There is no estoppel against the precise terms of a provision of a Code. 15 C.L.J. 451=13 Ind. Cas. 326.

——S. 115—None against law.

Defendant can plead that he was incompetent to alienate property sold by him. At least plaintiff cannot succeed where his title contravenes the provisions of statute. 12 C.L.J. 479=10 Ind. Cas. 928.

——S. 115—None against law—Statutory right.

A mortgagor J. D's right to have a decree absolute to be passed is for his benefit and he may contract himself out of it as it is not against public policy. If he does so he cannot be allowed to turn round and plead want of the decree absolute. 14 C.L.J. 648=10 Ind. Cas. 536.

——S. 115—None against law.

There can be no estoppel against an act of the legislature. 38 Cal. 512=13 C.L.J. 693=10 Ind. Cas. 467.

——S. 115—None against law—Suit for rent—Unregistered lease.

The right to recover rent in the case of an unregistered lease arises not upon the lease because according to law no lease exists but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel in S. 115 of the Evidence Act. 33 Bom. 610=10 Bom.L.R. 1146=4 Ind. Cas. 804.

——S. 115—None against law.

The principle of estoppel cannot be invoked to defeat the plain provisions of a statute. 36 Cal. 920=4 Ind. Cas. 414.

——S. 115—None against law—Public policy—Adoption by a dancing girl.

An adoption by a dancing girl for purposes of prostintion is invalid. Such an adoption cannot be validated tu the ground of estoppel as an estoppel cannot defeat a prohibition based on the ground of public policy. 59 Ind. Cas. 214=28 M.L.T. 106=12 L.W. 7.

——S. 115—None against law—Part-performance —Unregistered exchange—Actings of parties.

Plaintiffs and defendant exchanged adjacent lands worth more than Rs. 100 each by an unregistered deed both *bona fide* believing they had effected a valid transfer. Possession was taken by each and the defendant built considerable structures on the property exchanged. Plaintiff was aware of the progress of the building and even took an additional sum of money for the excess area found to have been given in exchange. In a suit by the plaintiff to eject the defendant; *Held*, by the majority that the plaintiff was not estopped and that he was entitled to recover his plot owing to the absence of a registered conveyance as required by Ss. 54 and 118 of the T.P. Act.

Per *Abdur Rahim, J.*—Plaintiff was estopped by his conduct from recovering the plot in spite of the absence of a formal conveyance. 40 Mad. 1134=6 L.W. 300 =22 M.L.T. 173=33 M.L.J. 252=(1917) M.W.N. 757=42 Ind. Cas. 138.

——S. 115—None against law—Right to appeal—Bidding at Court auction.

A joint owner who bids at the auction of the joint lands held under orders of the Court under the partition Act, is not by that Act estopped from filing an appeal in the matter. 61 P.L.R. 1915=86 P.W.R. 1916= 96 P.R. 1916=140 P.W.R. 1916=34 Ind. Cas. 587.

——S. 115—None against law—Public policy—Stifling criminal prosectuion—Money received.

The defendant in a suit for refund of money paid to stifle a prosecution is not estopped from showing that the money he seeks to recover was really due to him, if he has specifically put forth such plea. 28 Ind. Cas. 134; 9 B. and C. 902; (1903) A.C. 49, Foll. 40 Mad. 285=31 M.L.J. 264=34 Ind. Cas. 401.

——S. 115—None against law—Public policy—Estoppel.

The creation of estoppel cannot legalise a transfer contrary to public policy. 37 Ind. Cas. 360 (Pat.).

——S. 115—None against law—Applicability so as to defeat provisions of statute—No.

The principle of estoppel cannot be invoked to defeat the plain provisions of a statute and a defendant cannot evade the effect of S. 54, T. P. Act by saying tha his vendor, having received in part consideration for the sale, is estopped from contending there is no sale for want of registration of the sale-deed. (1909) 36 C. 920=4 Ind. Cas. 414.

35. None if truth known.

——S. 115—Party not led by representation to change his position—Whether can raise plea of estoppel.

It is not open to a party to raise the plea of estoppel against another if he has not been led by any representation made by the other to change his position in any way. I.L.R. (1947) Nag. 341=230 Ind. Cas. 471= A.I.R. 1948 Nag. 19=1947 N.L.J. 230.

——S. 115—No estoppel when facts known.

No estoppel arises when all the facts are fully known to the person pleading the estoppel. 230 Ind. Cas. 320=48 Cr.L.J. 609.

——S. 115—None, if truth known.

There can be no estoppel in the case of joint fraud where the facts are known to both the parties. A.I.R. 1941 Bom. 274=I.L.R. (1941) Bom. 575=43 Bom.L.R. 681=196 Ind. Cas. 90 (F.B.).

——S. 115—None, if truth known—Misrepresentation.

If a party is fully acquainted with the actual facts of the case, there cannot be in fact, any misrepresentation by the other party upon which the former could have been induced to act or alter his position. 1940 Cal. 436=44 C.W.N. 761=193 Ind. Cas. 26.

——S. 115—None, if truth known.

Section 115, Evidence Act, does not apply to a case where the statement relied upon is made to a person knows the real fact who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties. A.I.R. 1940 Lah. 254=191 Ind. Cas. 830.

——S. 115—None, if truth known—Person knowing property to have been sold, repairing it.

In order to bind a person by estoppel, it must be shown that the person incurring the expenditure did so under a *bona fide* belief that he was entitled to the land over which he was incurring the expenditure. Consequently, where knowing that a certain property constituted part of the property sold to the plaintiff, the defendants, of their own accord, incur expenditure by repairing buildings thereon, they cannot raise any plea of estoppel based upon their own conduct. A.I.R. 1937 Oudh 263=1937 O.W.N. 252=13 Luck. 192=167 Ind. Cas. 414.

——S. 115—None, if truth known—Decree-holder knowingly acquiescing in disbursement to judgment-debtor.

A decree-holder who knowingly acquiesces in the disbursement of money due to the judgment-debtor cannot, afterwards, come forward and say that the amount ought to have been kept for his benefit. A.I.R. 1936 Nag. 163=I.L.R. (1936) Nag. 172=166 Ind. Cas. 950 (2).

——S. 115—None if facts known—Real state of facts at variance with facts represented, knowing to party pleading estoppel.

In order to attract the doctrine of estoppel, there must be representation of a fact and on the faith of that representation, the act must be done. These two factors *prima facie* attract that doctrine. It would not be applied if the real state of facts, which is at variance with the facts represented, be known to the party pleading estoppel. It would not be applied also to defeat a statutory enactment on the principle that there is no estoppel against a statute. A.I.R. 1935 Cal. 481=39 C.W.N. 1014=168 Ind. Cas. 525.

——S. 115—None, if facts known.

No duty should be laid on one of the parties in respect of a matter which was or should have been equally within the cognizance of both parties. A.I.R. 1934 P.C. 83=38 C.W.N. 344=148 Ind. Cas. 546 (P.C.).

——S. 115—None, if truth known—Mutual convenience.

[Essential condition for estoppel explained.]

Where both parties are aware of the circumstances and were merely make a temporary arrangement for their mutual convenience, estoppel will not operate in respect of the arrangement. A.I.R. 1934 All. 75= 17 R.D. 1048=147 Ind. Cas. 715.

——S. 115—None, if truth known.

A party relying upon S. 115 has to establish not only that the opposite party had made a certain declaration but that the said declaration had been believed and had been acted upon and that it was not reasonably possible for the said party to know the true state of affairs by pursuing enquiries reasonably and with diligence. Where truth is accessible to a party, the plea of estoppel upon representation fails. 122 Ind. Cas. 871=52 All. 248=A.I.R. 1930 All. 847.

——S. 115—None, if truth known—Conduct—Notice.

Where after receiving notice of a preveious burden a person takes a mortgage of a property and advances money, he must be considered to have thought the property worth the further advance subject to the previous burden. 126 Ind. Cas. 17=A.I.R. 1930 All. 431.

——S. 115—None, if truth known.

Where the statement relied on is made to a party who knows the real facts and is not misled, there can be no estoppel: 30 Cal. 539, Foll. 113 Ind. Cas. 313=30 Bom.L.R. 1519=A.I.R. 1929 Bom. 24.

——S. 115—None, if truth known.

Railways Act (IX of 1890), S. 77—Claim for damages for loss of goods—Notice given to one of the two Railway Companies and forwarded by it to the other—Later company making enquires in the matter and repudiating its liability —Absence of notice cannot be pleaded by the latter Railway Company: 110 Ind. Cas. 718=A.I.R. 1928 Lah. 438.

——S. 115—None, if truth known.

When both parites are equally conversant with the true state of the facts it is absured to refer to the doctrine of estoppel. 99 Ind. Cas. 772=38 M.L.T. 32=A.I.R. 1927 Mad. 458.

——S. 115—None, if truth known.

The mere fact that the revisioners stood by and asked another person to purchase the property from the female holder, would not in any way estop them from setting up a claim to the property where the purchaser knew that the holder had only a life-interest in it. 99 Ind. Cas. 772=38 M.L.T. 32=A.I.R. 1927 Mad. 458.

——S. 115—None, if truth known.

There can be no estoppel where parties are aware of the facts. 6 O.C. 331, Foll. 95 Ind. Cas. 585=A.I.R. 1926 Oudh 506.

——S. 115—None if truth known—Both parties knowing true state of facts—No estoppel arises. 93 Ind. Cas. 279 =13 O.L.J. 463=A.I.R. 1926 Oudh 361.

——S. 115—None, if truth known—No estoppel exist where the other party knows the truth. 85 Ind. Cas. 855=21 M.L.W. 336=A.I.R. 1926 Mad. 95=47 M.L.J. 622.

——S. 115—None, if truth known.

But where the truth of the matter is known to both parties there can be no estoppel. 30 Cal. 539 (P.C.), followed. 78 Ind. Cas. 850=11 O.L.J. 219=A.I.R. 1925 Oudh 16.

——S. 115—None, if truth known.

There is no estoppel in favour of a man who knew a l the facts of the case, so a co-signatory to a mortgage-deed is not estopped in a suit for contribution by the other executant to deny that the latter alone mortgaged his property and that he (the de- fendant) mortgaged none. 85 Ind. Cas. 498=22 A.L.J. 855=5 L.R.A. (Civ.) 673=A.I.R. 1924 All. 787.

——S. 115—None, if truth known.

A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy. 162 P.R. 1919, followed. 69 Ind. Cas. 543=A.I.R. 1924 Lah. 294.

——S. 115—None, if truth known.

Registration Act, S. 28—Mortgagor is estopped from pleading want of title unless mortgagee knew real facts —Non-existence of property indicates fraud of both parties. 78 Ind. Cas. 398=A.I.R. 1924 Nag. 363.

——S. 11—None, if truth known-

A person who know the truth can hardly be allowed to rely upon an estoppel arising from a false representation. No estoppel can arise where the truth is known to the party who claims the estoppel, nor unless it is shown that the party claiming estoppel ever intended to do a thing and was prevented from doing so by the act of assertion of the other person. 72 Ind. Cas. 548=17 M.L.W. 755=1923 M.W.N. 225=A.I.R. 1923 Mad. 568.

——S. 115—None, if truth known.

There can be no estoppel where the other side knows the full facts and even a representation on a matter of law, *i.e.*, as to the validity of an adoption creates no estoppel. 70 Ind. Cas. 653=1922 M.W.N. 481=A.I.R. 1923 Mad. 11.

——S. 115—None, if truth known.

There is no estoppel where both parties knew the actual facts but chose to act on the supposition that the facts were otherwise. 74 Ind. Cas. 295=10 O.L.J. 24= 26 O.C. 1329=A.I.R. 1923 Oudh 173.

——S. 115—None, if truth known.

Where the truth is known to both the parties there is no case of estoppel. 75 Ind. Cas. 1022=4 P.L.T. 534= 1923 P.H.C.C. 177=2 Pat. 585=A.I.R. 1923 Pat. 464.

——S. 115—None, if truth known.

Where a party has not been misled by the representation made by anoher, that other is not estopped. 63 Ind. Cas. 109=36 C.L.J. 73=A.I.R. 1921 Cal. 453.

——S. 115—None, if truth known.

Estoppel is only a rule of evidence which precludes a person from denying the ruth of some statement previously made by him or the conventional statement of facts upon the basis of which an agreement has been entered into. 12 S.L.R. 78=49 Ind. Cas. 449.

——S. 115—None, if truth known—Negligence—Effect.

A person put on notice and who could by reasonable diligence have discovered the true facts cannot plea: estoppel. 46 Ind. Cas. 228 (Cal.).

——S. 115—None, if truth known.

The person who pleads estoppel must show that he was ignorant of the truth in regard to the representation of the other party. 3 Pat. L.W. 360=(1918) P.H.C.C.= 21=42 Ind. Cas. 425.

——S. 115—None, if truth known.

There can be no estoppel where the truth as to the matter stated is known to both parties. Nor can there be an estoppel to defeat the plaint provision of the law. 13 N.L.R. 130=42 Ind. Cas. 200 (F.B.).

——S. 115—None, if truth known.

Estoppel under S. 115 does not arise where the party to whom a representation is made does not believe it to be true or known the real facts, for the resulting conduct is in no sense the effect of the representation. 1 Pat.L.J. 16=3 Pat.L.W. 164=34 Ind. Cas. 375.

——S. 115—None, if truth known.

There is no estoppel where the false statement is made to a person who knows the real facts and is!not misled by the statement. 20 C.W.N. 418=32 Ind. Cas. 388.

——S. 115—None, if truth known.

An estoppel arises only when a man is not allowed to deny the truth of some matter which he has made another to believe to be true. Where it as agreed between the parties that the claim petition of the defendant should be allowed but without costs and that the plaintiff should

apparently in consideration of the first defendant giving up his costs refrain from institution a suit.

Held, that S. 115 of the Evidence Act did not apply and there was no estoppel. Whether such an agreement be void on the principle contained in S. 28 of the Contract Act. (1915) M.W.N. 237=28 Ind. Cas. 536.

——S. 115—None, if truth known.

The defendants with full knowledge of the Ikrar and of their own wrong could not plead estoppel by acquiescence. on the part of the plaintiff. 21 Ind. Cas. 256. (Oudh).

——S. 115—None, if truth known—Facts known to party.

If the true state of facts were knwon to a person or if he had any means of acquiring a knowledge of the truth neither he nor his representative can invoke the aid of estoppel. 23 W.R. 747 ; 36 W.R. 456; 77 R.R. 715, Rel. The foundation of estoppel arising out of an execuution, sale, must be laid on a representation made before and not after the sale. Consequenbtly the sale proclamation must be produced as the sale certificate would not by itself be sufficient to sustain the plea of estoppel. 40 Cal. 173= 17 C.W.N. 137=16 C.L.J. 202=16 Ind. Cas. 365. [**Also** 37 Mad. 38=12 Ind. Cas. 568 ; **Also** 15 C.W.N. 572= 9 Ind. Cas. 662.].

——S. 115—None, if truth known.

There is no estoppel when truth is known to the person pleading it nor can it be used to defeat a plain provision of law. There can be no rectification of a transaction when the promissor was not in a position to contract. A cause of action cannot be founded on an estoppel nor does an estoppel arise from a representation of a mere intention 37 Mad. 38=21 M.L.J. 1077=10 M.L.T. 385=(1911) 2 M.W.N. 461=12 Ind. Cas. 568.

——S. 115—None, if truth known—Both parties aware of facts and laws.

Where both parties are equally informed of the facts or law with regard to a particular question there is no estoppel. 46 P.R. 1912=127 P.L.R. 1912=180 P.W.R. 1912=13 Ind. Cas. 432.

——S. 115—None, if truth known—Name inserted as arbitrator fradulently in submission to arbitr tion—Party with knowledge keeping silent if can afterwards object.

Where the parties to asubmission to an arbitrator did not object when they came to know that a name was fraudulently entered in the submission as an arbitrator they cannot afterwards impeach the award. 15 C.L.J. 360=13 Ind. Cas. 161.

——S. 115—None, if truth known.

Where the facts are known there is no estoppel. 15 C.W.N. 572=9 Ind. Cas. 662.

——S. 115—None, if truth known.

Where both parties to a suit either know or have the means of knowing that a sale was effected for a fraudulent or immoral purpose, or was opposed to public policy, neither will be estopped from proving facts which would render the sale-deed void *ab initio*. 5 N.L.R. 146=4 Ind. Cas. 233.

——S. 115—None, if truth known—Misrepresentation no misleading the party—Full knowledge of facts—Effect.

There can be no estoppel where the defendant being fully aware of the position and powers of the plaintiff and the nature of the property, did not act upon any mistaken belief as to the title induced, by the misrepresentation of the plaintiff. 6 O.C. 355, Foll. 12 O.C. 236= 8 Ind. Cas. 549.

——S. 115—None, if truth known.

Where both parties are equally conversant with facts the doctrine of estoppel cannot be referred to. 35 Bom. 182=13 Bom. L.R. 92=9 Ind. Cas. 765.

——S. 115—None, if truth known—Mortgage by undivided coparcener—Partition—Purchase by other coparceners with knowledge of the equitable right of the mortgagee.

Two coparceners *A* and *B* who purchased the interest of another co-parcener *C* under the money-decree obtained in a partition suit with full knowledge of the mortgage in favour of the plaintiff *C* are estopped from contesting the right the plaintiff had. (1907) 7 C.L.J. 644.

——S. 115—None, if truth known—Deed in fraud of creditors—Benami executant seeking to set aside his own deed.

Under certain circumstances, the plaintiff (executant of a deed in favour of another to defraud his creditors) might be estoped from setting up a title in himself; but whereas in this case, the nominal transferee and the purchaser from him were of the true nature of the deed of relinquishment, they cannot set up a title by estoppel. (1906) 4 C.L.J. 22=10 C.W.N. 650=33 Cal. 967.

——S. 115—None, if truth known.

None if truth known—There will be no estoppel, when the real facts are known to both parties. (1906) 34 Cal. 13 =4 C.L.J. 573.

——S. 115—None, if truth known—Essentials—Applicability of, to minors—No estoppel when both parties are aware of truth—Privilege of infancy.

There can be no estoppel where the truth of the matter regarding which a statement is made is known to both parties to the transaction. A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy, 4 De. G. & J 488, approved.

Quaere.—Whether S. 115 of Evidence Act applies to infants. (1903) 7 C.W.N. 441=5 Bom.L.R. 421=30 C. 539=30 I.A. 114 (P.C.).

36. Non-production of evidence.

——S. 115—Non-production of evidence—Omission to call for document—Non-production by opposite side—No adverse inference.

Where the onus is on the plaintiff, it is within his power to call for papers in the defendant's possession, if he desires to do so and if he does not do so, he cannot make a grievance of the fact that they were not produced by the defendant A.I.R. 1931 Cal. 239=34 C.W.N. 1113=133 Ind. Cas. 573.

——S. 115—Non-production of evidence—Certified copies only of former applications filed—Evidence of identity available but not given—No estoppel created.

Where certain facts have been admitted by certain persons in certain applications the mere production of their certified copies without evidence of identity, when such evidence is available, only shows that persons purporting to be the persons sought to be estopped by the applications, made the applications and that the officer before whom they were made was satisfied as to their identity. This is not a sufficient for creating an estoppel against these persons so as to preclude them from deny the contents of the applications. 124 Ind. Cas. 369= A.I.R. 1930 Sind 150.

37. Omissions.

——S. 115—Omission—Statement in judgment that particular point was not supported—Whether amounts to estoppel.

Statement of omission to support a particular finding of the First Court in the judgment of the Appellate Court does not estop the party from sustaining it before the Privy Council. 30 All. 510=13 C.W.N. 1=8 C.L.J. 447=5 A.L.J. 701=35 I.A. 166=1 Ind. Cas. 165 (P.C.).

——S. 115—Omission—Silence—Proprietary interest—Wrong entry in settlement.

It is open to co-sharers to plead in a suit that th

entry in the settlement papers was wrong even though 27 years have already elapsed. 50 Ind. Cas. 767=17 A.L.J. 588.

——S. 115—Omissions—Omission to claim relief—Deliberate omission bars a subsequent suit.

Deliberate omission of a right relief with its perfect knowledge bars a subsequent suit for the relief so omitted. 37 All. 646=13 A.L.J. 929=30 Ind. Cas. 951.

——S. 115—Omission—Notice—Reply notice.

The mere neglect to answer a notice cannot make a ground for estoppel. 15 Bom.L.R. 333=19 Ind Cas. 789.

——S. 115—Omission—Duty to speak—Necessary.

The principle of estoppel by silence is not applicable to a person who keeps silent over a thing when he is under no duty to speak. 21 C.L.J. 441=29 Ind. Cas. 734.

——S. 115—Omission—Land acquisition case—Persons omitting to make claim—Effect of.

In land acquisition cases persons deliberately omitting to claim the property to be required or accepting the award treating the land as 'shamilat' cannot afterwards assert their right in Civil Court. 138 P.W.R. 1909=4 Ind. Cas. 1146.

——S. 115—Omission—Mortgage—Not impugned in prior proceedings.

Where a party who had been impleaded as defendant in prior proceedings failed to prove the unreal nature of a mortgage transaction though the mortgage-deed had been put in and he had been given an opportunity to do so, he is estopped from impugning the mortgage in a subsequent suit. 9 M.L.T. 294=9 Ind. Cas. 136.

——S. 115—Omission—Wrong parties impleaded—Failure to object.

Some persons, who were wrongly impleaded as defendants in execution proceedings and who did not prefer any claim to plaintiff's attachment and sale of property therein, were not estopped, by the said circumstance, from making a claim in subsequent suit or proceedings. 9 M.L.T. 95=8 Ind. Cas. 161.

——S. 115—Omission—Agreement between co-mortgagors to pay off prior mortgage—Failure to inform.

Where two persons agree to pay off a prior mortgage and take a first charge on the property, it is the legal duty of each to inform this co-mortgagee within a reasonable time that he had still an outstanding claim under the prior mortgage. The omission to give the information operates as an estoppel. 44 Ind. Cas. 547 (Nag.).

——S. 115—Omission—Puisne mortgagee bidding unsuccessfully at Court sale on decree on prior mortgagee—Puisne mortgagee not disclosing his mortgage.

A puisne mortgagee not a party to a suit by the prior mortgagee is not estopped from claiming his remedies, merely because he bid unsuccessfully for the property at the Court-sale in execution of the mortgage decree without disclosing his own mortgage. 9 N.L.R. 160=21 Ind. Cas. 608.

——S. 115—Omission—Mutation proceedings—Persons not parties thereto.

Persons not parties to a mutation proceeding, cannot be bound by it unless it could be shown that they have acquiesced in such proceeding. 20 Ind. Cas. 861 (Oudh).

——S.115—Omission—Sale—Proclamation—Omission to state arrear of rent—Material omission.

Where the landlord who brings the holding of his tenant so sale omits to mention the arrear of rent due on the land hold and the purchaser purchases the same without knowing of the existence of any arrear, the landlord loses his lien on the land for the arrears so due. (1900) 5 C.W.N. 497.

38. Parties and privies.

——S. 115—Parties and privies—Prior purchaser of land, if estopped as privy in estate by judgment in action against vendor after purchase—Estoppel by representation—Principle applicable—Landlord's lessee held not estopped as his privy by representation made by landlord after title had vested in lessee.

In execution of a decree for arrears of rent obtained against *C*, his holding was sold and purchased by the landlord, the landlord took out a certificate under the Public Demands Reccovery Act against *C* for the rents of the subsequent years. There was no representation that *C* was in possession of the land. The certificate Court issued a notice under S. 7 of the Act, and this notice was duly served upon *C*. While the cetificate proceedings were pending, the landlord obtained possession of *C*'s land which he had purchased in the rent execution case, and settled it with *D*. The land was sold in the certificate proceeding and was purchased by the plaintiffs. The plaintiffs got possession of it though the certificate Court. Afterwards, there was a dispute as to possession between the plaintiff and *D* and the latter was declared to be in possession by an order made under S. 145, Criminal Procedure Code in 1937, the plaintiffs instituted a suit for a declaration of their title to and recovery of possession of the disputed land. The point raised was that the landlord having represented openly and publicly when he obtained certificate that the disputed land belonged to *C* and having got the land sold on the footing was estopped from asserting that the land did not belong to *C* and *D* was also bound by the doctrine of estoppel as his privy or representative in interest.

Held, that notice under S. 7, Bihar and Orissa Public Demands Recovery Act did not amount to a representation or any statement by the landlord to the effect that *C* was still in possession of the disputed land. The utmost that could be said for the plaintiff was that there was a representation by the landlord at the time when the land was actually sold; but the estoppel raised on that ground could not operate against *D* because the title had vested in *D* before the disputed land was put up for sale and purchased by the plaintiffs. A.I.R. 1942 Pat. 317=23 P.L.T. 213=201 Ind. Cas. 560=8 B.R. 806.

——S. 115—Parties and privies—Pre-emption—Plaintiff not taking out position of legal representative of deceased—Widow of deceased ultimately made legal representative—In execution of decree, Court executing deed for and on behalf of widow as legal representative—Plaintiff, held not party to deed and was not estopped from seeking pre-emption.

Where the plaintiff never put himself forward as an heir of the deceased in the first instance but that the decree-holder himself proceeded to execute the decree obtained against the deceased against plaintiff alleging him to be such legal representative and the decree-holder was trying to execute the decree against some other persons whom he alleged to be the legal representatives of the deceased, and finally the deed was drawn up on behalf of the widow of the deceased as his sole legal representative to the exclusion of the collaterals or reversioners, the plaintiff cannot be said to be a party to the deed so as to estop him from seeking pre-emption of the property conveyed by the deed. A.I.R. 1941 Oudh 611=1941 O.W.N. 1021=1941 A.W.R. Rev. 760=17 Luck. 164=195 Ind. Cas. 880=1941 R.D. 782.

——S. 115—Parties and privies—

A defendant who claims title from a person other than the plaintiff is not estopped from pleading adverse possession in the alternative. A.I.R. 1941 Oudh 454=1941 O.W.N. 843=1941 A.W.R. Rev. 604=195 Ind. Cas. 168=1941 R.D. 559.

——S. 115—Parties and privies—Grandfather treating property as self-acquired—Grandson, if bound by this admission.

The fact that the grandfather treated the property as his own self-acquired property is not an admission binding upon the grandson who claims independently under the law. A.I.R. 1941 Oudh 230=1941 O.W.N. 214=16 Luck. 302=1941 A.W.R. C.C. 58=192 Ind. Cas. 643.

——S. 115—Parties and privies—District Board issuing licenses to motor bus for two months—Board having no power to issue licenses for shorter period than 1 year—Owners accepting—If can subsequently contend that licenses were ultra vires.

District Board, through its special officer issued license to the motor bus owners for a period of two months only. The owners accepted the licenses with the knowledge that they were issued for two months only. Subsequently, she contended that the Board had no authority to issue licenses for a temporary period of two months but for a period of one year :

Held, that the act of the special officer was the act of the District Board and, therefore, the ordinary laws of estoppel that arise out of the conduct of principals apply equally well to a contract of this nature entered into by the District Board through its executive officers with the motor bus proprietors, who were estopped from denying that the Board had authority for issuing licenses for a period of two months. The question of estoppel was not affected by the *ultra vires* nature of the order. A.I.R. 1938 Mad. 227=1937 M.W.N. 1223 (2)=(1938) 1 M.L.J. 391=177 Ind. Cas. 126.

——S. 115—Parties and privies—Patta **describing status of grantor as** raiyat **at fixed rate and conferring heritable right on grantee—**Patta **accepted by representatives of grantor.**

Where a *patta* described the status of the grantor as a *raiyat* at fixed rate and on that footing a heritable right was conferred on the grantee and the representative of the grantor accepted the *patta* and based their claim for rent on it :

Held, that they could not subsequently go back upon the grant and treat the heirs of the grantee as trespassers. A.I.R. 1935 Cal. 706=61 C.L.J. 9=159 Ind. Cas. 11.

——S. 115—Parties and privies—Person coming in possession under mortgagor.

As a rule, any person who comes into possession of the mortgaged property under the mortgagor is treated as being in privity with him and is estopped from denying the tile of the mortgagee. A.I.R. 1935 Cal. 666=61 C.L.J. 560=159 Ind. Cas. 159.

——S. 115—Parties and privies—Non-claimer by earlier grantees of different kinds of accretion—Whether precludes later grantees from claiming right.

The fact that some of the carlier grantees acquiesced in fresh grants being made by the Government of lands which they might have claimed for themselves as accretions cannot have any adverse effect upon the rights claimed by subsequent grantees when the accretions in the earlier cases were different from those subsequently claimed. A.I.R. 1934 P.C. 17=11 O.W.N. 217=1934 M.W.N. 212=66 M.L.J. 239=39 M.L.W. 271=38 C.W.N. 337=12 Rang. 136=59 C.L.J. 269=3 A.W.R. 281=61 I.A. 18=147 Ind. Cas. 657=18 R.D. 107 (P.C.).

——S. 115—Parties and privies—Transferee accepting transfer on stipulation contained in deed—Whether bound by them.

Conveyancing in India is generally unilateral in a sense, as sale-deeds, mortgage-deeds and the like are all executed by the transferor. The stipulations contained in the sale-deed or the mortgage-deed are binding on the transferees. If the transferee accepts the transfer on conditions stated in the deed, he cannot resile from those conditions. A.I.R. 1934 All. 447=150 Ind. Cas. 601.

——S. 115—Parties and privies.

Decree creating charge in favour of *A* against *B*—*B* subsequently mortgaging the property to *C* and again to *D* directing *D* to pay off the decree obtained by *A*—*D* paid up the decree—Suit by *C*—*D* claiming priority to the extent of the decretal amount paid by him—*C* contending that he had no notice :

Held, that *D* was not estopped by the fact that *B* had stated in the mortgage to *C* that there was no encumbrance, as *D* was not, in claiming the right of subrogation, claiming any right of *B* but an independent right. A.I.R. 1934 Mad. 353=1934 M.W.N. 80=66 M.L.J. 566=39 M.L.W. 732=150 Ind. Cas. 930.

——S. 115—Parties and privies—Person entering as life-tenant under will—Estoppel against denying title of remaindermen—Estoppel, whether binds his heirs.

Though where a person who *ex hypothesi* has no title at all went into possession for a life-estate under a will, he might be estopped from denying the remaindermen's title; his son who enters into possession after his father's death without any title, his father having had nothing to pass to him cannot be affected by his father's estoppel. The mere fact that he would have succeeded as heir to his father if his father had left an heritable estate does not make him a privy of his father for the purposes of the rule of estoppel. A.I.R. 1932 P.C. 172=1932 A.L.J. 691=9 O.W.N. 614=59 I.A. 268=56 C.L.J. 36=34 Bom.L.R. 1299=36 M.L.W. 146=36 C.W.N. 937=63 M.L.J. 336=7 Luck. 324=137 Ind. Cas. 539 (P.C.).

——S. 115—Parties and privies—

The defendant-divorced his wife by a valid *talak* on July 21, 1919 and requested *kazi* to communicate it to plaintiff, his wife. The *kazi* informed her on August 24, 1919 but stated by mistake that *talak* was dated August 21, 1919, instead of July 21, 1919. The plaintiff's suit for deferred dower was filed on July 25, 1922, more than three years from the real *talak*.

Held, defendant was estopped from showing that date of *talak* was earlier than August 21, 1919 as he had constituted *kazi* as his agent and representation made by agent effectual for the purpose of estoppel as if it had been made by principal. A.I.R. 1931 Mad. 647=1931 M.W.N. 570=133 Ind. Cas. 375.

——S. 115—Parties and privies.

Where a person assuming the position of a trustee in respect of property as to which there was no previous dedication, obtains from the Court, declaration that that property is trust property and acts as such trustee but subsequently alienates the preperty as his own private property, the alienee is entitled to set up a defence in a suit filed by a succeeding trustee for a declaration as to the invalidity of the alienation, that the property is not trust property. A.I.R. 1931 Mad. 97=1930 M.W.N. 1217=60 M.L.J. 155=33 M.L.W. 485=130 Ind. Cas. 463 (F.B.).

——S. 115—Parties and privies—Auction-purchaser.

Although a person holding a ganti interest in the land and granting a permanent lease of the same land will be estopped from asserting his right as a ryot, the purchaser of that interest at an auction sale, who obtains a new title from the landlord at an increased rent, will not be so estopped. 105 Ind. Cas. 641=A.I.R. 1928 Cal. 87.

——S. 115—Parties and privies.

An execution purchaser is the representative of the judgment-debtor so as to bring him within the rule of estoppel and the principle of *res judicata:* A.I.R. 1922 Pat. 63, followed. 97 Ind. Cas. 205=1926 P.H.C.C. 249=A.I.R. 1926 Pat. 478.

——S. 115—Parties and privies—Father and son.

Consent of father and grandfather to an adoption does not bind the son or grandson. 96 Ind. Cas. 749=8 Lah. 48=A.I.R. 1926 Lah. 654.

——S.115—Parties and privies—Husband and wife.

A widow claiming through her husband cannot impeach a settlement come to by her husband with other members of the family whereby he released by necessary implication the interest which he had in the property. 94 Ind. Cas. 535=A.I.R. 1925 P.C. 306 (P.C.).

——S. 115—Parties and privies—Party bound.

Where a lease, purporting to be of a permanent character, is granted by a person who, on the face of the document,confesses to have a higher status than that of a raiyat the grantee may invoke the doctrine of estoppel against the grantor and the persons claiming through him.

The question of invalidity of the lease may be raised by the landlord or a person claiming through him or by some one who has a permanent title, but not by the grantor or any one claiming through him. A.I.R. 1921 Cal. 451 (F.B.) followed. 105 Ind. Cas. 290=A.I.R. 1928 Cal. 156.

——S. 115—Parties and privies.

A person represented that a lady was full owner of a certain property, and accepted a transfer of a portion of it from her.

Held, that he could not be allowed to deny the truth of the representation in a suit between himself and the representatives of the lady. This is exactly the kind o estoppel defined in S. 115, Evidence Act. 85 Ind. Cas 509=12 O.L.J. 1=28 O.C. 8=A.I.R. 1925 Oudh 337.

——S. 115—Parties and privies—Representative.

Estoppel is purely personal and will not affect others in so far as they claim a title otherwise than through the person estopped primarily. 14 Cal. 401, followed. 85 Ind. Cas. 540=A.I.R. 1925 Cal. 993.

——S. 115—Parties and privies.

An estoppel available to a certain person will be available to his transferees in respect of the interest transferred. 85 Ind. Cas. 509=12 O.L.J. 1=28 O.C. 8=A.I.R. 1925 Oudh 337.

——S. 115—Parties and privies—Reversioners.

No act or omission by presumptive reversioners can amount to estoppel against actual reversioners. 121 Ind. Cas. 387=1929 A.L.J. 741=A.I.R. 1930 All. 9.

——S. 115—Parties and privies.

Probate obtained by widow on the nearest reversioner's withdrawing objections—A remote reversioner can contest proceedings and he is not estopped. 96 Ind. Cas. 682=30 C.W.N. 567=A.I.R. 1926 Cal. 792.

——S. 115—Parties and privies—Third parties.

Mere fact that son's widows of original mortgagees lived in ancestral house and meddled with outstanding debts does not estop heirs from suing for possession of mortgaged land of which the widows give discharge. 122 Ind. Cas. 89=11 L.L.J. 219=A.I.R. 1930 Lah. 286.

——S. 115—Parties and privies—Co-sharers—Recognition of tenancy by one co-sharer landlord—Effect.

In order that a recognition of tenancy by a co-sharer landlord may be effective against a third party such an admission must have been, at the time when it was made, against the interest or capable of affecting the interest of the person making it and so recognition of a tenancy by a co-sharer landlord after the property has been allotted to another co-sharer in the collectorate partition is not binding upon the latter co-sharer. 120 Ind. Cas. 44=11 P.L.T. 99=A.I.R. 1930 Pat. 149.

——S. 115—Parties and privies—Transferee.

Mahomedan lady executing mortgage attested by her brother to raise money to meet his debts—Mortgagee bringing suit on mortgaged property— Property purchased pending suit—Purchaser suing for cancellation of delivery order—Purchaser held not estopped from setting brother's rights in mortgage property. 123 Ind. Cas. 42=A.I.R. 1930 Mad. 567.

——S. 115—Parties and privies.

Gift by a widow—Next reversioner's assent—A transfer from such reversioner is not estopped from challenging the gift. 71 Ind. Cas. 287=A.I.R. 1923 All. 410.

——S. 115—Parties and privies—Two capacities.

Anything done by a person in his representative character cannot create an estoppel on what is a personal claim by himself by a perfectly different arrangement. 7 C.W.N. 940=32 M.L.W. 412=A.I.R. 1930 P.C. 249 (P.C.).

——S. 115—Parties and privies.

Partition decree—Some lands, liable to be sold for revenue due on another estate, allotted to one party—Land sold in revenue sale and purchased by other party —Such party is not estopped from enforcing his rights. 113 Ind. Cas. 465=56 Cal. 813=56 I.A. 74=33 C.W.N. 289=49 C.L.J. 112=A.I.R. 1929 P.C. 50 (P.C.).

——S. Parties and privies.

Admission of *wakf* by *mutwalli* does not estop him from claiming a share in it as heir, if *wakf* is void. 105 Ind. Cas. 647=55 Cal. 448=32 C.W.N. 248=A.I.R. 1928 Cal. 130.

——S. 115—Parties and privies—Under-propiretorship by estoppel.

Act of the Deputy Commissioner, holding a person's estate as manager on behalf of the Court of Wards, in describing persons in possession as under-proprietors of in accepting rents from their mortgagees cannot create a title as under-proprietor by estoppel in favour of them. A.I.R. 1924 P.C. 213, followed. 101 Ind. Cas. 803=A.I.R. 1927 Oudh 538.

——S. 115—Parties and privies.

Release of interest as the heir of father is not bar to a claim to inherit a share after the brother's death. *Halsbury's Laws of England*, Vol. X, page 461, followed. 83 Ind. Cas. 776=A.I.R. 1923 Lah. 8.

——S. 115—Parties and privies—Subsequent mortgagee—Representations of mortgagor.

A subsequent mortgagee is bound by the representations made by the mortgagor to a prior mortgagee and is estopped from challenging the validity of the prior mortgage so far as it affects the share which was subsequently mortgaged. 6 O.L.J. 31=2 U.P.L.R. (H.C.) 34=54 Ind. Cas. 766.

——S. 115—Parties and privies—Judgment-debtor—Execution purchaser.

Where a Court in execution of a decree purports to sell property outside its territorial jurisdiction it is open to a subsequent purchaser in execution of a decree against the same judgment-debtor to question the validity of the former sale although the judgment-debtor himself might be estopped from questioning the validity of the sale. 35 Cal. 877, 7 Cal.L.J. 644 not Foll. 22 Cal. 909 Expl. 43 Mad. 135 =37 M.L.J. 442=26 M.L.T. 271=11 L.W. 232=53 Ind. Cas. 579.

——S. 115—Parties and privies—Liability of—Intermediate arrangement between original parties.

An estoppel can be availed of by parties and their privies The privy cannot be deprived of such benefit by the fac t that since the time the representation was made and the privity of estate commenced, the person to whom the representation was made and the person who made the

representation have come to an arrangement contrary to the representation. 5 O.L.J. 458=47 Ind. Cas. 934.

—S. 115—Parties and privies—Transferee from person prejudicing.

Estoppel applies in favour of the person who is induced to change his position and also in favour of a transferee from the former. So also it works not only against the person making the representation but also against al person claiming under him by gratuitous title.

The doctrine of estoppel is based upon the change of position brought about by the representation or actings of the person bound by estoppel. Estoppel applies not only in favour of the person induced to change his or her position, but of a transferee from such person and it binds not only the person whose representations or actings have created it, but all claiming under him by gratuitous title. 45 Cal. 909=16 A.L.J. 576=35 M.L.J. 46=24 M.L.T. 462=20 Bom.L.R. 851=28 C.L.J. 192=22 C.W.N. 891 =(1918) M.W.N. 406=8 L.W. 163=5 Pat.L.W. 83 =45 I.A. 97=45 Ind. C . 770 (P.C.).

——S. 115—Parties and privies—Mortgagor and mortgagee—Puisne mortgagee.

Where a son mortgaged his share of the joint family property to a person and after his father's death mortgaged the same to another,

Held, that the second mortgagee, a representative in interest of the mortgagor, was estopped from challenging the validity of the first mortgage. 36 All. 141=12 A.L.J. 123=21 Ind. Cas. 721.

——S. 115—Parties and privies — Different capacity.

Though the representatives of a mortgagor are estopped from denying the mortgagee's right still as mutwallis they can plead, that the property being waqf, the mortgage was void. 34 All. 640= 10 A.L.J. 278=17 Ind. Cas. 632.

——S. 115—Parties and privies—Auction-purchaser bound by estoppel.

A mortgagee who purchases the property at a sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor (i.e.) a mortgage on the property. 47 Cal. 446=30 C.L.J. 496=24 C.W.N. 269= 55 Ind. Cas. 189. But see 37 M.L.J. 442=53 Ind. Cas. 579.

——S. 115—Parties and privies—Hindu reversioner—Consent to alienation by widow.

A Hindu reversioner does not claim through his father but directly through the last male owner and is not affected by any estoppel arising from the consent of his father to an alienation by the widow. Nor does the fact of his taking a gift of the property alienated, estop him from suing for possession. 30 C.L.J. 56=23 C.W. N. 1025=53 Ind. Cas. 654.

——S. 115—Parties and privies—Hindu reversioner — Relinquishment by—Taking advantage from widow — Heirs estopped from disputing validity of transaction.

Where a Hindu reversioner relinquished his rights to a portion of the inheritance in favour of the widow receiving a relinquishment from the widow of all her interest in the remaining portion of the inheritance neither the reversioner nor any person claiming through him, could set up that the relinquishment was not binding on him and did not operate on a portion of the inheritance relinquished in favour of the widow. 47 Ind. Cas. 978 (Cal.).

——S. 115—Parties and privies—Auction-purchaser — Decree-holder's right to sale enures for the benefit of auction purchaser.

When an auction sale cannot be questioned by the judgment-debtor or one claiming under him as against the decree-holder on the ground of estoppel it cannot be questioned as against the auction purchaser also, for whose benefit the decree-holder's right to sale enures. 20 C. 296 applied. 18 M. 13 Foll. (1917) M.W.N. 88=37 Ind. Cas. 825.

——S. 115—Parties and privies — Vendor and vendee—Vendee estopped if vendors waive their right to object to sale.

A vendee of a non-transferable occupancy holding is estopped from pleading non-saleability if the proprietors had an opportunity to object in execution. 32 Ind. Cas. 757 (Cal.)

——S. 115—Parties and privies — Execution purchaser—Estoppel affecting judgment debtor.

A purchaser at an execution sale is not entitled to raise the question of transferability of the holding and is bound by the same rule of estoppel as the judgment-debtor. 21 C.L.J. 441=29 Ind. Cas. 734.

——S. 115—Conduct — Mortgage — Parties and privies.

Where a mortgagee condones defects and defaults in the mortgage he or his representative cannot assail it later on those grounds. When a person makes another think that he recognised and accepted a transaction of his father and the latter consequently suffers liabilities, the former will be estopped from going back upon his recognition and acceptance. 3 P.R. 1915=110 P. W.R. 1914=215 P.L.R. 1914=25 Ind. Cas. 480.

——S. 115—Conduct — Parties — Mortgage—Foreclosure — Mortgagor and cultivator parties —Estoppel.

In a foreclosure suit the mortgagor and the cultivator in possession of the property were made parties. The former did not appear but the latter proved that the mortgage debt had been satisfied. The mortgagee cannot allege in appeal that the cultivator had no interest or right to redeem as he intended to secure a mortgage decree against him also by impleading him. No decree could be passed against the absent mortgagor, as the repayment of debt, was proved. 9 N.L.R. 38= 19 Ind. Cas. 547.

——S. 115—Parties and privies—Auction purchaser—Execution sale.

A purchaser at a sale in execution steps into the judgment debtor's shoes whose right title and the interests he acquired and is also bound by his estoppel. 16 Ind. Cas. 792 (Cal.).

——S. 115—Parties and privies—Auction purchaser at execution sale.

The question of transferability of the holding could not be raised at the instance of the defendants who were the representatives in interest of the tenant and were bound by the same estoppel of the judgment-debtor whose right, title and

interest had been purchased by them. 15 Ind. Cas. 718 (Cal.).

——S. 115—Parties and privies—Strangers not affected.

The plaintiff purchased from an occupancy raiyat the holding in dispute though it was not transferable without the landlord's consent. Subsequently the defendant purchased the same holding in execution of a decree for rent obtained by some of the co-sharer landlords. The plaintiff sued for declaration of title and recovery of possession.

Held, that the plaintiff got no title to the holding as it was not transferable, that there could not be estoppel against the defendants for they were no party to the transaction under which the plaintiff claimed title, and the suit must fail. 13 C.L.J. 479=10 Ind. Cas. 928.

——S. 115—Parties and privies—Auction purchaser—Transferability of holding.

The auction purchaser of a non-transferable occupancy holding being a representative of the J.D. cannot raise the question of the transferability of the holding as it could not have been raised by the tenants. 10 Ind. Cas. 530 (Cal.).

——S 115—Parties and privies—Rival claimants from same party—Occupancy holding — Mortgagee ot.

The question of transferability of a non-transferable holding does not arise between the mortgagee purchaser of the interest of the tenant and private purchaser from the same person. 15 C. W.N. 703=13 C.L.J. 481=10 Ind. Cas. 49.

——S. 115—Parties and privies — Heirs bound.

Where parties to the suit and others agreed in a previous case that, on the death of the parties to the agreement, the land in dispute would go to a shrine.

Held, that a gift of her share by a female, in favour of one of the managers of the shrine, cannot be questioned by a person who was also a party to the agreement and claimed a right to the land as donor's heir. 46 P.L.R. 1910=8 Ind. Cas. 231.

——S. 115—Parties and privies—Father and son.

The sons are estopped from urging against their father's admission in a previous suit to set aside the sale in question and are not entitled to get the sale set aside if nearly the whole of the consideration is for necessity. 157 P.W.R. 1909=4 Ind. Cas. 1017.

——S. 115—Parties and privies — Execution sale Purchaser — Liability of.

A mortgagor is estopped from denying the title of his mortgagee. A purchaser at a private or at an execution sale is as much bound by this rule of estoppel as the mortgagor himself but cannot urge any objection which is personal to the mortgagor. 22 C. 907, Foll. 10 C.L.J. 150=1 Ind. Cas. 264.

——S. 115—Parties and privies — Hindu father and sons—Dismissal of a suit to declare that a mortgage was discharged — Subsequent suit by mortgagee on the mortgage—Sons of plaintiff in the prior suit not estopped from setting up a plea of discharge.

A mortgagor filed a suit to declare that the mortgage had been discharged and it was dismissed; in a subsequent suit by the mortgagee against the sons of the mortgagor to enforce the mortgage the sons pleaded discharge.

Held, that they were not estopped from putting forth their plea since there was nothing to show that the prior suit by their father was filed by him in a representative capacity. (1910) M. W. N. 401=8 M.L.T. 204=20 M.L.J. 852=7 Ind. Cas. 341.

——S. 115—Parties and privies — Reversioners.

The assent of one reversioner to a sale by a widow does not bind another reversioner, since the latter claims title from the deceased husband and not from the previous reversioner.

An estoppel against a Hindu reversioner is not binding on his sons who claim the estate on the death of the widow. The sons claim from the last male owner and not from their father. 36 Cal. 780=6 A.L.J. 567=10 C.L.J. 58=13 C. W.N. 920=5 M.L.T. 423=11 Bom.L.R. 833=19 M.L.J. 548=93 P.R. 1909=146 P.W.R. 1909=68 P.L.R. 1910=36 I.A. 103=3 Ind. Cas. 382 (P.C.).

39. Pleadings.

——S. 115—Pleadings—Wife making statement that house in which her husband lived belonged to his mother—If estopped subsequently from setting up her husband as owner of house.

A husband brought a suit against his wife for restitution of conjugal rights. The wife, in her written statement, stated that her husband's mother had asked him to leave her (mother's) house:

Held, that the wife was not by these statements estopped from setting up her husband as the owner of the house. Nevertheless having made them it was a weakness in her case if she did not go into the witness box to explain what had caused her to change her opinion as to the ownership of the house. A.I.R. 1940 Mad. 161=50 M.L.W. 815=1939 M.W.N. 1237=I.L.R. (1940) Mad. 329=189 Ind. Cas. 722.

——S. 115—Pleadings.

A woman cannot file a suit on the basis of her own chastity and her husband's misconduct and, when she is proved to be unchaste and her husband's conduct is found to be irreproachable, fall back upon a plea of infidelity and subsequent reformation which has never been advanced and is not supported by the necessary evidence. A.I.R. 1939 Mad. 788=50 M.L.W. 200=1939 M.W.N. 831=(1939) 2 M.L.J. 294=186 Ind. Cas. 444.

——S. 115—Pleadings—Plaintiff allowing opposite party to proceed on footing he was suing in representative capacity — Contending in subsequent suit it was not so.

Where, having allowed the defendant to proceed with the suit on the footing that he was suing him in a representative capacity, and having taken the chance of a decree in his favour in three Courts, clear estoppel arises against the plaintiff to prevent him from contending later on in a subsequent suit that the opposite party was not represented in his own previous suit, there can be no stronger case of an absolute waiver or election or of conduct rendering it wholly inequitable to

permit him subsequently to resile from the position he previously adopted. A.I.R. 1937 Bom. 238=39 Bom.L.R. 130=I.L.R. (1937) Bom. 326=169 Ind. Cas. 934.

——S. 115—Pleadings—Judgment-debtor objecting to execution on the ground that the property is ancestral—Subsequent suit for possession by judgment-debtor against the decree-holder on the ground that the property sold was not ancestral.

Where in the execution proceedings, the decree-holders applied for the sale of the property as non-ancestral, the judgment-debtors made an application stating that the property attached was the ancestral property of the judgment-debtors from generation to generation and an inquiry was made from the Collector and it was reported that the property was ancestral and accordingly, the Civil Court found that the shares in question were ancestral property and directed the Collector to sell these shares as ancestral property:

Held, that there was estoppel on the question as to whether the property was ancestral and that the judgment-debtors were estopped from pleading in a subsequent suit for possession that the property was not ancestral. A.I.R. 1934 All. 430 =3 A.W.R. 718=150 Ind. Cas. 141.

——S. 115—Pleadings—Allegation of possession after widow's death—Finding that there was no such possession—Plaintiffs, if can take their stand on such finding:

Held, that it was not open to turn round and take their stand on that finding. A.I.R. 1934 Cal. 617=38 C.W.N. 539=151 Ind. Cas. 630.

——S. 115—Pleadings.

A party cannot plead an antecedent debt and acknowledgment, and then complain of gross irregularity, because he is not given a decree upon a promissory note. A.I.R. 1934 Mad. 500=1934 M.W.N. 474=66 M.L.J. 703=39 M.L.W. 582 =57 Mad. 783=151 Ind. Cas. 241.

——S. 115—Pleadings—Change of.

Where the plaint allegation was that the position of K under a certain award was that of a trustee for the plaintiff but in appeal the plaintiff's counsel urged that K had only a life-interest in the property but the other allegations were stuck to,

Held, that that plaintiff did not change her case so completely as to be estopped from urging what were the positions of the respective parties under the award. 78 Ind. Cas. 633=5 L.R.A. Civ. 276=A.I.R. 1924 All. 862.

——S. 115—Pleading — Nature of—Scope of the doctrine.

The word 'estoppel' is not infrequently used to cover transactions to which it has no proper application. In its essence it means that the party estopped has by his words or conduct prevented himself from asserting the true facts on which he would otherwise have been entitled to rely. 46 Cal. 552=45 I.A. 275=(1919) M.W.N. 278:= 23 C.W.N. 466=52 Ind. Cas. 909 (P.C.).

——S. 115—Pleading—Nature of plea.

Res judicata differs from estoppel. A true **res judicata** ousts the jurisdiction of the Court, while estoppel shuts the mouth of the party. Estoppel means that a person shall not be allowed to say one thing at one time and the opposite at another; while **res judicata** means that the person shall not say the same thing twice over. 36 Bom. 283=13 Bom.L.R. 950=12 Ind. Cas. 535.

——S. 115—Pleading—Plea of to be proved by production of the pleadings.

A plaintiff who wants to show that defendants are estopped from raising a certain plea by reason of their pleadings in a previous suit between the parties cannot do so by merely producing a copy of the Court's judgment in the previous suit containing a summary of the pleadings in that suit, but must produce the written statement filed by the defendants in that suit. 47 Ind. Cas. 985 (Cal.).

——S. 115—Pleading—Onus of proving.

The onus of proving an estoppel is upon the person pleading it. 46 Ind. Cas. 474 (Cal.).

——S. 115—Pleading of.

Estoppel under S. 115 is a rule of pleading based on the principle that where a man has induced another by his representation to alter his position he cannot turn round and say that he is not bound by the representation. (1920) M.W. N. 679=60 Ind. Cas. 635.

——S. 115—Pleading — Plea to be raised at the trial.

A question of estoppel can only be raised by pleading, and where no facts which would enable a Court to come to a conclusion whether the principle of estoppel is or is not applicable to the suit, have been placed before it, the Court will refuse to go into the matter. 52 Ind. Cas. 739 (Pat.).

——S. 115—Pleading—Elements necessary.

To establish estoppel the defendant must show that a representation was made by the plaintiff and that the defendant acting upon that representation has changed his position. 3 Pat.L.W. 218=43 Ind. Cas. 857.

——S. 115—Pleading—Proof.

A person invoking the plea of estoppel must clearly plead precise facts which led him to believe that his transferor was the real owner and must show the precise nature of the enquiries he relied on. 46 P.R. 1918=45 P.L.R. 1918=33 P.W. R. 1918=43 Ind. Cas. 556.

——S. 115—Pleadings—Blowing hot and cold.

Held, that the defendants to the suit; who pleaded that the plaintiff could not proceed in execution of a prior decree for delivery of possession of properties and had a prior application dismissed, cannot in defence to a suit instituted on the strength of the order plead S. 244 as a bar; and it matters nothing that the suit as framed was not exactly the suit suggested by the plea of the defendants. 17 M.L.J. 314.

——S. 115—Pleadings—Pre-emption—Re-sale of property claimed by pre-emptor—Second purchasor impleaded in pre-emptor's suit and issues determined as to his rights—Lis pendens.

After the filing of a suit for pre-emption, but before service of summonses, the heirs of the vendee re-sold the property claimed. The plaintiff impleaded the new vendee in his suit and amended his plaint raising fresh issues as against the defendant so added, and the added defendant also filed a written statement. The issues raised between the plaintiff and the added defendant were

heard and ultimately decided against the plaintiff in the lower appellate Court. **Held**, that the plaintiff could not, after himself causing the second vendee to be added as a party and issues to be decided as to his rights, still plead in bar of the claim put forward by that defendant the doctrine of **lis pendens**. 1905 A. W. N. 94=27 A. 544=2 A.L.J. 428 (F.B.). **See also** 1901 A. W.N. 207=24 A. 160.

——S. 115—Pleadings — Suit for possession of lands as owners—Withdrawal with liberty to bring fresh suit—Second suit to establish a right of easement.

The fact that in a previous suit withdrawn with leave to bring a fresh one plaintiff had claimed possession as owner does not preclude him from claiming in the second a right of easement only. 1905 A.W.N. 18=2 A.L.J. 59.

40. Plea under.

——S. 115—Plea under.

Plea of estoppel raised in written statement—Issue framed but not pressed in the trial Court:

Held, that the defendant was not entitled to raise the question of estoppel in appeal. A.I.R. 1942 Cal. 586=46 C.W.N. 1022=I.L.R. (1943) 1 Cal. 128=203 Ind. Ind. Cas. 630.

——S. 115—Plea under.

S. 41, Transfer of Property Act, is a statutory application of law of estoppel which is enacted in S. 115, Evidence Act. If, therefore, the facts satisfy either of these sections, there is an estoppel and it is not necessary to detail in pleadings the ingredients of S. 41 as such. 1942 N.L.J. 405.

——S. 115—Plea under—It cannot be allowed to be raised for first time in appeal.

In order to avail of the doctrine of estoppel, estoppel must be pleaded at the trial so that the parties may be able to show that there is no room for the applicability of the doctrine of estoppel in the particular case. Where the party has not pleaded estoppel in the trial Court, the Court should not allow the question of estoppel to be raised for the first time in appeal. A.I.R. 1942 Pat. 71=22 P.L.T. 821=196 Ind. Cas. 849=8 B.R. 127.

——S. 115—Plea under.

In order to establish a plea of estoppel, it is essential to plead representations on the part of the other side, action on the part of the appellants on the footing of those representations and detriment to them thereby. A.I.R. 1940 Bom. 330=42 Bom. L.R. 564=I.L.R. (1940) Bom. 562=191 Ind. Cas. 129.

——S. 115—Plea under—Plea of, not taken in plaint and not disclosed in evidence—Whether can be entertained in second appeal.

Where no case of estoppel was made out in the plaint or disclosed by the evidence, the plaint containing no allegation that the party had, by his representations, declarations, acts or omissions led the plaintiff to believe that the state of affairs was different from the real state of affairs, it is too late in second appeal for the plaintiff's plea of estoppel to be entertained. A.I.R. 1940 Pat. 480=186 Ind. Cas. 793=6 B.R. 395.

——S. 115—Plea under—Plea, if can be raised for the first time in second appeal.

It is too late to set up a new case of estoppel in second appeal when such a case was not set up in the written statement and no issue was framed on the point. A.I.R. 1939 All. 194=1938 A.L.J. 1238=1939 A.W.R. 141=180 Ind. Cas. 621.

——S. 115—Plea under—Point of estoppel based on facts and findings of lower Appellate Court, if can be raised for the first time in second appeal

Question of estoppel raised for the first time in second appeal can be entertained, if it is based on the facts on record and urged on the footing of the findings of the lower Appellate Court. A.I.R. 1938 Lah. 558=40 P.L.R. 848=178 Ind. Cas. 436.

——S. 115—Plea under.

Where the purchaser had derived title from the mortgagor at a Court sale in execution of a decree for interest due on the mortgage-deed:

Held, that it was not open to him to say that this very mortgage deed was without consideration. A.I.R. 1938 Lah. 463=40 P.L.R. 315 & 709=181 Ind. Cas. 505.

——S. 115—Plea under.

A statement to ground an estoppel must be clear and unambiguous. A.I.R. 1935 P.C. 79=1935 M.W.N. 442=1935 O.W.N. 599=1935 A.L.J. 593=41 M.L.W. 764=39 C.W.N. 657=37 P.L.R. 323=13 Rang. 256=61 C.L.J. 239=68 M.L.J. 725=62 I.A. 100=37 Bom.L.R. 544=1935 A.W.R. 630=1 B.R. 463=155 Ind. Cas. 1 (P.C.).

——S. 115—Plea under.

A plea of estoppel depends for its decision very largely upon the facts of each case. Where, therefore, no issue of estoppel was raised in the suit and no reference to it was made in the judgments of the lower Courts, it cannot be allowed to be raised for the firsst time in the second appeal. A.I.R. 1935 Mad. 725.

——S. 115—Plea under—Plea of estoppel must be substantiated.

Per **Sulaiman, C. J. and Mukerji; J.** (Thom, J. contra.)—The plea of estoppel, specially where that plea seeks to disqualify a person from seeking his remedy in a Court of justice must be substantiated clearly.

The first Revenue Court decided the question of mutation against the appellant, and in appeal to the Collector, the appellant put in an application stating that if the respondent would swear by Holy Quran that according to Muhammadan Law the appellant is not the holder of right, judgment may be given against him who shall not seek remedy anywhere. Thereupon the respondent accepted the offer saying that he purchased the property with his own money and the purchase was fictitious in the name of the deceased, his wife; and that he did not know the relationship between the deceased and the appellant. Judgment was passed against the appellant who did not take the matter before the Commissioner or the Board of Revenue but filed a civil suit:

Held, that the offer of an oath did not ask whether the deceased was the owner or not; what was asked, was to state whether the appellant was the

lawful heir of the deceased under the Muhammadan Law, or not. The respondent never accepted the offer inasmuch as he did not state whether the appellant was the heir of the deceased. Consequently, the appellant was not estopped from making the claim in the Civil Court. All that the appellant undertook to do was that he would not go in appeal to the Commissioner or the Revenue Board. The respondent was precluded from pleading "estoppel" against the appellants. A.I.R. 1934 All. 300=1934 A.L.J. 92=3 A.W.R. 362=151 Ind. Cas. 793=18 R.D. 181.

——S. 115—Plea under—Conditions for operation—Plea—Whether can be raised for the first time in second appeal.

In order to sustain a plea of estoppel, which is not a pure question of law but a mixed one of fact and law, there should be distinct pleadings by the defendants stating the facts on which an estoppel can be founded. A contention on the point of estoppel cannot be raised for the first time in sesond appeal. A.I.R. 1934 Nag. 51=16 N.L.J. 248=149 Ind. Cas. 1031.

——S. 115—Plea under—Nature of plea.

The plea of estoppel ordinarily rests on a question of fact, namely, whether the persons sought to be estopped intentionally caused or permitted another person to believe a thing to be true and to act upon such belief and in general, the person pleading estoppel has to establish that in consequence of the representation or conduct of the person against whom estoppel is pleaded, he was induced to act in a particular manner. A.I.R. 1931 All. 689=1931 A.L.J. 653=53 All. 747=136 Ind. Cas. 353.

——S. 115—Plea under.

Defence of estoppel can always be taken if it is warranted by the facts proved or admitted even if those facts have not been specifically pleaded. 125 Ind. 365=8 Rang. 223=A.I.R. 1930 Rang. 265.

——S. 115—Plea under.

Where plea of estoppel is not set up in the pleadings or issues it cannot be availed of later, because estoppel is eminently a matter of pleadings. 119 Ind. Cas. 152=A.I.R. 1929 Mad. 467.

——S. 115—Plea under—To whom available.

Only the person to whom the representation was made or for whom it was designed can avail himself of it. If however, the declaration was intended to be general, then, it seems that one who did not hear it, but to whom it was made known directly afterwards or within the time to be allowed for acting upon it, may act upon it.

A declaration in the sale proclamation by the decree-holder that the property advertised for sale is not subject to any encumbrance does not act as estoppel as against him in favour of a purchaser of the property privately from the judgment-debtor and not in auction sale to which the proclamation related: **Case law discussed.** 97 Ind. Cas. 625=A.I.R. 1927 Cal. 34.

——S. 115—Plea under.

The rule of estoppel is a rule of evidence and ought to be pleaded with sufficient clearness. 61 Ind. Cas. 807=2 P.L.T. 556=6 P.L.J. 273=A.I.R. 1921 Pat. 166.

——S. 115—Plea under—Nature of.

Per Kemp, A.J.C.—Estoppel being a rule of evidence is not proper to be set out in a plaint which should confine itself to facts. It is a rule of evidence and not a cause of action. 83 Ind. Cas. 360=16 S.L.R. 207=A.I.R. 1921 Sind 159 (F.B.).

41. Pre-emption.

——S. 115—Pre-emption—Proceedings under S. 26-F, Beng. Ten. Act—Sale-deed mentioning certain persons as landlords — Transferee allowing such recitation—Such persons seeking pre-emption — Transferee cannot subsequently contend that idol is landlord and applicant is shebait — Non-disclosure of true facts in sale-deed, specially when the applicants themselves were in doubt, amounted to fraudulent concealment. A.I.R. 1937 Cal. 577 =41 C.W.N. 1185=173 Ind. Cas. 686.

——S. 115—Pre-emption—Proceedings under S. 26 F, Beng. Ten. Act. Deed of transfer and notice of transfer mentioning applicant landlord as sole landlord — Transferee is not estopped from raising the plea that there are other co-sharers. 163 Ind. Cas. 696=39 C.W.N. 862.

——S. 115—Pre-emption—Execution of sale-deed by Court under decree for specific performance—Decree against subsequent transferee—Fresh suit by transferee for pre-emption;

Held, right to pre-emption accrued due only on the date when the Court executed the sale-deed, and question of right of pre-emption was not res judicata. There was no constructive estoppel. A.I.R. 1932 All. 694=139 Ind. Cas. 714.

——S. 115—Pre-emption.

The mere fact that a co-pre-emptor is found to have acquiesced in a sale before the suit and is consequently estopped from pre-empting does not disqualify the other pre-emptor who has not acquiesced in the same way inasmuch as estoppel under S. 115, Evidence Act merely operates as a bar to the suit and does not necessarily distinguish the right. A.I.R. 1931 All. 216=1931 A.L.J. 204=131 Ind. Cas. 681.

——S. 115—Pre-emption.

Successful pre-emptor dying — Vendor succeeding as legal representative of pre-emptor—Vendor is not estopped from taking benefit of decree. 1930 A.L.J. 369=A.I.R. 1930 All. 220.

——S. 115—Pre-emption—Consent to a transfer—Effect.

By consenting to a transfer a person disqualifies himself from pre-empting and loses his right of pre-emption altogether. He is then estopped not only as against the vendor and the vendee but also against a rival pre-emptor. 117 Ind. Cas. 345=1929 A.L.J. 935=A.I.R. 1929 All. 589.

——S. 115—Pre-emption—Co-sharer — Refusal to purchase—Effect.

A co-sharer intended to sell his share. Other co-sharer refused to purchase the share, on the ground that he had no money to make the purchase, but without showing his intention to reserve his right to pre-empt subsequently, and thereby induced the vendee to purchase the share on the blief that this other co-sharer had waived

his right to pre-empt. In a suit for pre-emption by the other co-sharer.

Held, that there was absolute refusal to purchase the share and he would now be estopped from going behind his refusal and claiming a right to pre-empt although no notice was given under S. 14, Agra Pre-emption Act: 6 All. 463; 27 All. 670 and 5 A.L.J. 331, Not appr.; A.I.R. 1926 All. 467, Rel. on. 121 Ind. Cas. 241=1929 A.L.J. 665=51 All. 820=A.I.R. 1929 All. 531.

——S. 115—Pre-emption—Appeal.

Withdrawal by the vendee of the money paid in the lower Court under its decree by the pre-emptor does not debar the vendee from appealing against that decree: 16 P.R. 1907; 83 P.R. 1912 and A.I.R. 1926 All. 661, Foll.; 82 P.R. 1868, Overruled. 111 Ind. Cas. 814=A. I. R. 1929 Lah. 137.

——S. 115—Pre-emption — Pre-emptor party to suit by village landlords challenging sale to be pre-empted—Sale confirmed by compromise decree—Right of pre-emption cannot be exercised. 110 Ind. Cas. 1=10 Lah. 75=55 I.A. 266=48 C.L. J. 158=33 C.W.N. 90=30 P.L.R. 1=A.I.R. 1928 P.C. 190 (P.C.).

——S. 115—Pre-emption.

The Mukhtar-am of the vendor, who took part in the proceedings relating to the sale and subsequently purchased part of the property sold to the vendee, on account of his having taken part in the negotiation relating to the sale is not estopped from resisting the plaintiffs' claim, of whom he is co-sharer and with whom he is on equal footing and who as such have no preferential right as against him, and so he is entitled to say that as the property has now come into his hands, he being a co-sharer of the plaintiffs, they have no preference over him. 29 All. 125, F[illegible] 108 Ind. Cas. 157=26 A.L.J. 89.

——S. 115—Pre-emption.

The applicability of the rule of estoppel by acquiescence in cases of pre-emption in the Province of Oudh cannot be questioned. 22 O.C. 323; 10 O.C. 257; 5 O.C. 395 and 1 O.C. 254, Foll. 93 Ind. Cas. 640=29 O.C. 327=13 O.L.J. 212 =3 O.W.N. 356=1 Luck. 68=A.I.R. 1927 Oudh 86.

——S. 115—Pre-emption.

Where the vendor has offered property to the pre-emptor at a price higher than that ultimately accepted by him from vendee the pre-emptor is not estopped from asserting his right by reason of his refusal to buy the property. 92 Ind. Cas. 258 =7 L.L.J. 559=26 P.L.R. 835=A.I.R. 1926 Lah. 10.

——S. 115—Pre-emption.

The person to whom a notice has been given to the effect that a property is going to be sold and who intimates his refusal to purchase cannot be allowed, after the sale has been made after his refusal; to turn round and seek to enforce his right of pre-emption through the Court. The doctrine of estoppel applies to all sorts of cases including pre-emption cases. 87 Ind. Cas. 414= 6 L.R.A. Civ. 300=A.I.R. 1925 All. 645

——S. 115—Pre-emption.

Party consenting to sale to vendee cannot pre-empt—Taking active part in collecting money and in effecting registration amounts to acquiescence. 79 Ind. Cas. 132=A.I.R. 1925 Lah. 57.

——S. 115—Pre-emption.

Accepting money from the vendee in satisfaction of mortgage does not estop mortgagee from pre-empting. 69 Ind. Cas. 648=A.I.R. 1924 Lah. 159.

——S. 115—Pre-emption—Refusal of offer.

The refusal of a pre-emptor when property was offered to him before sale according to a Wajib-ul-arz clause operates as estoppel. 17 A.L.J. 290 =50 Ind. Cas. 126.

——S. 115—Conduct—Pre-emption.

A pre-emptor cannot claim pre-emption when the vendee purchases the same at the pre-emptor's request. 205 P.L.R. 1910=8 Ind. Cas. 780.

42. Proof of.

——S. 115—Proof of—Mode of proving.

Ordinarily where a plaintiff wants to show that the defendants are estopped from raising a certain plea by reason of their attitude in a previous suit between the parties, he should not be permitted to do so by merely producing a copy of the judgment in the earlier suit which might contain the summary of the pleadings in that suit, but the plaintiff must produce the written statement filed by the defendants in that suit in order to give the Court, where the plea of estoppel is raised, a full and clear idea of the attitude adopted by the defendants. A.I.R. 1942 All. 122= 1941 A.L.J. 721=I.L.R. (1942) All. 103= 1941 A.W.R.H.C. 379=199 Ind. Cas. 190

——S. 115—Proof of.

There must be evidence of representation to base a claim on estoppel. A.I.R. 19[illegible] Pat. 62[illegible] =188 Ind. Cas. 417=6 B.R. 688.

——S. 115—Proof of—Acting on representation—Representation due to mistake—Transfer of Property Act (4 of 1882), S. 52.

Where, in a suit, the defendant pleads that the plaintiff is estopped by his representations and the suit is not, therefore, maintainable; the plaintiff is not precluded from showing that the representation was due to a mistake and that it cannot operate as an estoppel, unless and until the defendant is able to establish that he had acted on that representation and his position had been prejudiced.

T brought a suit against J for recovery of lease money. The defendant pleaded that T had represented to him that C had half share in the property, the subject-matter of the lease and that on such representation, he paid half the lease money to C and took a mortgage of his half share from C. It was, therefore; contended that the plaintiff was estopped from denying his title as mortgagee and that he was bound by his mortgage. It was found that J took his mortgage from C after repudiation by T of C's title to the property and after the institution of the suit by T against C for declaration of his title to the property. To this suit, J was also made a party:

Held, that even if T was aware of the fact that

the title of his mortgagor C was in dispute, he took the mortgage from C. The mortgage was consequently affected by lis pendens and T could not be held bound by it. A.I.R. 1938 Lah. 448 =40 P.L.R. 763=181 Ind. Cas. 400.

——S. 115—Proof of—No evidence to show intentional representation or omission.

Where there is no evidence to show that there was any intentional representation or omission by the plaintiff which led the defendants transferees to change their position, the elements necessary to attract the application of S. 115 are altogether wanting. A.I.R. 1936 Oudh 87=1935 O.W.N. 1376=159 Ind. Cas. 780.

——S. 115—Proof of—Estoppel in pais.

Estoppel in pais is a rule of evidence, and the circumstances giving rise to an estoppel may be proved by evidence of any kind. A.I.R. 1935 Rang. 279=158 Ind. Cas. 492.

——S. 115—Proof of — Suit for demolition—Necessary finding—Principles applicable.

Where a plaintiff sued to recover possession of land by removal of constructions made thereon by the defendants.

Held, that it was not sufficient to debar the plaintiff from success, that he merely sat still and allowed the constructions to come into existence. There should be a distinct finding, first, whether they were twelve years from attempting to establish that they were the heirs of G. (1908) 5 A. L.J. 701=18 M.L.J. 424=8 C.L.J. 447=10 Bom.L.R. 1088=13 C.W.N. 1=35 I.A. 166= 1 Ind. Cas. 175=11 O.C. 362=4 M.L.T. 380= 30 A. 510 (P.C.).

43. Questions of law.

——S. 115—Question of law.

See also EVIDENCE ACT, S. 115—ADMISSION.

Although a question of estoppel may be said to be a point of law, yet; when it is a point of law to which the answer appears quite evident, e.g.; whether the registration of a firm estops the income-tax authorities from making further inquiry into identity of person actually receiving profits in the share of a partner and assessing them, the High Court will decline to direct the Income-tax Commissioner to make a reference to it on h that point. A.I.R. 1943 Sind 64=I.L.R. (1942) Kar. 541=206 Ind. Cas. 34 (D.B.).

——S. 115—Questions of law.

There cannot be estoppel against a statute and the doctrine of approbate and reprobate also cannot apply. It applies only to the conduct of the parties, and the conduct of the parties is immaterial when the question of the legality of a document is concerned. Before effect can be given to an award by execution proceedings, there must be a judgment according to the award and a decree following thereon. A.I.R. 1939 Bom. 114=41 Bom.L.R. 170=181 Ind. Cas. 608.

——S. 115—Questions of law.

Estoppel is not a pure question of law. Certain necessary facts have got to be found out in order to enable the Court to apply the doctrine of estoppel. A.I.R. 1936 Cal. 181=61 C.L.J. 75=162 Ind Cas. 296.

——S. 115—Questions of law — Representations on matters of law.

There can be no estoppel whether express or implied to a person who knew all the facts and there would not be any estoppel on representation on matters of law. A.I.R. 1955 Mad. 404=1935 M.W.N. 267=41 M.L.W. 364=164 Ind. Cas. 353.

——S. 115—Questions of law — Admission by Pleader.

An admission or concession on the part of a Pleader on a pure question of law will not estop the party from questioning it in appeal or revision. A.I.R. 1932 Mad. 409=35 M.L.W. 393 =138 Ind. Cas. 88.

——S. 115—Questions of law — Construction of document—No estoppel.

The question of the proper construction to be placed on a deed is a question of law and there can be no estoppel by a pleading of law inasmuch as the other side must be presumed to know what the law is. A.I.R. 1931 Oudh 133=7 O.W.N. 1052=6 Luck. 382=129 Ind. Cas. 163.

——S. 115—Question of law.

Applicability of a case cited is a pure question of law and no question of estoppel arises. 114 Ind. Cas. 479=7 Pat. 85=10 P.L.T. 399=A. I.R. 1929 Pat. 32.

——S. 115—Question of law.

There cannot be any estoppel on a point of law going to the jurisdiction of the Court. A.I.R. 1928 Lah. 802.

——S. 115—Question of law — Construction of document.

Per Ashworth, A.J.C.—The question of the proper construction to be placed on a deed is a question of law and there can be no estoppel by a pleading of law inasmuch as the other side must be presumed to know what the law is. 77 Ind. Cas. 310=25 O.C. 349=A.I.R. 1923 Oudh 123.

44. Recitals.

——S. 115—Recitals.

Although there is no estoppel against a statute a party to a document may be estopped from putting forward the fact that he was or was not an occupancy tenant. A.I.R. 1943 Pat. 386=22 Pat. 532=24 P.L.T. 418=9 Cut.L.T. 67=10 B.R. 156=209 Ind. Cas. 438.

——S. 115—Recitals.

Where in inam title-deed, certain acres of land is stated as wet and rest as dry, there is nothing like estoppel which prevents the inamdar from showing his exact rights. A.I.R. 1939 Mad. 475=1939 M.W.N. 73=184 Ind. Cas. 447.

——S. 115—Recitals—Donor and donee.

Where a gift deed itself recites that the donor had given up possession of all his properties to the donee, such a recital is binding on his heirs. A.I.R. 1939 Sind 9=I.L.R. (1939) Kar. 348= 179 Ind. Cas. 252.

——S. 115—Recitals—Executant neither blind nor illiterate—Plea of non est factum—Binding nature of deed.

In a case where the person executing the deed

is neither blind nor illiterate, where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of non est factum is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed because it operates as a conclusive bar against him. This is equally true (apart from fraud) in equity as at law except in those special cases where there is an equitable ground for setting aside or rectifying the deed. A.I.R. 1938 P.C. 103=1939 M.W.N. 85=182 Ind. Cas. 419 (P.C.).

——S. 115—Recitals—Recitals in deeds, how far binding on heirs.

Even in cases where the defendant is the heir-at-law of the obligor and, as such, bound by the recitals contained in the document executed by its predecessor, the Court will, in valuing the evidence, be justified in taking into account the fact that the defendant was not himself a party to the transaction and the plaintiff and those opposed to the plaintiff are thus placed in a position of advantage and the disparity arising from this circumstance becomes all the greater when the defendants are minors. A.I.R. 1937 Mad. 182=1936 M.W.N. 1167=44 M.L.W. 784=(1937) 1 M.L.J. 543=I.L.R. (1937) Mad. 299=167 Ind. Cas. 819.

——S. 115—Recitals—Sale-deed—Recitation found incorrect.

Where in a sale-deed in respect of a jagir plot there is a recital to the effect that the vendor has no more jagir land but it is found that he has more than one such plot, the recital being only a statement of fact not amounting to transfer, does not estop the vendor unless the vendees have changed their position in any way by such recital. A.I.R. 1937 Pat. 598=4 B.R. 62=171 Ind. Cas. 711.

——S. 115—Recitals — Sale kobala not reciting fixity of rent—Question of estoppel, whether arises against purchaser.

Where, in pre-emption proceedings, when the landlord wanted to exercise his right of pre-emption, an objection that the tenancy was at a fixed rate of rent is allowed, leaving open the question of status of the tenant, the fact that in the kobala by which the purchaser purchased the holding, there was no mention of the fixity of rent and that the price was paid at the time of registration of kobala, does not give rise to any estoppel against purchaser in a suit by the latter for a declaration that he was a fixed rate tenant of the holding Ss. 26-D and 26-F, Bengal Tenancy Act have no application. A.I.R. 1936 Cal. 582 =167 Ind. Cas. 596.

——S. 115—Recitals—Railway Company accepting goods for carrying—Bill of lading mentioning "goods received in good condition"—Goods found damaged before being taken into custody by company:

Held, the clause in the bill of lading "received in good condition" did not affect the railway, as their liability did not depend upon the bill of lading or the English Common Law, and no question of estoppel arose. A.I.R. 1935 Sind 218=159 Ind. Cas. 591.

——S. 115—Recitals—Insurance—Policy.

Where an insurance policy began by stating that the holder of the policy paid the Company a certain sum by way of premium:

Held, that the existence of these words in the policy did not prevent the Insurance Company from asserting that the premium had not been paid. A.I.R. 1934 Rang. 343=153 Ind. Cas. 387.

——S. 115—Recitals—Recitals are binding only on parties to deed.

When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument. Estoppel can arise only between the parties to the deed. A recital in a deed cannot operate as estoppel between a party to the deed and a third party. A.I.R. 1933 Pat. 708 (2)=149 Ind. Cas. 734.

——S. 115—Recitals.

If a grantor conveys property in a form actually and actively misleading, so that any persons reading the conveyance necessarily conclude that the grantees are the absolute owners, the grantor cannot subsequently be heard to say that this is not the real transaction but the grantees take on a secret trust not disclosed in the conveyance. A.I.R. 1932 P.C. 255=63 M.L.J. 418=36 M.L.W. 761=1932 A.L.J. 971=139 Ind. Cas. 891 (P.C.).

——S. 115—Recitals.

Recitals in deed—Executant is not necessarily estopped from denying. 96 Ind. Cas. 440=8 L. L. J. 291=27 P.L.R. 581=A.I.R. 1926 Lah. 471.

——S. 115—Representation—Recitals.

It is not open to the grantor of a lease to show that the recitals in the document as to his status are incorrect and that on the true facts, he had no right to create a lease. But this does not apply to a person purchasing the holding leased at a sale on decree for arrears of rent. 43 Cal. 178=19 C.W.N. 1077=22 C.L.J. 99=30 Ind. Cas. 898.

——S. 115—Recitals—Effect.

A collateral statement not concerning the direct purpose of a deed does not create an estoppel. 13 C.L.J. 271=15 C.W.N. 976=9 Ind. Cas. 374.

——S. 115—Recitals — Mortgage suit—Plea of mortgagor of invalidity of registration in wrong district.

Per **Semble, C.J.**—The mortgagor is estopped from raising a plea in a suit upon his mortgage that though the mortgage deed recites that certain properties were situate in the district in which the registration took place, there are really no such property there and that consequently the deed is invalid. The English cases seem to be the other way. (1903) 31 C. 146.

——S. 115—Recitals — Mortgage by alienee of talukdar—Recital of the status of mortgagor as talukdar—How far mortgagee estopped from contending that mortgagor is no talukdar.

Where an alienee from a Gujarat Talukdar mortgaged his property and the deed recited he was a talukdar, though the mortgagee did not cause that belief in him, the recital indicates no

more than subsequent acquiescence exmajoricautela, on the part of the mortgagee in a precaution suggested by the belief already professed by the mortgagor and there is no estoppel. (1902) 4 Bom. L.R. 550=26 B. 757.

——S. 115—Recitals—Purdanashin ladies—Document executed by—Recital that they had only a life interest—Effect of.

Where in a petition by certain pardanashin ladies it was said that they had only a life interest in certain properties, that recital does not bar them from afterwards contending that they had an absolute interest in them. (1902) 6 C.W.N. 657= 4 Bom.L.R. 547=29 C. 664=29 I.A. 132 (P. C.).

45. Representation.

——S. 115—Estoppel by representation—Representation by widow as to adoption.

To invoke the doctrine of estoppel by representation it is necessary that in acting upon it, the party to whom it was made shall have altered his position to his prejudice. It invokes a combination of several essential elements, the representation or statement to be acted upon, action on the faith of such statement and in the manner intended and resultant prejudice or detriment to the person acting. Estoppel though a branch of the law of evidence is also capable of being viewed as a substantive rule of law in so far as it helps to create or defeat rights which would not exist or be taken away but for that doctrine.

It was held that representations made by a widow contained in a statement made to the Revenue authorities as to an adoption made by her on the authority of her husband were not enough to estop her personally from disputing the truth or validity of the adoption in view of the satisfactory explanation as to the reasons which made her make such a statement. 63 L.W. 952=1950 M. W.N. 710=A.I.R. 1951 Mad. 403=(1950) 2 M. L.J. 575.

——S. 115—Representation—Acts or declarations—Intention to deceive—If necessary.

It is quite unnecessary in order to create estoppel that the person whose acts or declarations induced another to act must have been under no mistake himself, or must have acted with an intention to mislead or deceive. A.I.R. 1950 Pat. 9=28 Pat. 519.

——S. 115—Representation—Conduct induced by it different from that intended by maker—Estoppel, if arises.

If a man either by express terms or by conduct, makes a representation to another of the existence of a certain state of fact, he is estopped from denying the existence of such a state of facts although the other acts in a way different from the way intended by the maker of the representation. I.L.R. (1949) 1 Cal. 400=A.I.R. 1949 Cal. 20.

——S. 115—Representation—Suit for pre-emption—Oral consent of pre-emptor given before sale—Purchaser, if can plead estoppel. 1950 N.L.J. 1 =A.I.R. 1950 Nag. 22.

——S. 115—Representation—Statement by decree-holder as to area of property in sale proclamation—If may operate as estoppel against him.

Where the sale proclamation embodied the statement as to the area of the property as made by the executing decree-holder and the auction-purchaser purchased the property on the faith of that statement acting to his prejudice, the statement in the sale proclamation would operate as estoppel against the decree-holder. I.L.R. (1948) 2 Cal. 284.

——S. 115—Representation of law—Estoppel.

In order to operate as an estopped the representation must be of a fact and not on a matter of law. I.L.R. (1947) Nag. 510=A.I.R. 1948 Nag. 110.

——S. 115—Representation—Mortgagee bidding at auction sale not disclosing his mortgage—Whether estopped from enforcing mortgage.

A mortgagee bidding at an auction sale of the property mortgaged to him is not estopped from enforcing his mortgage although he had not disclosed his mortgage at the time when he bid at the auction. Unlike an execution creditor, he was under no obligation to disclose his mortgage, and his bid did not amount to any representation that there was no mortgage in his favour. I.L.R. (1948) Nag. 133=1949 N.L.J. 12.

——S. 115—Representation—Oral agreement for grant of permanent lease—Lessee actively encouraged by lessor to erect permanent structures—Lease not executed—Lessor suing to eject lessee after expiry of limitation for suit for specific performance of the contract—Doctrine of part performance or equitable estoppel—Whether available to lessee—Lessee's right to compensation for structures—T. P. Act, Ss. 53-A and 108 (h).

After an oral agreement was made between the plaintiff and the defendant for the grant to the defendant by the plaintiff of a permanent lease of land on certain terms, the plaintiff urged the defendant to erect permanent structures on the land and took an active part in obtaining sanction for them and assured the defendant that he would never evict him. The defendant completed the structures within two years of the agreement, (i.e.) when a considerable part of the time within which the agreement could be enforced had yet to run. The defendant, however; neglected to enforce the agreement and obtain a registered lease within the time limited by law. After the expiry of the period of limitation for a suit to enforce the agreement, the plaintiff sued to eject the defendant.

Held, (1) that the defendant could not avail himself of the doctrine of part performance under S. 53-A of the T. P. Act, as the agreement was not in writing; (2) that the plaintiff was not estopped from evicting the defendant as on the facts of the case there was no room for applying the doctrine of equitable estoppel the statement of the plaintiff that he would not evict the defendant could not serve as a basis for an estoppel, as there was a valid agreement for a permanent lease to which it was referable. Further it was only a promise and thus a representation not of an existing fact but of an intention for the future; (3) that the defendant was not entitled to any compensation for the structures erected by him but could remove them from the land having regard to S.

108 (h) of the T. P. Act. 50 C.W.N. 851=A. I.R. 1947 Cal. 353.

——S. 115—Representation by agent — Estoppel against company—Insurance.

An insurance company is estopped from taking up a position inconsistent with the representation made by their agent, which representation was intended by the company to be communicated to the assured and on the faith of which, he took out a policy. A.I.R. 1945 Oudh 152=1945 A.W.R. (C.C.) 15=1945 O.W.N. 8=20 Luck. 194.

——S. 115—Representation.

Where representations are made of facts on which the Court acts and passes a certain order, that would operate as an estoppel against that party from contending in other proceedings that those facts were not true. No party can, however, be estopped because of a legal argument put forward by his Pleader. A.I.R. 1944 Mad. 62 =(1943) 2 M.L.J. 508=1943 M.W.N. 830=215 Ind. Cas. 130.

——S. 115—Representation.

It is not necessary to invoke successfully the defence of estoppel that the representation should be fraudulent. A.I.R. 1943 Sind 177=I.L.R. (1943) Kar. 227=210 Ind. Cas. 35.

——S. 115—Representation — No representation, no estoppel.

No estoppel arises when no representation is shown to have been made and acted upon. A.I.R. 1942 Mad. 193=(1941) 2 M.L.J. 877=54 M.L.W. 563=1941 M.W.N. 1003=201 Ind. Cas. 50.

——S. 115—Representation — Wrong representations to oneself, if estoppel—There cannot be an estoppel on a point of law.

According to the rules of a Municipality, chemicals were liable to Terminal Tax. The Municipality did not tax the defendant shopkeeper when he received the consignments of the chemicals. The Municipality subsequently sued the defendant to recover the tax. The defendant contended that as he was not taxed before, he concluded that he was not liable and sold his goods on this basis and that the Municipality was estopped from subsequently holding him liable for the tax:

Held, that the Municipality was not so estopped;

Held, further that according to S. 115, Evidence Act, it would have to be shown that the Municipality had intentionally caused the defendant to believe that he was liable for the tax.

If a person had been making wrong representations to himself, this is no estoppel. A.I.R. 1939 Nag. 195=1939 N.L.J. 265=183 Ind. Cas. 443.

——S. 115—Representation.

It must be shown before a stranger building on land of another can be said to have an equitable right to possession of the land on the ground that the true owner stood by and allowed the construction to proceed, that the stranger supposed it to be his own and that the true owner stood by. A. I.R. 1939 Nag. 7=I.L.R. (1941) Nag. 655= 1938 N.L.J. 418=181 Ind. Cas. 203.

——S. 115—Representation — Estoppel by negligence and representation — Conversion—Pledge —Railway receipt — Pledgor re-pledging it to another Bank—Such bank bona fide giving advances—Suit for conversion—Suit, if can be based on estoppel by negligence — There must be duty cast between the parties.

Where the merchants, after the pledge of the receipt with a Bank, re-pledge the same with another who takes the pledge **bona fide**, no action for conversion can be founded on the ground of estoppel by the negligence or representation. The type of estoppel which enables a party as against another party to claim a right of property, which in fact, he does not possess is described as estoppel by negligence or by conduct or by representation or by a holding out of ostensible authority. But the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also, it must be the neglect of some duty that is owing to the person led into that belief, or; what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy. In this case, the Bank does not owe any duty to the subsequent pledgee. There is no relationship of contract or agency. Not only is there an absence, both of any duty or of anything amounting to a neglect of usual precautions, but there is no ground for finding any representation. There is no reason for the Bank to think that they were representing to anybody that the merchants had any title to dispose of the goods. The railway receipts are not dangerous things; there is no question of arming the merchants with them. It is only in special conditions of fact that an estoppel by representation can be established. The railway receipt, though a document of title, is; in form, merely an authority to take delivery of the goods and the possession of such a document contains no representation that the holder has any implied authority or right to dispose of the goods. It is clear that no plea of estoppel can be raised in the cases where the merchants pledged the goods themselves after having obtained delivery under the railway receipt. The fact that first pledgee does not put his seal on the receipt by way of warning is immaterial, specially in the absence of usual practice, so that failure to adopt it can be charged against the party but even if it is, it would still be of no avail because there is no duty as between the parties to adopt any such practice. The duty may be "to the general public of whom the person is one." There is a breach of the duty if the party estopped has not used due precautions to avert the risk. The detriment may entitle the innocent third person either to prosecute or to defend a claim. His identity may be ascertainable only by the event, in the sense that has turned out to be the member of the general public actually reached and affected by the conduct, negligence, representation or ostensible authority. A.I.R. 1938 P.C. 52=4 B.R. 260=1938 O.W.N. 206=42 C.W.N. 321=19 P.L.T. 147=1938 A.L.J. 273=47 M.L.W. 329 =(1938) 1 M.L.J. 268=66 C.L.J. 510=1938

A.W.R. 90=I.L.R. (1938) Mad. 360=1938 M.W.N. 552=32 S.L.R. 313=40 Bom. L. R. 713=65 I.A. 75=172 Ind. Cas. 745 (P.C.).

——S. 115—Representation.

A mere representation of an intention cannot be the basis of estoppel. A promise made is not a representation of a fact. A.I.R. 1938 Cal. 172=65 C.L.J. 590=174 Ind. Cas. 790.

——S. 115—Representation — Mortgagor representing himself to be authorised to transfer—Such person subsequently becoming owner—Mortgage, if operative against property — Mortgagee, if bound to enquire—Estoppel.

Where a person represents that he is authorised to transfer property, and mortgages such property such mortgage shall, at the option of the mortgagee, operate on any interest which the mortgagor may subsequently acquire in such property at any time during which the contract of transfer subsists. There is no obligation on the mortgagee to enquire whether the mortgagor had any power to make the transfer or not. 172 Ind. Cas. 707=41 C.W.N. 1124.

——S. 115—Representation.

Both parties under mistaken impression—Duty of Court to scrutinise connection between representation and course of conduct.

Where both parties are under a mistaken impression as to their respective rights, if one of the parties asks the Court to believe that any conduct or omission on the part of the other misled the former party into adopting a particular course of action, it is necessary for the Court to scrutinise the connection, between the representation and the course of conduct alleged to have been pursued as a result thereof. A.I.R. 1937 Mad. 158=44 M.L.W. 859=1937 M.W.N. 82=168 Ind. Cas. 842.

——S. 115—Representation.

Government letting out plot for building purposes—Duration of term not fixed—Government advancing loan for building on land by taking mortgage of land:

Held, that the advance was not an implied representation founding an estoppel. A.I.R. 1937 Pat. 399=4 B.R. 33=171 Ind. Cas. 461.

——S. 115 — Representation — Property joint—One mortgaging as self-acquired—Others attesting deed and representing that property belonged to mortgagor.

The defendants were aware of their own rights; they knew the contents of the mortgage deed mortgaging their property in the name of another as his exclusive property, they were interested in the loan money, which was a good consideration in so far as they were concerned, and they attested the deed raising no objection that they had share in the property. They did more than merely stand by and allow the mortgagee to part with his money. By their conduct, they impliedly represented that whatever the title of the mortgagor might be he had their authority to mortgage the property and attested the deed on that basis:

Held, that whether the case was based on the contract or was based on estoppel, it was equally operative against the defendants and prevented them from setting up their title as against the mortgagee:

Held, also that these representations were effective so as to prevent the subsequent purchaser from these defendants from raising the title which he had acquired, because, if a man has once represented that another has a right to convey property, his representations are effective to prevent any subsequent purchaser from him from asserting his (the subsequent purchaser's) title. A.I.R. 1937 Pat. 169=17 P.L.T. 697=15 Pat. 721=165 Ind. Cas. 98=3 B.R. 8.

——S. 115—Representation—Owner of property clothing third person with apparent ownership and right of disposition—Property disposed of by third party — Transfer taken in good faith and for value.

If the owner of property clothes a third person with the apparent ownership and right of disposition thereof, not merely by transferring it to him but also by acknowledging that the transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property, and who took it in good faith and for value. If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfers property, he voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner free from every show of encumbrance or adverse equity and he cannot be heard to say that he has not, in fact, received such purchase money. This principle is equally applicable to a case in which the beneficial owner of the premises has represented that someone else, being the owner thereof, has assigned them to a third person in consideration of a sum of money paid by the third person to and received by the alleged assignor. A.I.R. 1935 P.C. 208=43 M.L.W. 12=1936 A.L.J. 111=1936 A.W.R. 207=159 Ind. Cas. 794 (P.C.).

——S. 115—Representation.

No written contract between parties—Defendants accepting in correspondence liability of constituents and actually sending goods towards discharge—Estoppel, held may be founded and the defendants held liable. A.I.R. 1935 P.C. 154=1935 O.W.N. 857=69 M.L.J. 341=1935 M.W.N. 1149=157 Ind. Cas. 9=1 B.R. 768 (P.C.).

——S. 115—Representation — What constitutes.

For an estoppel by representation to come into operation, there must be a deception which has led the person claiming the estoppel to entertain a false belief about a question of fact and which has also led him on the faith of that belief to change his legal position. Where the parties in the suit were also parties to the deed of sale and it has been held as a fact that the deed of sale was evidence of a transaction by which the parties intended to transfer certain other property but not the property in suit as the respondent was a party to that transaction, it cannot be said that he had been deceived about its true nature by the subsequent conduct of the other party. A.I.R. 1935 All. 739=1935 R.D. 316=1935 A.L.J. 964=1935 A.W.R. 766=155 Ind. Cas. 1063.

——S. 115—Representation — Absence of representation by one person to make another believe in certain facts.

The principle upon which the rule of estoppel rests is that it would be most inequitable and unjust if a person by a representation made or by conduct amounting to a representation has induced another to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it. Where there has been no representation on the part of the defendants to make the plaintiff believe that she was really the owner of a 14 annas share in the property in dispute, there can be no estoppel against them when they show clearly that the plaintiff is in law entitled only to an 8 annas share in the property left by her father and not to the 14 annas share in that property. A.I.R. 1935 Oudh 387=1935 O.W.N. 423=11 Luck. 82=155 Ind. Cas. 23.

——S. 115—Representation—Nature of representation necessary for estoppel to operate.

In order to found an estoppel, the representation must be in respect of an existing thing and must be clear and unambiguous. Where it is not shown that any representation was made by the plaintiff that notwithstanding the absence of any written permission of the Deputy Commissioner sanctioning a mortgage-deed, that mortgage would be deemed by him to be binding upon himself, no estoppel can be pleaded against him.

A party cannot, by representation, any more than by other means, raise against himself an estoppel so as to create a state of things which he is under a legal disability from creating. A.I.R. 1935 Oudh 121=11 O.W.N. 1571=10 Luck. 361=153 Ind. Cas. 585.

——S. 115—Representation must be clear and unambiguous and it must be acted on by the other party—Cross-estoppel.

In order to attract the applicability of the plea of estoppel in pais, two conditions must be fulfilled. In the first place, the representation whether by words spoken or written or by conduct upon which the estoppel is founded must be clear and unambiguous. And in the next place, there must be proof that such representation was acted on by the person to whom it was made.

The defendants had admitted the right of plaintiff No. 1 to maintenance, and had consented to maintenance being allowed to her pending the suit. The plaintiffs were claiming a higher right than that admitted by the defendants and if plaintiff No. 1 sought execution of the decree of the trial Court:

Held, that under the circumstances, instead of the conduct of the plaintiff being an act amounting to a waiver of the right of the plaintiffs to challenge the decree by way of appeal, there was clear notice to the defendants that execution was being sought pending appeal and subject to what the Appellate Court might decide and both the links in the chain of estoppel were wanting in the case.

Held, also that even assuming that the plea of estoppel applied, it was rather a case of cross-estoppels. The defendants are as much estopped by their conduct in not raising the plea referred to above in the Court below and in not asserting in that Court that plaintiff No. 1 could not execute the decree during the pendency of her appeal, and thus putting plaintiff No. 1 to her election. A.I.R. 1935 Sind 142=162 Ind. Cas. 274.

——S. 115—Representation.

Representation need not be made to the person who relies upon the plea of estoppel. All persons who rely on the representations may claim the benefit of estoppel. 1934 M.W.N. 1131.

——S. 115—Representation.

Although S. 41, T. P. Act deals with a branch of estoppel, yet S. 115, Evidence Act does not impose upon a person, acting on the faith of a representation made to him, the same duty of making inquiries into the truth of the representation as is imposed upon a transferee from an ostensible owner by S. 41, T. P. Act. A.I.R. 1934 Oudh 460=11 O.W.N. 1097=151 Ind. Cas. 576.

——S. 115—Representation—Necessity of.

Where there is no representation by a person, the plea of estoppel cannot be invoked against him. 53 C.L.J. 222=134 Ind. Cas. 888.

——S. 115—Representation.

There can be no estoppel except when one person has, by his declaration, act or omission; intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. A.I.R. 1931 Lah. 598=32 P.L.R. 390=132 Ind. Cas. 201.

——S. 115—Representation—Absence of.

Person misled by mistaken legal advice and not by representations by another—The other is not estopped. 102 Ind. Cas. 639=5 Rang. 427=54 I.A. 276=29 Bom.L.R. 1017=1927 M.W.N. 492 =39 M.L.T. 134=25 A.L.J. 713=46 C.L.J. 126=31 C.W.N. 1078=26 M.L.W. 417=A.I R. 1927 P.C. 151=53 M.L.J. 71 (P.C.).

——S. 115—Representation.

Where a Mahomedan widow who had one-eighth share, alienated property on behalf of her minor children but it did not appear either from the recitals or from evidence on record that she intended or contracted to transfer property, or any portion thereof in her own individual right,

Held, the alienation was not valid to the extent of her share. 103 Ind. Cas. 209=A.I.R. 1927 Nag. 290.

——S. 115—Representation—No question of estoppel arises.

P sued D for possession on the basis of the expiry of a lease. D claimed to be an occupancy tenant and the matter went up to the Privy Council. While the appeal was pending D transferred his right to R. P therefore impleaded R as party in the appeal. D was ultimately declared as the occupancy tenant. P then instituted this suit to eject R as a mere trespasser.

Held, there is nothing even remotely of the nature of an estoppel in this case. The plaintiffs neither in the petition nor in the presenting of it made any representation that transferees had acquired any title to the lands in question or were tenants of those lands either with or without a right of occupancy. The position of the plaintiffs

then was and still is that transferees were trespassers without any title to the possession of or interest in the lands in question. 69 Ind. Cas. 134 =16 M.L.W. 692=31 M.L.T. 205=4 P.L.T. 199=27 C. W. N. 461=21 A.L.J. 365=A.I.R. 1922 P.C. 349=44 M.L.J. 723 (P.C.).

——S. 115—Representation—Action on.

In the absence of any evidence to prove that the plaintiff acted on the faith of any representation made by the defendant, the question of estoppel does not arise. 90 Ind. Cas. 124=21 M.L.W. 551=A.I.R. 1925 Mad. 645.

——S. 115—Representation—Adoption.

Where, in a dispute regarding family property, settlement was effected between **B** and **W** (a female member) and property was partitioned between them and **B** agreed that **W** would be at liberty to adopt any person as her son and in pursuance of the compromise between them **W** adopted a son.

Held, that whatever the legal position as regards the validity of the adoption may be, **B** is estopped from questioning the adoption by **W**. 114 Ind. Cas. 711=A.I.R. 1929 Lah. 16.

——S. 115—Representation—Application for sanction.

Where a party led another to apply for sanction to validate a sale he cannot plead that that sanction will not validate the sale. 77 Ind. Cas. 275=48 Bom. 259=26 Bom.L.R. 1037=A.I.R. 1924 Bom. 119.

——S. 115—Representation—Award.

Where one party to the award led another to believe to his prejudice that he is going to abide by the award he is estopped from contesting it. The fact that he signed the award does not however by itself render it more binding on him. 6 C.P.L.R. 95, Foll. 77 Ind. Cas. 41=A.I.R. 1924 Nag. 14.

——S. 115—Representation — By mortgagor — Auction-purchaser with knowledge of defect—Protected.

When a person mortgages a property falsely representing it as his own, and after inheriting it subsequently, claims to recover the same, contending that he had no right to mortgage it, the auction-purchaser gets a good title even if he had knowledge of the facts provided the mortgage was unaware. 70 Ind. Cas. 385=27 C.W.N. 943= 36 C.L.J. 78=A.I.R. 1922 Cal. 542.

——S. 115—Representation—Carrier.

Consignor's agent — Representation to Railway and getting reduced rate thereby creates estoppel. 81 Ind. Cas. 1=46 All. 649=22 A.L.J. 645= 5 L.R.A. Civ. 396=A.I.R. 1924 All. 692.

——S. 115—Representation—Finding of.

Finding as to representation by one including another to do an act is one of fact. 90 Ind. Cas. 875=1925 M.W.N. 596=A.I.R. 1926 Mad. 39= 49 M.L.J. 396.

——S. 115—Representation—Knowledge unnecessary.

S. 115 does not require that a person, who by his declarations or conduct induces a belief in the mind of the other, must of a necessity have been aware of his rights: 20 Cal. 296 (P.C.) and A.I.R. 1925 P.C. 146, Foll. 106 Ind. Cas. 524=25 A.L.J. 878=A.I.R. 1927 All. 838.

——S. 115—Representation—Lease.

Lessee requesting permission of lessor to build leasehold—Lessor informing that lease was permanent and that lessee had a right to build—Lessee building accordingly—Lessor cannot evict lessee on the ground that lease was not permanent. 87 Ind. Cas. 318=52 I.A. 178=6 L.R.P.C. 119= 1925 M.W.N. 453=23 A.L.J. 548=27 Bom.L.R. 860=41 C.L.J. 543=2 O.W.N. 514=6 P.L.T. 404=4 Pat. 707=30 C.W.N. 49=A.I.R. 1925 P.C. 146=49 M.L.J. 48 (P.C.).

——S. 115—Representation.

Property taken on lease for public purposes—Public purposes forming part of consideration for lease—Lessee or his successors cannot be allowed to claim absolute interest. 88 Ind. Cas. 505=A. I.R. 1925 Cal. 1233.

——S. 115—Representation—Nature of.

In order that representation may operate as an estoppel, it must be representation of an existing fact and not of a mere intention or of future promises. Estoppel does not confer any title but is merely a rule of evidence which prevents one party from denying the existence of fact which he represented as existing and upon which representation another person has been induced to act to his detriment. 121 Ind. Cas. 737=56 Cal. 989=A.I. R. 1930 Cal. 230.

——S. 115—Representation.

A representation that the interests of a deceased had devolved upon the persons making the representation is a "thing" within the meaning of S. 115 as it is not a question of law but is mixed question of law and fact. 33 C.W.N. 873=A.I. R. 1929 Cal. 819.

——S. 115—Representation, of a mere opinion or of a point of law.

No estoppel can ensue upon a representation, not of a fact, but of a mere opinion or of a point of law. If, therefore, a person alters his position; to his detriment; by acting on the representation of a mere question of opinion or a matter of law which would be equally accessible to both the parties, no estoppel could arise. But where there has been a representation as to the existence of a fact to a certain person and the latter believes it and acts upon it and his position is altered, so that he cannot be put back to his original position at all, at any rate, without great loss and inconvenience; estoppel will undoubtedly ensue. 110 Ind. Cas. 665=50 All. 885=26 A.L.J. 1106=A.I.R. 1928 All. 459.

——S. 115—Representation—Promises de futuro.

The doctrine of estoppel by representation is applicable to some state of facts alleged at the time to be in existence and not to promises de futuro which if binding at all, must be binding as a contract. (1883) 8 A.C. 473, Foll. 89 Ind. Cas. 164=A.I.R. 1926 Sind 42.

——S. 115—Representation — Inducing belief in validity of custom.

The fact that defendant induced the belief that a custom was valid is not such a belief as is referred to in S. 115 of the Act, that is to say, a belief in the truth of a "thing" which means a belief in